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The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?

Nancy A. Welsh†

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INTRODUCTION

Ethical codes for mediators describe party self-determination as “the fundamental principle of mediation,”¹ regardless of the context within which the mediation is occurring. But what exactly does “party self-determination” mean? Does it mean the same thing now in the context of court-connected mediation as it did when it inspired many people to become involved in the “contemporary mediation movement”² that arose in the 1970s and early 1980s?³ Most importantly, if the meaning of this “fundamental” term is changing as mediation adapts to its home in the courthouse, does it matter?⁴

Based on a review of the debate surrounding recently promulgated or revised ethical codes for court-connected mediators in Florida and Minnesota,⁵ this Article will demonstrate that the originally

1. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS § I (Joint Committee of Delegates from American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution 1994); see also John Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 460 (1997) (explaining that drafters of the *Model Standards of Conduct for Mediators* believed that self-determination is the fundamental principle of mediation); FLA. R. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.310; MINN. R. OF COURT, STATE 114 app. (2000); THE NEW UNIFORM R. ON DISP. RESOL., Massachusetts Continuing Legal Education Inc. 1(b)(v) (stating the importance of party self-determination to the mediation process); VA. R. OF PROFESSIONAL CONDUCT 2.11 (2000).

2. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *PROMISE OF MEDIATION* 1 (1994). Bush and Folger coined the term “contemporary mediation movement,” recognizing that mediation had been used for many years before this time to resolve labor disputes and that many of the early writings and proposals regarding mediation relied upon this experience. It is also worth noting, however, that many of the principles and practices that had developed in the labor mediation context varied considerably from those that arose in the context of the 1970s and early 1980s.

3. See *id.* at 1-2; see also JAY P. FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING DISPUTES WITHOUT LITIGATION* 4-7 (1984).

4. Deborah Hensler recently argued for attention to be paid to the evolution or “transmogrification” of ADR in the courts, explaining that ADR has “a catch to it—this romantic ideology about empowering people and giving power to people to settle their disputes I think we ought to challenge courts to make good on those promises that are made to disputants, and I think that’s becoming ever more critical as courts order people to use these procedures on the claims that these procedures are doing something better for them.” Deborah Hensler, *Address at “ADR 2000: Court-Sponsored ADR Programs,” Association of American Law Schools Centennial Annual Meeting* (Jan. 7, 2000).

5. See *infra* Part IV.

dominant vision⁶ of self-determination, which borrowed heavily from concepts of party empowerment,⁷ is yielding to a different vision in the court-connected context. Perhaps not surprisingly, this vision is more consistent with the culture of the courts.⁸

Believers in the originally dominant vision of self-determination assumed that the disputing parties would be the principal actors and creators within the mediation process. The parties would: 1) actively and directly participate in the communication and negotiation that occurs during mediation, 2) choose and control the substantive norms to guide their decision-making, 3) create the options for settlement, and 4) control the final decision regarding whether or not to settle.⁹ The mediator's role was to enable the parties' will to emerge and thus support their exercise of self-determination.¹⁰ Many mediation advocates continue to adhere to this vision.¹¹

However, as mediation has been institutionalized in the courts and as evaluation has become an acknowledged and accepted part of the mediator's function,¹² the original vision of self-determination is giving way to a vision in which the disputing parties play a less central role. The parties are still responsible for making the final decision regarding settlement, but they are cast in the role of consumers, largely limited to selecting from among the settlement options developed by their attorneys. Indeed, it is the parties' attorneys, often aided by mediators who are also attorneys, who assume responsibility for actively and directly participating in the mediation process, invoking the substantive (i.e., legal) norms to be applied and creating

6. It would be unreasonable to suggest that there was only one vision of self-determination that inspired every person who became involved in the contemporary mediation movement or that this vision was consistently and/or fully realized in believers' mediation practice. Nonetheless, many of the writings and proposals from the time do suggest at least a dominant rhetoric embraced by those involved in the contemporary mediation movement. See *infra* Part II.A.

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part II.

10. In PROMISE OF MEDIATION, *supra* note 2, at 15-32, Bush and Folger describe four different accounts of the contemporary mediation movement, each with a different view of the societal goal the mediation movement should seek to achieve. Most attention has focused on two of these stories—the "Satisfaction Story" and the "Transformation Story." Bush and Folger describe the mediators' approaches in these two stories as quite different, but both of these accounts share a commitment to party self-determination. Despite the differences between these accounts, both place importance on the parties' control of the decision whether and how to resolve a dispute and parties' self-definition of the criteria to be used to fashion a resolution.

11. See *infra* Part IV.A.

12. See *infra* Part III.

settlement options.¹³ Thus, even as most mediators and many courts continue to name party self-determination as the “fundamental principle” underlying court-connected mediation, the party-centered empowerment concepts that anchored the original vision of self-determination are being replaced with concepts that are more reflective of the norms and traditional practices of lawyers and judges, as well as the courts’ strong orientation to efficiency and closure of cases through settlement.

It can be argued that this thinning of the vision of self-determination does not matter. After all, even in its reduced form, self-determination still promises that the mediator will respect, support, and protect the parties’ control over the final decision regarding settlement. Unfortunately, however, a disconnect is surfacing between even this more limited promise and the reality of court-connected mediation.

It is quite clear that court-connected mediators are providing evaluations of the parties’ positions (e.g., estimates of the strengths and weaknesses of the parties’ cases, suggestions regarding settlement options, etc.).¹⁴ When offered in the context of a party-centered, facilitative mediation, evaluation can serve a useful educational function and can aid party self-determination by assisting the parties in making informed decisions.¹⁵ There is growing evidence, however, that at least some court-connected mediators are engaging in very aggressive evaluations of parties’ cases and settlement options (i.e., “muscle mediation”)¹⁶ with the goal of winning a settlement, rather than supporting parties in their exercise of self-determination. As mediation has become increasingly institutionalized in the courts, a small but growing number of disputants have approached courts and ethical boards, claiming that mediators’ aggressive evaluation or advocacy for particular settlements actually coerced them into a settlement.¹⁷

13. See *infra* Part III.

14. See *infra* Part III.

15. See *infra* Part III.

16. FOLBERG & TAYLOR, *supra* note 3, at 135.

17. See *infra* Part I. Professor Menkel-Meadow concisely described the importance and difficulty of this issue when she wrote, “[O]ne of the most troubling of our ethical dilemmas in ADR [is determining]—when is a solution suggested . . . by a third party neutral too coercive on the parties[.]” 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, 411 (1997) [hereinafter Menkel-Meadow, *Ethics*] (emphasis added); see also Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L. J. 2663, 2693-94 (1995) (arguing that if settlements are not

In response to this challenge to party self-determination, ethical boards in some states have established mechanisms intended to keep evaluative mediation in check. Specifically, Florida and Minnesota, while permitting mediator evaluation in their ethical guidelines,¹⁸ have incorporated safeguards that pronounce party self-determination as the paramount goal of mediators and clearly prohibit coercion by the mediator.¹⁹

These mechanisms are unlikely to be effective in taming mediator evaluation and in protecting even the narrowed vision of party self-determination. Despite the aspirational language and the good intentions underlying Florida's and Minnesota's ethical guidelines, the narrowed vision of party self-determination that is now institutionalized in these guidelines will be understood as no different than the free will which is to be exercised by parties involved in judicially-hosted settlement conferences. In that context, when parties have alleged that the judge or magistrate presiding over their settlement conference coerced them into reaching a settlement agreement by evaluating the parties' cases or urging a particular settlement, the courts have generally refused to find coercion unless the judge or magistrate engaged in outright threats or issued sanctions. Indeed, one court has written, "We do not agree that a judge should refrain from offering his or her assessment of a case on the eve of trial, solely to avoid the appearance of impropriety. *Such a policy would effectively render meaningless a judge's role in the settlement process.*"²⁰ It is unlikely that the courts or ethical boards responsible for interpreting and enforcing mediators' ethical guidelines will judge aggressive evaluation as coercive just because it occurred within the context of a mediation rather than in a judicially-hosted settlement conference, especially if the vision of party self-determination in mediation is no longer anchored in the concept of party empowerment.

This Article examines possible means to protect parties' self-determination in mediation²¹ and advocates for a particular solution. Specifically, the proposal suggests modifying the current presumptions regarding the finality of mediated settlement agreements and urges the adoption of a three-day, non-waivable cooling-off period

truly consensual, they must be questioned because one of the important values that justify enforcing settlements is absent).

18. See *infra* Part IV.

19. See *infra* Part IV.

20. *Associates Fin. Serv. Co. of Haw. v. Mijo*, 950 P.2d 1219, 1230 (Haw. 1998) (emphasis added); see also *infra* Part V.C (examining the *Mijo* case).

21. See *infra* Part VI.

before mediated settlement agreements may become enforceable.²² This modification would permit the continued use of evaluative techniques as a means to educate parties and inform their decision-making while rewarding the use of techniques (often facilitative) that increase parties' commitment to their settlement. The more committed parties are to their settlement, the less likely it is that they will withdraw from the settlement during the cooling-off period. Ultimately, this proposal has the potential to keep "muscle mediation" in check while also allowing the return to a vision of self-determination which is closer to that which first dominated (and inspired) the contemporary mediation movement.

This Article begins with a description of a 1998 court-connected mediation in which the parties alleged mediator coercion. This case demonstrates both the reality and the potential consequences of the thinning vision of party self-determination in court-connected mediation. Part II discusses the vision of self-determination that dominated the original mediation movement and inspired the broad facilitative approach to mediation. Part III traces the adaptation of the mediation process to the culture of the courts,²³ with particular attention given to the facilitative-evaluative debate because it clearly reveals the differing conceptions of self-determination. The focus of Part IV is on the background, process, debate, and final language of Florida's and Minnesota's ethical guidelines for court-connected mediators regarding the propriety of evaluation and the protection of self-determination. Part V reviews the courts' handling of allegations of coercion by judges and magistrates presiding over settlement conferences in order to explain why Florida's and Minnesota's provisions will not be adequate to safeguard party self-determination or to protect parties from coercive evaluation by mediators. Finally, Part VI discusses various means to protect party self-determination and prevent coercion in mediation, with particular focus on a proposal for a non-waivable cooling-off period.

I. ILLUSTRATING THE REALITY AND CONSEQUENCES OF A THINNING VISION OF SELF-DETERMINATION

Self-determination in mediation has deep significance for the parties who participate in the process because the meaning and implementation of self-determination almost certainly affects parties'

22. See *infra* Part VI.E.

23. This Article will focus primarily on the use and model of mediation employed to resolve personal injury, contract, employment, and other non-family law civil actions.

judgments regarding the procedural justice furnished by the mediation process,²⁴ as well as their level of commitment to the settlement they reach in mediation.²⁵ The vision of self-determination that inspired the contemporary mediation movement placed the disputants themselves at the center of the mediation process. They were the principal actors and creators within the process. It was assumed that the parties would *actively and directly participate* in the communication and negotiation that occurs during mediation, would *choose and control* the substantive norms to guide their decision-making, would *create* the options for settlement of their dispute, and ultimately would *control* the final decision regarding whether or not to settle their dispute in mediation. This vision of party self-determination assumed that, at the conclusion of a mediation, the parties would feel that the agreement they reached was their own. This vision did not anticipate that the parties would feel that they had been forced to agree to accept or offer a settlement which reflected a third party's norms, experience, or will.

24. See E. ALLAN LIND, PROCEDURAL JUSTICE, DISPUTING, AND REACTIONS TO LEGAL AUTHORITIES 2-5 (Am. B. Found. Working Paper No. 9403, 1994) (noting that high levels of party control over the presentation of evidence and arguments [termed "disputant voice"] and parties' feeling that they have been treated in a "dignified and polite fashion" correlate highly with their procedural justice judgments); see also Stephen Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 43-44 (1992) (noting that "dialogic negotiation" has the potential to make the adversarial system more fair); 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, 18-21 (1996) (reporting that procedural justice studies have found that parties usually prefer consensual processes, regardless of the outcome, because they value the opportunity to participate in the process and the ability to express their own views); Craig McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1384 (1995) ("A central conclusion from the research about procedural justice is that people value highly the opportunity to voice their grievances and to be heard in a dignified setting").

Carrie Menkel-Meadow has observed that judges' roles in settlement conferences and the particular tactics they employ vary depending upon whether they conceive of the "facilitation of procedural justice" as their overriding goal or favor other competing goals, such as "efficient case management," "facilitation of substantive justice," or "simple brokering of what would occur anyway in bilateral negotiations." See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 506-7 (1985). Similarly, the role of the mediator in court-connected mediation will depend upon which of these goals is deemed most fundamental to the mediation process.

25. See LIND, *supra* note 24, at 1 (surveying research which has shown that whether or not a party perceives that the judicial system is just affects their obedience to laws and judgments as to the legitimacy of legal authority); see also Bundy, *supra* note 24, at 50 (expressing doubts that settlement will increase compliance unless agreements accurately reflect the party's interests or improve provision of justice).

Yet, increasingly, parties involved in court-connected mediation are bringing complaints to courts and ethical boards, alleging that mediators' conduct or statements had the effect of supplanting the parties' will and their central role in the mediation process.²⁶ The following case, which was mediated in Texas in 1998, raises serious questions about whether the concept of party self-determination, even in its narrowed form, is truly as fundamental to court-connected mediation practice as our ethical codes of conduct suggest.

A. *The Mediation of Allen v. Leal*²⁷

In July, 1995, a Bellaire, Texas, police officer shot and killed Noel and Rebecca Allen's 17-year-old son.²⁸ Alleging an intentional deprivation of their son's constitutional rights, the Allens brought

26. In *Randle v. Mid Gulf, Inc.*, No. 14-95-01292, 1996 WL 447954, at *1 (Tex. App. Aug. 8, 1996), an action to enforce a mediated settlement agreement, the defendant asserted the defense of duress, claiming that the mediator refused to grant his request to leave the mediation session despite chest pains and a history of heart trouble. The appellate court reversed the granting of summary judgment for plaintiff and remanded for trial on the merits.

In a Complaint to the Office of the Executive Secretary of the Supreme Court of Virginia (Nov. 3, 1996) (on file with author), a complainant alleged that "the mediator assumed the role as a judge meeting privately with the attorneys" and then repeatedly said, in a threatening and manipulative manner, that "if you don't accept my offer to you then I'll have to[.]" The complainant failed to pursue a grievance. *Id.*

A number of complaints have also been reported to the Florida Mediator Qualifications Board. In *Florida Mediator Qualifications Board Case No.* [hereinafter *Florida MQB*] 98-009 (1998) (summary on file with author), the complainant in a family case alleged that the mediator was abusive and attempted to intimidate the parties into accepting his preferred solution. *Id.* A consent agreement was entered into and the grievance was dismissed for lack of probable cause.

In *Florida MQB* 96-001 (1996) (summary on file with author), the complainant alleged that the mediator coerced him into agreement and destroyed neutrality by giving his own opinion regarding reconciliation. *Id.* The Complaint Committee determined that there was probable cause that the mediator demonstrated bias against the complainant and exhibited a lack of impartiality but decided not to pursue the case because it concluded the "violation committed by the mediator was of a minor nature and did not significantly prejudice the interests of the complainant." *Id.* The Committee recommended that the mediator complete a course dealing with mediator ethics and sensitivity training. *Id.*

See also other allegations of coercion, *infra* note 153.

27. 27 F. Supp. 2d 945 (S.D. Tex. 1998).

28. On the night of July 15, 1995, Travis Allen attended a party with friends in Bellaire, Texas. Sometime between 1:00 and 1:30 in the morning, Travis and a friend left the party and began walking home. Travis, under the effects of LSD, abruptly ran away from his friend and entered a nearby home by leaping through a large plate glass window. Travis sustained serious injuries. The homeowners placed a 911 call, to which three police officers responded. The officers ordered Travis to get down on the ground. After he was on the ground, one of the officers returned to the police car and another one stood on Travis' back in order to restrain him. Officer Michael Leal

suit against the City and the three police officers who were involved.²⁹ After two and a half years of litigation, the attorney for the defendants³⁰ suggested that the dispute be submitted to mediation.³¹ The Allens agreed to attempt the process and to use the mediator suggested by defendants' counsel.³²

The Allens attended the mediation with their attorney on Saturday, July 25, 1998.³³ The mediation began at 10:30 a.m. and ended at about 6:45 p.m., after Rebecca Allen and then Noel Allen reluctantly agreed to a settlement.³⁴ At approximately 11:00 p.m. that night, the Allens called their attorney³⁵ and told him that they wished to withdraw their consent to the agreement.³⁶ On Monday, July 27, 1998, defendants' counsel received a letter from plaintiffs' counsel expressing the Allens' wishes.³⁷

By August 5, 1998, at a settlement conference held that day,³⁸ it appeared that the Allens had reconsidered and decided that they would be willing to proceed with a modified agreement.³⁹ The parties' attorneys and the judge discussed the settlement and possible modifications.⁴⁰ Then, the Allens' attorney said, "Judge, there is one other matter."⁴¹ With the judge's permission, Mrs. Allen addressed the court regarding her perceptions of the mediation and her reasons for expressing her desire to withdraw her consent from the agreement that had been reached on July 25, 1998:

shot Travis twice in the back at this time, later claiming that Travis was acting irrationally and was not complying with the officers' instructions. *See Defendants' Response in Opposition to the Plaintiffs' Motion for Summary Judgment at 5-6, Leal v. Allen, No. 98-53281 (Tex. Dist. Ct., Harris County, Tex., Feb. 8, 1999).*

29. *See Allen, 27 F. Supp. 2d at 945.*

30. One of the original defendants had been dismissed from the case. *See id.* at 946.

31. *See Defendants' Response in Opposition to the Plaintiffs' Motion for Summary Judgment at 7, Leal v. Allen, No. 98-53281 (Tex. Dist. Ct., Harris County, Tex., Feb 8, 1999).*

32. *See id.*

33. *Id.*

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

35. *See Defendants' Response in Opposition to the Plaintiffs' Motion for Summary Judgment at 8, Leal v. Allen, No. 98-53281 (Tex. Dist. Ct., Harris County, Tex., Feb 8, 1999).*

36. *See id.*

37. *See id.*

38. *See Transcript of Proceedings Before The Honorable David Hittner, Settlement Hearing, August 5, 1998, Allen v. Leal, 27 F. Supp. 2d 945 (S.D. Tex. 1998) (No. H-96-CV-30).*

39. *See id.* at 3.

40. *See id.* at 3-14.

41. *Id.* at 14.

MRS. REBECCA O'NEILL ALLEN: You characterized the mediator as excellent, and that would not exactly be my characterization. We settled this case out of fear, fear of leaving ourselves exposed financially. It's just that I did not know—my husband and I did not know going into mediation that fear would be a part of our decision-making process, and I understand—and I cannot talk about the mediation process because that is confidential, but we didn't want our family destroyed anymore. We didn't want any more insults.

THE COURT: Was that what you were told in mediation?

MRS. REBECCA O'NEILL ALLEN: Yes

THE COURT: [A]pparently, you're saying you have some concern about the mediator in this case. Is that right?

MRS. REBECCA O'NEILL ALLEN: Yes, sir

THE COURT: Do you think he was leaning one way or the other?

MRS. REBECCA O'NEILL ALLEN: Absolutely.

THE COURT: To settle the case?

MRS. REBECCA O'NEILL ALLEN: To settle the case and to diminish and demoralize it, at least, this is the way I felt. It was only my perception.⁴²

By the end of this hearing, the court had determined that the Allens needed to “think about” whether they wished to settle their case or not.⁴³ He rescheduled the settlement conference for later in the week, saying:

I want you to come in here without the concept of settling because you're afraid or—not afraid but you have fear but that you think it's the right thing to do, the correct thing to do, for you and your family and it's a decision you can live with because I don't see that right now. It's going to eat at you for a long time. So you need to think. Talk to your attorney, talk to anyone else or just talk to—or just get together with the family or just sit and make your own decision; but I don't want you to be eaten, you know, from the inside out for the rest of your life that you walked away from something like this concerning the death of a child.⁴⁴

At this point, the trial judge appeared to be very concerned with party self-determination. He wanted to be sure that the parties felt

42. *Id.* at 14-15, 23-24.

43. *Id.* at 29.

44. Transcript of Proceedings Before The Honorable David Hittner, Settlement Hearing at 29-30, August 5, 1998, *Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998) (No. H-96-CV-30).

that this was *their* settlement and that it reflected *their* substantive norms.

At the second settlement conference, the Allens' attorney announced that his clients had decided that they wished to rescind the settlement agreement and proceed to trial. As part of the ensuing discussion of the enforceability of the written settlement agreement which had arisen out of the mediation, the Allens' attorney described the final hours of the July 25, 1998 session:

[E]verything he [the mediator] said to them was, "Your family is going to be destroyed in this case. You got zero"—and if he said it once, he must have said it 40 times—"you got zero chance of success on this and your family is just going to be destroyed"—and he really harped on that. [When the mediator returned with an offer that was \$10,000 less than the Allens' demand] [h]e said, "This is a take it or leave it. You got the 90 and that's it. And you better do this because you got zero chance of success and this will destroy your family." Mr. and Mrs. Allen were very distressed; but ultimately said—they authorized me to tell him yes. I went out. I told him how they felt, that they hated it but they would agree. [When the Allens' attorney returned with a written agreement,] they were standing up saying, "We thought about it and we just can't do this." They said, "This is bad. This is wrong. We can't do this." That was just before 5:00 o'clock in the afternoon; and [the mediator] sat there and harangued them for an hour and half . . . [H]e just beat up on them vigorously for that hour and half. Finally, they signed it; and you could see that Mr. Allen was—when he tells you that he felt shamed, it was visible. That's what transpired.⁴⁵

Before turning to the court's reaction to and analysis of the Allens' claim of coercion, it is worth pausing to consider whether the Allens' self-determination was the fundamental principle underlying

45. Transcript of Proceedings Before the Honorable David Hittner, Settlement Hearing at 36-38, August 7, 1998, *Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998) (No. H-96-CV-30). At a later settlement hearing held before the court on August 13, 1998, the mediator testified: "Well, the value of each case, the risk associated with each case is driven by the ability to distinguish the facts and then apply the law; and I said, 'Guys, based on my experience, based on the facts as I understand it, based on the law as I understand it, I think the risk of winning this case ultimately is very slim' . . . There has not been a case that I know about that the 5th Circuit has affirmed under these types of facts where there's been a shooting where they have held for the Plaintiff. And what I discussed for the entire day in the presence of [the Allens' attorney] was the risk to this family . . . And as a mediator, I'm obligated to point out to both sides the risk associated with litigation; and I think that I have the experience and the ability to do it correctly, Your Honor." Transcript of Proceedings Before the Honorable David Hittner, Settlement Hearing at 14-15, August 13, 1998, *Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998) (No. H-96-CV-30).

this mediation. There is no question that the Allens uttered words on Saturday evening in which they agreed to the defendants' settlement proposal. However, the circumstances under which they agreed certainly would not be used to illustrate mediator respect for and protection of party self-determination. Of course, the question confronting the court was whether to enforce the settlement agreement that arose out of these circumstances.

B. *The Court's Reaction to Allen v. Leal*

The federal district court never reached the question of whether to enforce the settlement agreement in *Allen v. Leal* because it issued an order declining to exercise supplemental jurisdiction over the breach of contract counterclaim brought by the defendants.⁴⁶ The opinion accompanying the court's November 1998 order is nonetheless instructive. The court began by criticizing the recent statement of a prominent Texas mediator⁴⁷ that "[w]hat some people might consider a little bullying is really just part of how mediation works."⁴⁸ The court continued by pointing out that Texas' standards governing the conduct of mediators provide that a "person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but *may not compel or coerce the parties to enter into a settlement agreement.*"⁴⁹ The court then concluded that "[c]oercion or 'bullying' clearly is not acceptable conduct for a mediator in order to secure a settlement."⁵⁰

46. The defendants brought an action in state court to enforce the settlement agreement. See Plaintiffs' Original Petition, *Leal v. Allen*, No. 98-53281 (Tex. Dist. Ct., Harris County, Tex., Nov. 10, 1998). On February 22, 1999, the court granted summary judgment for the defendants, finding that the parties had entered into an enforceable contract. See Order Partially Granting Plaintiffs' Motion for Summary Judgment, *Leal v. Allen*, No. 98-53281 (Tex. Dist. Ct., Harris County, Tex., Jan. 4, 1999). However, the Allens did not raise their allegations of coercion either in their answer in the state court action or in their opposition to defendants' summary judgment motion. See Defendants' Response in Opposition to the Plaintiffs' Motion for Summary Judgment, *Leal v. Allen*, No. 98-53281 (Tex. Dist. Ct., Harris County, Tex., Feb. 8, 1999). Instead, they relied on other grounds. See *id.*

47. The mediator was John Lee Arellano, the president of the Houston chapter of the Association of Attorney-Mediators. See *Allen*, 27 F. Supp. 2d at 947.

48. *Id.* (quoting Charlotte Aguilar, *No Decision in Allen Case*, 14 SOUTHWEST NEWS, Oct. 6, 1998, at 1, 22).

49. *Id.* at 948 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(a) (Vernon 1997)) (emphasis added).

50. See *id.*

Based on this language and the court's comments during the August 5, 1998 hearing, it might appear that this court was very concerned about party self-determination in mediation. However, the court saved its strongest language for the Allens and their attorney:

The court is gravely concerned with the plaintiffs' frontal attack on the mediation process itself. The mediation process has been responsible for the resolution of countless cases in this district, thereby avoiding the necessity for expensive adversary proceedings, including jury and non-jury trials. A significant amount of time and energy has been expended by the court and the parties in this case as a result of the plaintiffs' actions. The conduct of the plaintiffs and their attorneys in attempting to upset a settlement of this case appears to constitute an abuse, even if unintentional, of the federal trial process. Considering the enormity of the loss of a child, the court is perplexed that the Allens would have agreed to settle this case (even assuming *arguendo* that the mediator exerted pressure on the plaintiffs to settle the case) without being certain that such a settlement was appropriate. The court is even more concerned that counsel for the Allens failed to advise his clients of the seriousness and finality of signing a settlement agreement if they had any reservations whatsoever. Moreover, the court has not been advised of any actions taken by counsel for the Allens to protect them against any untoward pressure allegedly exerted by the mediator or the defendants.⁵¹

The court's reaction is striking. First, it illustrates the clash between the original vision of the "fundamental" principle of party self-determination and the goal of settlement, which is fundamental to the judicial system's enthusiasm for mediation. Second, the court's ultimate reaction raises questions about whether a party's interest in protecting his or her self-determination in the mediation process by avoiding very aggressive evaluation will ever prevail if it conflicts

51. *Id.* at 949. The court's concern about the role of counsel in this case is understandable. Unfortunately, a discussion of the appropriate role of the legal advocate in mediation is beyond the scope of this Article. However, it is worth noting the following: first, attorneys often are just as committed to settlement as judges, and attorneys are likely to expect that a mediation will be run in much the same way as a judicial settlement conference. Thus, attorneys may choose not to protect their clients from aggressive evaluation in mediation if they believe settlement is more likely to result. Second, it is unclear whether a client who had been coerced into a settlement would have any real remedy if the court enforced the settlement agreement and left the client to pursue a legal malpractice claim against his/her attorney due to the difficulty proving damages. Third, given the original vision of the mediator's role as one who *supports and nurtures* party self-determination, it is ironic and sad that mediation is now conceived as a process in which the parties require *protection from* mediators.

with the court's interest in using mediation to close cases. Finally, this case and the court's reaction suggest that the judge (and perhaps the mediator) did not recognize that mediation is somehow different from a traditional judicial settlement conference and that the difference relates to the underlying principle of party self-determination.

With *Allen v. Leal* providing a very real backdrop, Part II will turn to the meaning of party self-determination and how that meaning is evolving. It will focus on the conception of self-determination that inspired the "contemporary mediation movement."

II. THE CONTEMPORARY MEDIATION MOVEMENT AND THE QUEST FOR SELF-DETERMINATION

A. *The Original Vision of Self-Determination*

The discontent and idealism of the 1960s and early 1970s fueled the "contemporary mediation movement."⁵² Much of the support for mediation was rooted in dissatisfaction with the legal system's perceived mistreatment of disputants.⁵³ Commentators argued that the legal system mistreated litigants by depriving them of control over the resolution of their disputes. Mediation proponents pointed out that, even before trial, the litigation process took "[m]uch of the decision making out of the hands of the clients, as the attorneys engage[d] in battle within the legal system."⁵⁴ Because the civil

52. The 1960s were "characterized by strife, conflict, and discontent on many fronts." Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 *MEDIATION Q.* 3, 5-6 (1983). Interest began to develop in alternative dispute resolution at that time, with experimentation occurring in the 1970s. By 1978, the Law Enforcement Assistance Administration (LEAA) in the Department of Justice had provided demonstration grants to establish community mediation and neighborhood justice projects in several cities. The mediation process developed strong supporters in these communities. See generally James Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 *FLA. ST. U. L. REV.* 47, 50-59 (1991) (describing the evolution of Florida's court-connected mediation programs); Barbara McAdoo, *The Minnesota ADR Experience: Exploration to Institutionalization*, 12 *HAMLIN J. PUB. L. & POL'Y* 65 (1991) (describing the evolution of mediation in Minnesota); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 *FLA. ST. U. L. REV.* 1, 6-9 (1991) (providing a chronological overview of the evolution of ADR from the 1960s through the 1980s); Harry M. Webne-Behrman, *The Emergence of Ethical Codes and Standards of Practice in Mediation: The Current State of Affairs*, 1998 *WIS. L. REV.* 1289.

53. See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 *HARV. NEGOT. L. REV.* 71, 88-89 (1998) [hereinafter Kovach & Love, *Mapping Mediation*].

54. McEwen et al., *supra* note 24, at 1324 n.22 (citing JOHN M. HAYNES, *DIVORCE MEDIATION* 3 (1981)); see Frank E. Sander et al., *Judicial (Mis)use of ADR?: A Debate*,

litigation system forced disputants to delegate their disputes "to lawyers for expression and [to] judges for decision,"⁵⁵ some commentators argued that disputants inevitably felt excluded from the resolution of their disputes in the courts, regardless of whether that resolution occurred at trial or through settlement.

Commentators "urged that dispute resolution should more fully involve the participants in disputes."⁵⁶ In sharp contrast to the traditional litigation process, then, mediation was conceived as a disputant-centered, disputant-dominated process.⁵⁷ It relied on the parties' active and direct participation in the process and in decision-making.⁵⁸ Thus, mediation offered citizens a means to wrest control over both the dispute resolution process and the dispute resolution outcome from judges and lawyers.⁵⁹ It could even be argued that by providing disputants with a process in which they participated directly and controlled the expression of their perceptions and concerns, mediation offered a means to import procedural justice into the often-invisible yet ubiquitous settlement process.⁶⁰ Ultimately, advocates argued that mediation offered the potential to enhance parties' "self-determination."⁶¹

27 U. TOL. L. REV. 885, 893 (1996) (describing research that found that because ordinary lay litigants were unable to participate, they perceived their attorneys' negotiations and judicial settlement conferences to be less procedurally fair than arbitration or trial).

55. NANCY ROGERS & CRAIG McEWEN, *MEDIATION: LAW, POLICY AND PRACTICE* § 5.02 n.10 (2d ed. 1994); see FOLBERG & TAYLOR, *supra* note 3, at 10-11 (supporting the proposition that the adversarial process denies parties control over their situation).

56. FOLBERG & TAYLOR, *supra* note 3 at 6.

57. See Folberg, *supra* note 52, at 8.

58. See, e.g., FOLBERG & TAYLOR, *supra* note 3, at xiii ("Those involved in mediation are not simply recipients of a service; they are actively involved in the process as participants.").

59. For example, "[p]articipation in the resolution of their own disputes can give clients a sense of control over their own lives in contrast to the feeling of being victims of legal process they do not understand," ROGERS & McEWEN, *supra* note 55, at §5:02 n.10 (citing Rifkin & Sawyer, *Alternative Dispute Resolution—From A Legal Services Perspective*, NLADA BRIEFCASE, Fall 1982, at 20, 22).

60. See *supra* notes 24-25 and accompanying text.

61. FOLBERG & TAYLOR, *supra* note 3, at 34-35. The "basic assumption" of mediation is described as: "Equity and joint interests are best served through cooperative techniques of conflict resolution and guided negotiation resulting in the maximum degree of individualization and self-determination." *Id.* at 34. See also Bush, *supra* note 24, at 27-28 (attributing improvement in negotiation processes to increased party participation and decision control, or party self-determination); Jamie Henikoff & Michael Moffitt, *Remodeling the Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 102 n.63 (1997) (noting that the principle of self-determinations requires that the parties be able to take mutual responsibility for developing the terms of their own agreement).

Mediation advocates also rejected the notion that the law should serve as the exclusive source of the substantive norms controlling discussion and decision-making in the dispute resolution process.⁶² Instead, these advocates argued that the disputants could and should define fairness for themselves.⁶³ Control of the substantive norms to be applied to the discussion and in decision-making was part of the originally dominant vision of self-determination.⁶⁴ Thus, many mediation advocates envisioned party self-determination as involving more than just the disputants' passive ability to respond to the particular settlement proposal put before them. Rather, self-determination in mediation involved party empowerment that "restor[ed] to individuals . . . a sense of their own value and strength and own capacity to handle life's problems."⁶⁵ It promised disputants the opportunity to participate actively and directly in the process of resolving their dispute, control the substantive norms guiding their discussion and decision-making, create the options for settlement, and control

62. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & Soc'y REV. 631, 643 (1980-81) (arguing that judicial norms make parties' needs irrelevant); Andrew W. McThenia & Thomas Shaffer, *For Reconciliation*, 94 YALE L. J. 1660, 1664-65 (1985) (positing that the ADR movement rests on non-legal values and that "justice . . . is something people give to one another"); see also John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 148-50 (2000) (suggesting that the growth of ADR has been supported by the evolution of a "process pluralist" ideology"); McEwen et al., *supra* note 24, at 1327 (noting that the legal system fashions decisions that do not relate to the parties' interests); Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 17, at 2673-76 (asserting that negotiated settlements can be more democratic and just than adjudicated results). *But see* David Trubek, *Turning Away from Law?*, 82 MICH. L. REV. 824, 825 (1984) (criticizing mediation as being a form of "informal justice [that] seems to be the negation of the idea of the rule of law).

63. FOLBERG & TAYLOR, *supra* note 3, at 8, 10 (noting that parties involved in mediation have the freedom to tailor their settlement to their personal values and norms because the process does not operate under the constraints of legal precedent); see also Kovach & Love, *Mapping Mediation*, *supra* note 53, at 89 (stating that resolution in mediation reflects the parties' definition of fairness).

64. With mediation conceived in this way, it made great sense that the law would be viewed as at least irrelevant and potentially antithetical to parties' self-determination. Similar concerns have inspired various ethnic and religious groups to create their own alternative dispute resolution systems. Folberg, *supra* note 52, at 3, 5; see Menkel-Meadow, *Ethics*, *supra* note 17, at 416 (noting that courts' rigid rules and limited remedies created need for more flexible and party-sensitive processes like mediation).

65. BUSH & FOLGER, *supra* note 2, at 2. In describing the potential of mediation to transform people, the authors describe empowerment as "realizing and strengthening one's inherent human capacity for dealing with difficulties of all kinds by engaging in conscious and deliberate reflection, choice and action," *id.* at 81, and "when disputing parties experience a strengthened awareness of their own self-worth and ability to deal with whatever difficulties they face." *Id.* at 84.

the final outcome of the dispute resolution process. Self-determination in mediation was founded upon principles of party empowerment.⁶⁶

B. *Manifesting the Original Vision of Self-Determination*

The mediation model which was developed by many community mediation programs at this time manifested this empowerment-oriented vision of self-determination.⁶⁷ Specifically:

1. Mediation was voluntary. Mediation advocates argued that people should participate in mediation only if they chose to do so.⁶⁸
2. Mediation required that each party become "an active part of the communication."⁶⁹ Consistent with this participatory conception of self-determination, the mediator was to make

66. See FOLBERG & TAYLOR, *supra* note 3, at 8 (urging that mediation is a "self-empowering process"); see also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545, 1581 (1991) (describing self-determination as empowering); Sally Merry, *Albie M. Davis: Community Mediation as Community Organizing*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 244, 254 (Deborah M. Kolb & Assoc. eds. 1994) (describing the importance of empowerment to Albie Davis' mediation program); Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 29, 45 (1996) [hereinafter Riskin, *Understanding Mediators' Orientations*] (observing that facilitative mediators empower parties, giving the parties an enhanced feeling of participation, control, and understanding).

67. It appears that regardless of whether these programs adopted a "problem-solving" approach or a "transformational" approach, they were committed to "empowering" the parties through the parties' active and direct participation and through the development of resolutions responding directly to the parties' self-identified interests, needs, and norms. See BUSH & FOLGER, *supra* note 2.

68. See, e.g., JENNIFER BEER ET AL., PEACEMAKING IN YOUR NEIGHBORHOOD: MEDIATOR'S HANDBOOK 19 (1982) (emphasizing the party's choice to participate in mediation); Grillo, *supra* note 66, at 1581 (musing that mandatory mediation destroys the benefits brought by allowing parties to make their own decisions); Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3, 22-23 (1984) (contrasting the effects of "coerced participation" in the civil justice system with benefits of voluntary participation in community boards' model of mediation); see also Lucy Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 5 (noting that "the growth in compulsory ADR may have destroyed part of its original value as an informal, consensual alternative"); SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION [hereinafter SPIDR], MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS 13-14 (1991) (observing that mandated participation in mediation can lead to "short, rigid sessions [that] may result in lower party involvement, poor resolution, and thus lower voluntary compliance with the resolution").

69. FOLBERG & TAYLOR, *supra* note 3, at 41; see also BEER ET AL., *supra* note 68, at 2, 18 (establishing empowerment as the first guideline for mediation).

sure that each party had a chance to speak, that no one dominated the session, that the disputants heard each other's perceptions, and that positions were translated into interests and "positive need statements."⁷⁰

3. The mediator's role was to "validate[] and encourage[] parties throughout the process"⁷¹ and to foster an environment that would enable the parties' individual and joint will to emerge.⁷² The general presumption was that the mediator was facilitative and was not to give his or her own view on any issue.⁷³
4. The disputants themselves were responsible for the process. The parties' responsibilities included identifying the issues to be resolved,⁷⁴ recognizing the concerns and interests underlying their positions,⁷⁵ generating options for resolution of their dispute,⁷⁶ and evaluating the resolution options.⁷⁷
5. Mediation promised "a climate of cooperation"⁷⁸ that would enhance all disputants' ability to understand each other and

70. See COMMUNITY DISPUTE RESOLUTION CTR. (Ithaca, N.Y.) MEDIATION TRAINING MANUAL - SIX STAGES OF MEDIATION [hereinafter COMMUNITY DISPUTE RESOLUTION CTR.] 2 (1989) (excerpt on file with author); see also, e.g., BEER ET AL., *supra* note 68, at 12, 23, 35; NEIGHBORHOOD JUSTICE CTRS. OF ATLANTA, INC., TRAINING MANUAL FOR MEDIATORS 49 (1987) (emphasizing the importance of joint sessions).

71. See COMMUNITY DISPUTE RESOLUTION CTR., *supra* note 70, at 4.

72. Recommended techniques included: actively listening, clarifying, reflecting and acknowledging feelings, probing for parties' underlying issues and concerns, translating positions into interests and positive need statements, helping parties state what was important to them and what they would like to have happen, enabling the parties to generate a list of possible options, checking the "workability" of each alternative with the parties, and encouraging the parties to select alternatives which appeared acceptable to them. See *id.*; see also, e.g., BEER ET AL., *supra* note 68, at 23-30.

73. See COMMUNITY DISPUTE RESOLUTION CTR., *supra* note 70, at 4; see also, e.g., BEER ET AL., *supra* note 68, at 35, 38 (providing several techniques to encourage and assist parties in developing their own solution); NEIGHBORHOOD JUSTICE CTRS. OF ATLANTA, INC., *supra* note 70, at 22 (stressing the importance of assisting parties' communication so that they may reach common solution).

74. See COMMUNITY DISPUTE RESOLUTION CTR., *supra* note 70, at 4.

75. See *id.*

76. See *id.*; see also BEER ET AL., *supra* note 68, at 35, 38 (providing several techniques to permit parties to develop their own solutions but also providing techniques to assist parties who were unable to do so unaided); NEIGHBORHOOD JUSTICE CTRS. OF ATLANTA, *supra* note 70, at 17 ("The two or more sides involved in a dispute are given an OPPORTUNITY through the MEDIATOR to fashion between and among THEMSELVES a solution SATISFACTORY to ALL sides.")

77. See COMMUNITY DISPUTE RESOLUTION CTR., *supra* note 70, at 4.

78. *Id.*; see also BEER ET AL., *supra* note 68, at 35:

Compassion and respect are the intangible attitudes which let disputants safely express feelings and break away from locked-in positions. . . . An agreement is signed when each disputant is willing to accept each point of the contract. A person pressured into concession is less likely to follow the

participate in reaching resolution.⁷⁹ To be sure that disputants heard each other's perceptions and to enhance their communication, some programs discouraged the use of caucuses or separate meetings.⁸⁰ Some programs also explicitly excluded lawyers.⁸¹

When first established, mediation's form fit its function rather neatly, and it appeared that this form was quite effective in aiding parties to reach resolution and in generating high user satisfaction.⁸² Unfortunately, a relatively small number of disputants actually chose to take advantage of this new process.⁸³ Most disputants continued to turn to the courts for resolution of their disputes. By the mid-1980s, despite mediation's genesis out of dissatisfaction with the judicial process, many mediation proponents were advocating for the institutionalization of mediation *within* the courts because that is where parties and their disputes could be found.⁸⁴ The next section

terms of the agreement. If someone is uncomfortable with a suggestion, no matter how rational the solution appears, the group continues to look for other possibilities.

Id. See also NEIGHBORHOOD JUSTICE CTRS. OF ATLANTA, *supra* note 70, at 14 (noting that mediation is, by nature, nonadversarial and seeks reconciliation).

79. Mediation's focus of cooperation is in contrast to a competitive approach, which many have argued favors men and those with power. See, e.g., Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 993-94 (1997). See generally Linda Stamato, *Voice, Place, and Process: Research on Gender, Negotiation, and Conflict Resolution*, 9 MEDIATION Q. 375, 378 (1992) (reporting on research regarding the effect of gender differences and situational power on negotiating behavior).

80. See, e.g., BEER ET AL., *supra* note 68, at 21 (noting the underutilization of caucus in a community mediation program); NEIGHBORHOOD JUSTICE CTRS. OF ATLANTA, *supra* note 70, at 49 (directing that caucuses should only be implemented after there has been an attempt at joint discussion between the parties).

81. See, e.g., BEER ET AL., *supra* note 68, at 12 (excluding lawyers and witnesses from the mediation proceedings). Even if not explicitly excluded, lawyers often were to play a limited role in mediation. See, e.g., NEIGHBORHOOD JUSTICE CTRS. OF ATLANTA, *supra* note 70, at 111 (noting that, while attorneys have a right to be present at a mediation session, the session will be adjourned if the attorney attempts to control the process); Leonard Riskin, *Mediation and Lawyers*, 43 OH. ST. L. J. 29, 36 (1982) (describing Houston Neighborhood Justice Center's discouragement of use of lawyers).

82. See, e.g., Tom Tyler, *The Quality of Dispute Resolution Procedures and Outcome: Measurement Problems and Possibilities*, 66 U. DENVER L. REV. 419, 436 (1989).

83. See ROGERS & McEWEN, *supra* note 55, at §5:02, n.19 (citing COOK, ROEHL & SHEPARD, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST 2 (1980)).

84. See *infra* notes 95-96 and accompanying text. Interestingly, it does not appear that most mediation advocates or courts acknowledged the irony—and potential conflict—created by transplanting a process which rejects the relevance of the law into the very institution which conditions access upon an effective invocation of the law. Further, this party-centered process was transplanted into an institution which tended to constrict parties' participation in its processes and viewed the individual

will examine the reasons that the courts decided to embrace mediation, the evolution of mediation once it entered the courthouse, and the changing vision of self-determination as revealed in the rise of evaluative mediation.

III. THE ADAPTATION OF MEDIATION TO THE COURTHOUSE

A. *The Courts' Reasons for Embracing Mediation*

It is somewhat ironic that the courts embraced a process that originally arose out of frustration with the litigation process,⁸⁵ but there were two major reasons for its welcome. First, mediation advocates promised that the process would save time and money.⁸⁶ This benefit responded directly to concerns raised by judges—including the Chief Justice of the U.S. Supreme Court⁸⁷—and attorneys that

litigant not as an unique, multi-faceted person but as “a legal problem accompanied by a person.” ROBERT BASTRESS & JOSEPH HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 30 (1990). Viewed in this way, it was inevitable that the mediation process had to adapt in order to survive in its new home.

85. See generally ELIZABETH PLAPINGER & MARGARET SHAW, *COURT ADR: ELEMENTS OF PROGRAM DESIGN* (1992); Nancy Welsh & Barbara McAdoo, *The ABCs of ADR: Making ADR Work in Your Court System*, *JUDGES' J.*, Winter 1998, at 11.

86. See Thomas Radio, *Advising Your Client Regarding ADR*, 46 *BENCH & BAR OF MINN.*, April, 1989, at 19 (listing “savings in legal fees and expenses” as a potential benefit of using ADR); Nancy Welsh, *The Lawyers' Buffet: Options in Resolving Disputes*, 44 *BENCH & BAR OF MINN.*, Nov. 1987, at 17, 18 (suggesting that ADR will aid courts in reducing the volume of cases litigated); see also STEVENS H. CLARKE ET AL., *COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS* 56 (1996) (noting that the program of court-ordered mediated settlement conferences reduced the median filing-to-disposition time in contested cases by about seven weeks and, although data was not conclusive, it suggested that the program produced savings for litigants); DONNA STIENSTRA ET AL., *REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990* 16 (1997) (reporting finding that, for cases assigned to Missouri Western's Early Assessment Program, median age at termination was reduced by more than two months). *But see* Wayne Kobbervig, *Mediation of Civil Cases in Hennepin County: An Evaluation* 19 (1991) (indicating that median disposition times in cases referred to mediation and cases disposed of in the judicial process were identical); RAND INSTITUTE FOR CIVIL JUSTICE, *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT* 48 (1996) (finding that federal courts' use of mediation and early neutral evaluation, as mandated by the Civil Justice Reform Act of 1990, has not resulted in significantly quicker settlements or reduced expenses for litigants).

87. In 1976, the American judicial system acknowledged popular dissatisfaction with a national conference that focused on “the Causes of Popular Dissatisfaction with the Administration of Justice” (the conference is more popularly known as the “Pound Conference”). Chief Justice Burger, who planned and implemented the conference, later observed: “The notion that ordinary people want black-robed judges,

the courts were facing increased dockets and reduced resources, while litigants were enduring longer waits for trial.⁸⁸ Mediation advocates also highlighted the high levels of party satisfaction achieved through the use of mediation.⁸⁹ To some, mediation appeared as a timely and attractive antidote to the perceived ills of the judicial system. It was a process that could simultaneously increase efficiency and improve litigants' satisfaction with their treatment in court.⁹⁰

well-dressed lawyers, and fine paneled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible." Warren E. Burger, *Our Vicious Legal Spiral*, JUDGES' J., Fall 1977, at 22, 49. The primary focus of the Chief Justice and others was on remedying the perceived slowness, expense, and inefficiency of the civil litigation system, not on changing the role played by litigants within the system or the "quality" of the outcomes produced by the system. See STEPHEN GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 6-9 (3d ed. 1999) (describing the sources and goals of the ADR movement); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 6-10 (1991) (contrasting early conceptions of the purposes of ADR).

88. See 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, 954 (1997) (noting that "the ultimate goal of mediation or any other ADR technique [within the courts is] the efficient and just resolution of controvers[ies]"). Of course, the degree of these efficiency pressures (or perceptions regarding the degree of these pressures) varied from location to location. This may be one factor that helps explain why some courts began adopting ADR programs in the early 1980s, while other courts are just now experimenting with ADR.

89. See SUSAN KEILITZ ET AL., *MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL COURT PROCESSING* 18-22 (1992) (showing that, in a study of divorcing litigants who participated in mediation or conventional court program, those involved in mediation rated the process more favorably on most measures of quality and fairness of process); KOBBERVIG, *supra* note 86, at 23-25 (demonstrating that litigants in mediation rated it more favorably than did litigants in the judicial process, while attorneys rated the judicial process more highly); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 238 (1981) (reporting that litigants in mediation expressed higher levels of satisfaction with their experience than those whose cases were adjudicated); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 19 (Kenneth Kressel et al. eds, 1989) (noting that, in two studies of divorcing couples with child custody and visitation disputes, more than three-quarters of mediation users expressed extreme satisfaction with mediation). See generally SUSAN KEILITZ ET AL., *NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS—IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS* (1994).

90. Some commentators raised concerns about the potential incompatibility of "quantitative-efficiency claims" and "qualitative-justice claims." See Menkel-Meadow, *Pursuing Settlement in an Advisory Culture*, *supra* note 52, at 6; see also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 838 (1984). On the whole, however, most

A second reason the courts welcomed mediation was that a critical mass of lawyers and judges became persistent advocates for the process. As the years passed, some of these lawyers and judges found themselves in positions of influence as they became members of the committees, commissions, and advisory groups working to improve the judicial process.⁹¹ As a result, mediation was put on the reform agenda in many state and federal courts.

B. *The Evolution of Mediation in the Court-Connected Context*

During this time of change, some courts experienced success by experimenting with the use of mediation in "smaller" cases (e.g., small claims court)⁹² and in cases that were more emotionally charged (e.g., disputes over custody and visitation).⁹³ These successes helped to set the stage for the introduction of mediation to resolve more substantial civil cases (e.g., contract, personal injury, and employment cases involving claims for damages greater than the jurisdictional limit for small claims court).⁹⁴ Mediation advocates persuaded many courts to give parties the option to submit these larger

advocates either acknowledged no conflict in goals or anticipated that, with appropriate modifications, mediation could always achieve both sets of goals. *See, e.g.,* Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991).

91. *See* ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS* 3 (1996) (describing the institutionalization of ADR in the federal courts); *see also* McAdoo, *The Minnesota ADR Experience*, *supra* note 52, at 67 (describing the transition from the period of exploration to the development of the institutionalized recommendations that later served as the basis for state legislation and court rules); Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 *HAMLINE J. PUB. L. & POL'Y* 376 (1997) (continuing the story of Minnesota courts' institutionalization of ADR and reporting perceptions of the effect of Rule 114 on the practices of law and mediation).

92. *See* Alfini, *supra* note 52, at 51-54; McAdoo, *The Minnesota ADR Experience*, *supra* note 52, at 74. Small claims court easily adapted to the mediation process. Generally, disputants were not accompanied by attorneys, the legal issues were not as significant, and community mediators trained according to the facilitative model of mediation often provided the mediation services in this setting.

93. *See* Alfini, *supra* note 52, at 54-56; McAdoo, *The Minnesota ADR Experience*, *supra* note 52, at 79-80. The mediation model began to evolve in domestic cases. In this setting, court personnel served as mediators, there were limits on the amount of time that could be spent in mediation, and some courts expected that if the parties were unable to reach resolution themselves, the mediators would make recommendations regarding custody and visitation. *See generally* McEwen et al., *supra* note 24, at 1330-50; Grillo, *supra* note 66, at 1554-55.

94. *See* Alfini, *supra* note 52, at 60; McAdoo, *The Minnesota ADR Experience*, *supra* note 52, at 81-82.

cases to voluntary mediation programs. However, few parties chose to exercise this voluntary option.⁹⁵

In response to this lackluster reception, mediation advocates proposed "mandatory" mediation. They argued that courts should have the authority to order parties into mediation. This was inconsistent with the original conception of self-determination, but mediation proponents suspected that parties were not choosing mediation because they (or their attorneys) were simply wary of an unfamiliar process⁹⁶ or feared signaling an overeager willingness to settle.⁹⁷ Many mediation advocates saw "mandatory" mediation as an opportunity to provide a forced education regarding mediation to attorneys and their clients.⁹⁸ Additionally, research indicated that parties who were required to use mediation continued to reach settlements in a substantial percentage of the cases and reported high levels of satisfaction with the process.⁹⁹ Those courts that adopted pilot projects to test the use of mandatory mediation in civil cases involving claims for substantial damages experienced success, and this triggered even

95. See CENTER FOR ANALYSIS OF ALTERNATIVE DISPUTE RESOLUTION SYSTEMS & THE INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS 3-1 (1992).

Experience with court mediation programs has shown that voluntary programs often are underutilized. In spite of the increasing number of ADR programs, in courts and communities, mediation remains a largely unfamiliar process to judges, court administrators, citizens and attorneys. Judges, lawyers and clients tend to do things in the way to which they are accustomed and may resist new processes with which they are unfamiliar.

Id.; see also ELIZABETH PLAPINGER & MARGARET SHAW, COURT ADR: ELEMENTS OF PROGRAM DESIGN 15-16 (1992) (describing commentators' evaluation of usefulness of voluntary mediation programs in the courts); SPIDR, MANDATED PARTICIPATION AND SETTLEMENT COERCION, *supra* note 68, at 11 (observing that "[r]ates of voluntary usage are often low, perhaps because parties or their lawyers may be more accustomed to the litigation process or do not want to signal to their adversary a desire for compromise.").

96. See SPIDR, MANDATED PARTICIPATION AND SETTLEMENT COERCION, *supra* note 68, at 11; Riskin, *Mediation and Lawyers*, *supra* note 81, at 41 (noting that unless a lawyer is familiar with mediation, he will tend not to recommend its use).

97. See SPIDR, MANDATED PARTICIPATION AND SETTLEMENT COERCION, *supra* note 68, at 11.

98. See SPIDR, MANDATED PARTICIPATION AND SETTLEMENT COERCION, *supra* note 68, at 12; see also Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1932 (1997) (acknowledging the "educative effect of 'presumptively mandatory' referrals"); Sander et al., *supra* note 54, at 886 (comparing mandatory mediation to affirmative action).

99. See Pearson & Thoennes, *supra* note 89, at 9, 14, 18.

greater institutionalization with the development of statewide court-connected mediation in several states.¹⁰⁰

Perhaps inevitably,¹⁰¹ current evidence strongly suggests that the “legitimacy handed to [the ADR movement] by its assimilation into the court system”¹⁰² has come at a price. Court-connected mediation of non-family civil cases is developing an uncanny resemblance to the judicially-hosted settlement conference. In certain types of cases, such as personal injury and medical malpractice, the defendants regularly fail to attend mediation sessions.¹⁰³ Even when all of the clients do attend, their attorneys are likely to do much, if not all, of the talking, particularly in joint sessions.¹⁰⁴ An increasing number of mediators are abandoning or greatly minimizing the joint session, preferring to move quickly to caucuses.¹⁰⁵ The attorneys are

100. See, e.g., Barbara McAdoo & Nancy Welsh, *supra* note 91, at 378-81 (describing Hennepin County District Court mediation pilot project and legislation and court rules establishing statewide court-connected ADR program); see also KOBBERVIC, *supra* note 86, at 5-8.

101. See Menkel-Meadow, *Ethics*, *supra* note 17, at 418. (“As with all cyclical human history, the reforms of flexibility, informality, particularity and privacy have led to their own set of abuses. . . . ADR now needs ‘ethics’ or standards in part because of its successes—it is being challenged from within as well as without.”); see also Stempel, *supra* note 88, at 983 (noting that court-ordered mediation forces mediation away from the spirit of cooperation that fostered its growth).

102. Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*, *supra* note 52, at 2.

103. In personal injury actions, insurers often are required to attend mediation sessions while those who are insured—the actual defendants—are not to required to attend. See, e.g., MINN. R. OF PRACTICE FOR DIST. CT. 114.07(c) (2000) (“Facilitative processes aimed at settlement of the case, such as mediation . . . shall be attended by individuals with the authority to settle the case, unless otherwise directed by the court.”); Thomas Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW AND CONTEMP. PROBS. 107, 123-25 (1997) (observing that in eight of 36 observed mediation sessions, the physicians who were named as defendants were not present, despite existence of rules that anticipated presence of all parties); see also Kovach & Love, *supra* note 53, at 99 (reporting that Civil Appeals Management Plan of the United States Court of Appeals for the Second Circuit “neither expects nor requires party participation, though mediators may invite the parties to attend the conferences”).

104. See, e.g., Elizabeth Ellen Gordon, *Why Attorneys Support Mandatory Mediation*, 82 JUDICATURE 224, 227 (1999) (stating that, in observed mediations, lawyers dominated negotiation and that the minority of clients who did “play active roles” were “supporting rather than starring players”); Metzloff, *supra* note 103, at 123-25. *But see* BARBARA MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT: THE IMPACT OF RULE 114 ON CIVIL LITIGATION PRACTICE IN MINNESOTA 39 (1997) (reporting that nearly 80 percent of attorneys perceive that mediators always or frequently encourage clients to participate); McEwen et al., *supra* note 24, at 1382-84 (describing lawyer appreciation of client involvement in divorce mediation).

105. See Alfini, *supra* note 52, at 66 (reporting that “trashers” discourage direct party communication and quickly move to caucuses); Metzloff, *supra* note 103, at 120;

choosing mediators who, like judges, are expected to have the knowledge and experience which would permit them to comment on the parties' legal arguments.¹⁰⁶ Indeed, mediators now often focus on the legal issues and opine regarding the strengths and weaknesses of each party's case and appropriate settlement ranges.¹⁰⁷ Finally, it appears that few mediators now actively promote the search in mediation for creative, non-monetary settlements.¹⁰⁸

To a large extent, the presence of lawyers, as advocates and as mediators, explains why court-connected mediation now looks like a judicial settlement conference. First, attorneys have long operated

see also McADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 104, at 39 (reporting that approximately 72 percent of attorneys perceive that mediators "always or frequently" use caucuses effectively while only about 49 percent of attorneys perceive that mediators "always or frequently" ask each side to present an opening statement); McAdoo & Welsh, *supra* note 91, at 391 (noting that mediator's often abandon asking the parties for opening statements).

106. See Alfini, *supra* note 52, at 66-71 (describing "trashers" and "bashers"); Gordon, *supra* note 104, at 228 (noting that attorneys prefer mediators who are experienced in the courtroom); see also McADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 104, at 38 (reporting that lawyers perceive that the most important qualification for mediators is "substantive experience in the field of law related to case" [84 percent of respondents]); McAdoo & Welsh, *supra* note 91, at 390 (showing that Hennepin County lawyers reported that they wanted mediators to give their view of settlement ranges); Metzloff, *supra* note 103, at 144-45 (reporting that almost 70 percent of attorneys want mediators to provide opinions on the merits of cases and that attorneys highly valued mediator's substantive expertise).

107. See, e.g., Kovach & Love, *Mapping Mediation*, *supra* note 53, at 99 (reporting that mediators employed by the Civil Appeals Management Plan of the United States Court of Appeals for the Second Circuit evaluate strengths and weaknesses of cases); McADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 104, at 39 (reporting that approximately 30 percent of lawyers perceive that mediators frequently or always predict court outcomes, and about 68 percent perceive that mediators frequently or always propose realistic settlement ranges); McAdoo & Welsh, *supra* note 91, at 390 n.71 (stating that Hennepin County lawyers reported that they "perceive mediators to 'frequently or always predict' court outcomes about one-third of the time and 'propose realistic settlement ranges' about two-thirds of the time"); Metzloff, *supra* note 103, at 121 (reporting that half of the mediators who were observed expressed opinions about parties' offers, while 12 percent opined regarding the case's merits); see also DONNA STIENSTRA ET AL., *supra* note 86, at 267 (describing observed EAP and settlement week sessions). *But see* Gordon, *supra* note 104, at 228 (reporting that observed mediators were reticent in offering opinions or suggesting specific offers or demands).

108. See McADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 104, at 39 (reporting that about 26 percent of attorneys perceive that mediators frequently or always "provide input for non-monetary aspects of settlement"); see also Elizabeth Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, MEDIATION Q. 377, 384 (Summer 2000) (reporting that plaintiffs are more likely to receive nonmonetary relief in cases disposed through a trial than in cases settling at mediated settlement conferences); Metzloff, *supra* note 103, at 151.

within an “adversary culture.”¹⁰⁹ As they were ordered to participate with their clients in the mysterious process called “mediation,” they brought with them a “standard philosophical map,”¹¹⁰ assumptions regarding their relationship with their clients,¹¹¹ and expectations and tactics that they had honed in their prior experience with traditional judicial settlement conferences.¹¹² Second, as more and more attorneys and retired judges were attracted to mediation as a remunerative activity, they brought to the role of mediator the skills and knowledge that had served them well in their careers,¹¹³ as well as certain assumptions about “the role of the [quasi-]judicial host.”¹¹⁴ Parties and their attorneys began to select mediators who could and would provide reasoned evaluation.¹¹⁵ Increasingly, mediators were willing to provide it.¹¹⁶

C. *The Facilitative-Evaluative Debate and the Changing Conception of Self-Determination*

In 1994, Professor Leonard Riskin pointedly acknowledged that legal evaluation was occurring in mediation.¹¹⁷ Specifically, he wrote that he had observed mediators using the following strategies:

- Urg[ing] parties to settle or to accept a particular settlement proposal or range.
- Propos[ing] position-based compromise agreements.

109. See Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*, *supra* note 52, at 1.

110. Riskin, *Mediation and Lawyers*, *supra* note 81, at 43-44 (describing lawyers’ “standard philosophical map” as one that assumes the “adversariness of parties and rule-solubility of dispute”).

111. See Ronald Gilson & Robert Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994) (noting that a “distinctive characteristic of our formal mechanisms of conflict resolution is that clients carry on their disputes through lawyers”); Leonard 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, 1076-77 (1991) [hereinafter Riskin, *The Represented Client*] (contrasting traditional and participatory lawyer-client relationships).

112. See Kovach & Love, *Mapping Mediation*, *supra* note 53, at 96 (arguing that lawyers tend to bring mediation into the adversarial system with which they are more familiar).

113. See *id.* at 94.

114. Riskin, *The Represented Client* *supra* note 111, at 1081-89 (describing courts’ and attorneys’ expectations of the role of the judicial host in settlement conferences).

115. See *supra* note 106.

116. See *supra* note 107.

117. See Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, ALTERNATIVES TO HIGH COST LITIG., Sept. 1994, at 111 [hereinafter Riskin, *Mediator Orientations*]. See also Riskin, *Understanding Mediators’ Orientations*, *supra* note 66, at 7.

- Predict[ing] court (or administrative agency) dispositions.
- Try[ing] to persuade parties to accept the mediator's assessments.
- Directly assess[ing] the strengths and weaknesses of each side's case (usually in private caucuses) and perhaps try[ing] to persuade the parties to accept the mediator's analysis.¹¹⁸

Professor Riskin suggested that these strategies were consistent with an "evaluative-narrow" orientation.¹¹⁹ He outraged some by going further and arguing that a process dominated by such an evaluative-narrow approach could still be described as "mediation."¹²⁰

In the debate that followed, some scholars and practitioners reacted very strongly, proclaiming that "[e]valuative' [m]ediation is an [o]xymoron" and arguing that mediation should be clearly distinguishable from other, evaluative processes.¹²¹ These critics used several bases to support their arguments. First and quite provocatively, they pointed out the danger of permitting mediators to provide unfettered evaluations and assessments and suggested that "ethical norms

118. See Riskin, *Mediator Orientations*, *supra* note 117, at 112. In his 1996 article, Professor Riskin altered the list, concluding that mediators were "assess[ing] the strengths and weaknesses of each side's case," "predict[ing] outcomes of court or other processes," "propos[ing] position-based compromise agreements," and "urg[ing] or push[ing] the parties to settle or to accept a particular settlement proposal or range." See Riskin, *Understanding Mediators' Orientations*, *supra* note 66, at 27.

119. In his article, Professor Riskin proposed a system for classifying mediator orientations, strategies, and techniques with reference to: 1) "the scope of the problem that the mediation seeks to address or resolve" (narrow vs. broad) and 2) "the strategies and techniques that the mediator employs in attempting to address or resolve the problems that comprise the subject matter of the mediation" (facilitation of parties' negotiations vs. evaluation of matters that are important to the mediation). An evaluative-narrow mediator would define the problem to be addressed by the mediation narrowly and would use evaluative strategies based on an assumption "that the participants want and need her to provide some guidance as to the appropriate grounds for settlement—based on law, industry practice, or technology—and that she is qualified to give such guidance by virtue of her training, experience, and objectivity." Riskin, *Understanding Mediators' Orientations*, *supra* note 66, at 17, 24.

120. It is quite clear that Professor Riskin anticipated that some would object to his inclusion of this orientation and set of strategies within the definition of mediation, based on "fear[s] that somehow it will legitimize activities that are inconsistent with the goals that they associate with mediation." *Id.* at 13. However, Professor Riskin responded:

Although I sympathize with this view, I also disagree with it. Usage determines meaning. It is too late for commentators or mediation organizations to tell practitioners who are widely recognized as mediators that they are not, in the same sense that it is too late for the Pizza Association of Naples, Italy, to tell Domino's that its product is not the genuine article.

Id.

121. See Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is An Oxymoron*, *ALTERNATIVES TO HIGH COST LITIG.*, Mar. 1996, at 31 [hereinafter Kovach & Love, *Evaluative Mediation*].

and legal standards” would be required to “direct those evaluations.”¹²² The remainder of their arguments were grounded in their understanding of the unique goals, underlying principles, and activities that should be associated with a process labeled “mediation.” They claimed that evaluation was “not consonant with mediation’s primary goals of enhancing understanding between parties and encouraging parties to create outcomes that respond to underlying interests;”¹²³ that, because “a mediator’s assessment invariably favors one side over another,” evaluation “jeopardizes” the mediator’s “neutrality;”¹²⁴ that “[e]valuation and facilitation require different skills and expertise[,] generate different outcomes [and] should have accurate—and separate—labels;”¹²⁵ and, ultimately, that “‘mediation’ should connote facilitation.”¹²⁶

Later, these same critics focused their disapproval primarily on the dangers presented by mediators with predominantly evaluative orientations¹²⁷ or those using the most aggressive of the possible evaluative strategies (i.e., “assert[ing] an opinion or judgment as to the likely court outcome or a ‘fair’ or correct resolution of an issue in

122. *Id.* See also Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 942-43 (1997) [hereinafter Love, *Top Ten Reasons*] (arguing that insufficient protections against incorrect mediator evaluations exist).

123. Kovach & Love, *Evaluative Mediation*, *supra* note 121, at 32. See also Riskin, *Understanding Mediators’ Orientations*, *supra* note 66, at 45, 47 (acknowledging that evaluative techniques “can interfere with the parties’ coming to understand fully their own and each other’s positions and interests” and “with the development of creative solutions”); Stulberg, *supra* note 79, at 991 (noting that “[n]othing in principle [would be] improper about the mediator bullying someone into an agreement as long as there is some operative notion that the parties ‘voluntarily’ agreed to the outcome” if the efficiency with which the parties accepted the outcome of mediation were the only criterion for evaluating mediators).

124. Kovach & Love, *Evaluative Mediation*, *supra* note 121, at 31. See also Stulberg, *supra* note 79, at 986. Professor Riskin also anticipated this objection. See Riskin, *Understanding Mediators’ Orientations*, *supra* note 66, at 44.

125. Kovach & Love, *Evaluative Mediation*, *supra* note 121, at 32. See also Love, *Top Ten Reasons*, *supra* note 122, at 938-39, 948 (arguing that evaluators and facilitators use “different skills and techniques” and require “different competencies, training norms, and ethical guidelines”).

126. Kovach & Love, *Evaluative Mediation*, *supra* note 121, at 32. See also Stulberg, *supra* note 79, at 1005 (“[The] vision of consensual decision making, and the facilitative role required to support it, should inform the meaning of the term ‘mediation’ in whatever statute, rule, or program it appears, and should constitute the standards by which we select and evaluate mediator performance.”)

127. See Kovach & Love, *Mapping Mediation*, *supra* note 53, at 80 (arguing that a mediator is “off the mediation map when the mediator has an attitude or identity of being an evaluator (evaluative orientation)”).

dispute”).¹²⁸ For the reasons described above, critics continued to argue that these mediators were “off the mediation map.”¹²⁹ Ultimately, these critics argued that the evaluative-narrow orientation and its most aggressive strategies were inconsistent with “a paradigm that has party self-determination as its primary value.”¹³⁰

In response, scholars and practitioners who supported evaluative mediation admitted that “[i]n some instances, ‘evaluative’ mediators undoubtedly need to be reined in to prevent mediation from being converted to arbitration and to prevent the evaluative mediator who jumps to conclusions from bullying one or both parties into an unsatisfactory resolution of a controversy.”¹³¹ They argued, however, that “it hardly follows that all evaluative mediation is bad and all nonevaluative mediation is good.”¹³² These commentators raised the importance of the context within which court-connected mediation was occurring. Some emphasized the courts’ obligation to facilitate

128. *Id.* It seems reasonable to assume that Kovach and Love also would term a mediator “‘evaluative’ in the sense of being off the mediation map” if the mediator urged or pushed the parties to settle or to accept a particular settlement proposal or range. Importantly, Kovach and Love identified *certain* “evaluative” activities as “essential parts of a mediator’s *facilitative* role” including “challenging proposals that seem unrealistic . . . and sometimes making suggestions about possibilities for resolution in order to stimulate the parties to generate options.” In determining whether such activities were consistent with the mediator’s *facilitative* role, Kovach and Love express most concern with whether the activities were “motivated by and result[ed] in the stimulation of party evaluation and decision-making[.]” *Id.* at 79-80.

129. *Id.* at 80.

130. Kovach & Love, *Mapping Mediation*, *supra* note 53, at 75; see also Kovach & Love, *Evaluative Mediation*, *supra* note 121, at 32 (“[T]hese practices are inconsistent with primary objectives of mediation: promoting self-determination of parties and helping the parties examine their real interests and develop mutually acceptable solutions.”); Stulberg, *supra* note 79, at 1001-02.

[M]ediation is a dialogue process designed to capture the parties’ insights, imagination, and ideas that help them to participate in identifying and shaping their preferred outcomes. Concepts of participation and empowerment are not idle pleasantries but are central principles of a democratic society and critical features of consensual decision making processes, of which mediation is traditionally thought to be a prime example.

Id. See also Riskin, *Understanding Mediators’ Orientations*, *supra* note 66, at 45 (observing that the *facilitative*, rather than the *evaluative*, approach gives parties and their lawyers “a greater feeling of participation and more control over the resolution of the case . . . and offers greater potential for educating parties about their own and each other’s position, interests, and situation”).

131. Stempel, *supra* note 88, at 969.

132. *Id.* See also Robert Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669, 671-72 (1997) (acknowledging that evaluative mediation potentially endangers parties’ self-determination, but arguing that there is not a “sufficient record of abuse that would justify banning evaluation per se”).

fair and just results, which often required the application of established legal norms, not heedless adherence to a particular model of mediation.¹³³ Others pointed out that the clients may invoke legal norms and are entitled to explore the application of these norms to their cases.¹³⁴ Still others observed that mediation was simply assisted negotiation and that negotiators had to have the opportunity to define and understand the consequences of going to trial, which would be their best alternative to a negotiated agreement (BATNA).¹³⁵ They argued that, at its worst, mediator evaluation under these circumstances would not impair party self-determination

133. See Stempel, *supra* note 88, at 966 (arguing that “the formalist ‘facilitative’ model of mediation” should not be elevated “above the practical needs of disputants and the fairness concerns that must animate decision making in any government-sponsored proceeding”); see also Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2031-36 (1999) (urging redefinition of the mediator’s role to insure that fair and just agreements are produced by court-connected mediation involving poor, unrepresented litigants).

134. See James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 *CLINICAL L. REV.* 457, 487 (1996).

135. See Stempel, *supra* note 88, at 982-83 (“[B]oth economic and sociological analysis tends to suggest that more value is added to the process when the mediator provides some yardstick for assessing the options and some information about the range of default options if the matter is adjudicated rather than settled.”); see also Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L. J.* 950, 968-70 (1979) (noting that in negotiating and settling divorce matters, disputants are aware of the range of likely outcomes at trial if settlement is not achieved); Riskin, *Understanding Mediators’ Orientations*, *supra* note 66, at 44. *But see* Lande, *supra* note 62, at 153 (noting that research shows that claims adjusters and personal injury lawyers “rely on folk conceptions” to determine liability and damage estimates).

and, at its best, evaluation could enhance party self-determination.¹³⁶ Some commentators even asserted that evaluation was necessary and even inevitable, regardless of the mediator's orientation.¹³⁷

Many judges, attorneys and mediators viewed (and continue to view) this debate as a purely academic dialogue largely irrelevant to

136. See Moberly, *supra* note 132, at 675 (arguing that "mediator evaluation can assist the parties in their self-determination efforts"); see also Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-Making*, 74 NOTRE DAME L. REV. 775, 777 (1999) (arguing that self-determination is undermined by the absence of informed consent); Donald Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 511 (1997) ("Rather than interfering with the self-determination of parties to resolve their own dispute, activist interventions by the mediator may enhance the parties' empowerment by educating them and by aiding their realistic understanding of the alternatives to agreement."). Roselle Wissler's research examining the perceptions of parties in domestic relations and general civil mediation in Ohio lends support to this argument. Her research shows no statistically significant relationship to exist between parties' perceptions that the mediator engaged in evaluation of the merits of the case and their perceptions of whether they had enough chance to tell their views or whether they were pressured by the mediator to accept a settlement. A significant relationship was found between parties' perceptions that mediators engaged in evaluation of the merits of the case and parties' perceptions that their understanding of the other's views and/or their own case had improved, that they had more input in deciding the outcome of the mediation, and that the mediation process was more fair. When parties perceived that mediators had recommended a particular settlement, however, they reported that they felt their input was more limited and they were pressured to accept a settlement. See ROSELLE L. WISSLER, TRAPPING THE DATA: AN ASSESSMENT OF DOMESTIC RELATIONS MEDIATION IN MAINE AND OHIO COURTS (1999) (on file with author); ROSELLE L. WISSLER, AN EVALUATION OF THE COMMON PLEAS CIVIL PILOT MEDIATION PROJECT (2000) (on file with author).

137. These commentators contended that even facilitative mediators could, should, and perhaps were required to make use of certain "evaluative" techniques in order to be effective. See Stulberg, *supra* note 79, at 1002-03.

The image of the placid intervener—that is, a mediator embracing the facilitative orientation—who can be helpful to the parties reaching realistic agreements about real problems but who, in the process, never makes a suggestion or offers an idea that might be responsive to party concerns, does not aggressively prod one or more parties to reconsider its proposed position, does not actively restructure the bargaining agenda based upon party presentations, or does not challenge party proposals (perhaps in caucus) as unworkable or misleading based upon one's knowledge of the field and practices, is stunningly implausible.

Id. See also Stempel, *supra* note 88, at 961 (urging that a "broad notion of facilitation encompasses the use of evaluative techniques in appropriate circumstances"); David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 L. & Soc'y Rev. 613 (1989) (suggesting that mediators inevitably evaluate what they hear from the parties and directly or indirectly communicate such evaluation); WISSLER, *supra* note 136 (showing that parties involved in domestic relations mediation in Ohio and Maine were more likely than their mediator to report that the mediator evaluated the merits of the case, disclosed his or her opinion of the merits and recommended a particular settlement).

real practice. However, there were a few states in which state regulators found themselves forced to grapple with the debate and consider its relationship to the core principles of mediation, including the principle of party self-determination. These regulators had to decide what mediator behavior was and was not ethical, particularly when parties were ordered into mediation by the courts. The next section will focus on the processes of creating ethical guidelines for court-connected mediators in Florida and in Minnesota. These states' processes and the debate accompanying them shed light on the evolving conception of self-determination in mediation as it has adapted to the courthouse.

IV. DEFINING AND PROTECTING SELF-DETERMINATION IN COURT-CONNECTED MEDIATION

As state courts institutionalized mediation, lawyers, judges, and mediation advocates recognized that the courts needed to create ethical guidelines for mediators handling court-connected cases.¹³⁸ State supreme courts appointed drafting committees to take on this task. As some of the drafting committees set to work, they found that they specifically needed to address the questions raised by the evaluative-facilitative debate and this required consideration of mediation's underlying principle of party self-determination.

This section will focus on two of those states: Florida and Minnesota. There are four reasons for focusing on these two states. First, both states' ethical guidelines apply to all court-connected mediators throughout the state.¹³⁹ Second, both states are recognized as leaders in the institutionalization of court-connected mediation.¹⁴⁰ Third,

138. This was particularly true for the courts that were ordering parties into mediation. As the degree of party autonomy decreased, the need for court oversight increased. See SPIDR COMMISSION ON QUALIFICATIONS, *QUALIFYING NEUTRALS: THE BASIC PRINCIPLES*, SPIDR COMMISSION ON QUALIFICATIONS REPORT 14 §§ 2-1, 6-1, 6-3, 6-5, 6-6 (1989).

139. Although the Virginia Bar Association's ethical provisions for attorneys serving as mediators are particularly thoughtful, they are not considered in this article because they have not been adopted by Virginia's courts to apply to all court-connected mediators. For brief descriptions of statutes and rules in Virginia, Florida, Texas, and Minnesota, see Kovach & Love, *Mapping Mediation*, *supra* note 53, at 84-88.

140. This may be particularly true of Florida, which has effectively disseminated information regarding its programs and carefully engaged in a national dialogue regarding its institutionalization of court-connected mediation. In distributing the first draft of the 1998 revisions to the Florida Rules for Certified and Court-Connected Mediators, Sharon Press, Director of the Florida Dispute Resolution Center, observed: "I do not believe it is an overstatement to say that we have reached a critical juncture in the field and that the revisions to these rules will greatly affect the practice of

both states have now decided to permit mediators to use evaluative techniques but have also incorporated mechanisms designed to “tame” such evaluation and keep it from violating party self-determination. Fourth, in drafting (or in Florida’s case, revising) their guidelines regarding the appropriateness of mediator evaluation, both states solicited written input from mediators, judges, attorneys, and others interested in the development of ADR.¹⁴¹ These comments—which this section will examine in some detail—vividly illustrate the different visions of self-determination held by people who shared a commitment to this principle. The comments also highlight what was included in and excluded from the vision of self-determination that now infuses the ethical guidelines in Florida and Minnesota. Last, the comments reveal very different points of view regarding effective safeguards for party self-determination.

A. *The Development of Florida’s Ethical Guidelines*

In order to understand the context for the comments that Florida received regarding its proposed revisions to its ethical guidelines for court-connected mediation, it is helpful to begin with a bit of background. Florida courts have had the authority to refer all or any part of a filed civil action to mediation since January 1, 1988.¹⁴² In 1990, the Florida legislature adopted a definition of mediation that suggested a preference for a facilitative, non-confrontational approach in mediation, but the statute also established facilitation of “resolution”—not communication or negotiation between the parties—as the key objective of the mediator.¹⁴³ The statute’s internally conflicting

mediation in the future—in Florida and nationally.” Sharon Press, *Message From the Director*, RESOL. REP. 1998, at 31 (Fla. Disp. Resol. Ctr., Vol. 13, Jan. 1998).

141. Florida held public hearings, public drafting sessions, and even solicited and received input from nationally-recognized scholars, mediators, judges, and lawyers outside the state, making the pool of comments particularly diverse, knowledgeable, and rich. See Florida Standing Committee on Mediation and Arbitration Rules’ Response to Comment on Amendment to the Florida Rules for Certified and Court-Appointed Mediators at 2, *In re Florida Rules for Certified and Court-Appointed Mediators*, 762 So. 2d 441 (Fla. 2000) (per curiam).

142. See FLA. STAT. ch. 44.302 (1989).

143. The Florida statute authorizing referral of civil actions to mediation was amended, effective October 1, 1990, by Laws 1990, c. 90-188, §1 to define mediation as:

a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying

language thus set the stage for a thinning understanding of self-determination.

Florida's first set of ethical guidelines for its court-connected mediators, the Florida Rules for Certified and Court Appointed Mediators ("the 1992 Rules"), became effective in May, 1992.¹⁴⁴ The 1992 Rules established standards of professional conduct for mediators and created two institutions, the Mediator Qualifications Advisory Panel and the Mediator Qualifications Board, to interpret and enforce the standards.¹⁴⁵ Although the facilitative-evaluative debate had not yet surfaced at the time that the 1992 rules were drafted, the rules touched upon evaluation by mediators. Subsection (a) of Rule 10.090 permitted a mediator to provide only "information" and only to the extent that it was information that he or she was "qualified by training or experience to provide."¹⁴⁶ Subsection (d) of the same rule permitted mediators to "point out possible outcomes of the case" being mediated. However, this subsection banned particularly potent evaluation by providing that "under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute."¹⁴⁷

issues, fostering joint problem-solving, and exploring settlement alternatives.

FLA. STAT. ch. 44.1011(2) (1997). Previously, the statute defined mediation as "a process whereby a neutral third party acts to encourage and facilitate the resolution of dispute without prescribing what it should be. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement." FLA. STAT. ch. 44.301(1) (1989).

144. See FLA. R. FOR CERTIFIED AND COURT APPOINTED MEDIATORS (1992), *available in* SHARON PRESS & KIMBERLY KOSCH, 1998 FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM, 11th Ed. 178-93 (Fla. Disp. Resol. Ctr.) [hereinafter 1992 FLA. RULES].

145. The 1992 Rules created a comprehensive set of institutions and procedures for enforcement of the rules. The Mediator Qualifications Advisory Panel was created to issue advisory opinions in response to the ethical questions raised by practicing mediators. See 1992 FLA. RULES, *supra* note 144, R. 10.300. The Florida Mediator Qualifications Board was created to adjudicate and dispose of actual grievances which were filed against mediators. See *id.* R. 10.190. In addition to establishing standards of professional conduct for mediators, the 1992 Rules incorporated previously-adopted qualification criteria for mediators. *Id.* R. 10.010 (establishing qualification criteria for mediators handling county court matters, family, circuit court, and dependency matters); see also Alison Gerencser, *Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 852-55 (1998) (describing the varying types of cases, training requirements, and mediation styles used for county, family, and circuit court mediation in Florida).

146. *Id.* R. 10.090(a).

147. *Id.* R. 10.090(d). Robert Moberly, who participated in the deliberations that resulted in this provision, has stated that "[t]his rule was adopted to 'prohibit tactics that imply some special knowledge of how a particular judge will rule.' Even that limited rule was controversial." Moberly, *supra* note 132, at 674 (citing Robert B.

The 1992 Rules also repeatedly asserted the importance of party self-determination and mediation process characteristics designed to achieve such self-determination. For example, Rule 10.020(d), entitled "General Principles," provided that mediation was "based on principles of communication, negotiation, facilitation, and problem-solving that emphasize the needs and interests of the participants; and self determination."¹⁴⁸ Most significant, however, was Rule 10.060, devoted entirely to self-determination. It provided:

- (a) Parties' Right to Decide. A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties themselves.
- (b) Prohibition of Mediator Coercion. A mediator shall not coerce or unfairly influence a party into a settlement agreement and shall not make substantive decisions for any party to a mediation process.

[Item (c) omitted]

- (d) A Balanced Process. A mediator shall promote a balanced process and shall encourage the parties to conduct the mediation deliberations in a non-adversarial manner.

[Item (e) omitted]

- (f) Mutual Respect. A mediator shall promote mutual respect among the parties throughout the mediation process.¹⁴⁹

This language indicated a particular understanding of what self-determination in mediation *meant*. Most clearly, it meant that the parties were to make the substantive decisions regarding whether to settle or not, and their decisions were to be voluntary. The language of these rules (i.e., balanced, non-adversarial, promoting mutual respect) also suggested that the mediation process was supposed to *feel*

Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mediation Experiment*, 21 FLA. St. U. L. Rev. 701, 715 (1994); see also Letter from Jim Alfini, Professor of Law, Northern Illinois University, to Sharon Press, Director, Florida Dispute Resolution Center (Feb. 20, 1998) (on file with author) ("The mischief we were seeking to prevent in the original rule was to reduce the risk of allowing the mediator to have undue influence, particularly where the parties are Unrepresented . . . Isn't this [predicting case outcomes] the kind of advice or opinion that is potentially most damaging to party self-determination?").

148. *Id.* R. 10.020(d).

149. 1992 FLA. RULES, *supra* note 144, R. 10.060. The Committee Notes to Rule 10.060 provided that:

While a mediator has no duty to specifically advise a party as to the legal ramifications or consequences of a proposed agreement, there is a duty for the mediator to advise the parties of the importance of understanding such matters and giving them the opportunity to seek such advice if they desire.

Id. R. 10.060 Committee Notes.

different than—or be alternative to—traditional court processes. Importantly, however, it was not at all clear that the vision of self-determination contained in these rules required: 1) the parties' active and direct participation in the communication and negotiation occurring within the mediation process; 2) the parties' direct participation in the definition of the substantive norms which would guide their decision-making; or 3) the parties' direct participation in the creation of settlement options. Thus, from the beginning, Florida's rules both reflected and invited the narrower vision of self-determination described *supra*.

Following the passage of the 1992 Rules, as Florida's Mediator Qualifications Advisory Panel "gained pragmatic experience in the application of ethical concepts to actual practice"¹⁵⁰ and the Florida Mediator Qualifications Board "gathered specific data from [its investigation and disposition of] actual grievances,"¹⁵¹ evidence began to accumulate that some disputants perceived mediators as reducing their participation in the mediation process, hindering their power to define the substantive norms which would guide their decision-making, and ultimately depriving them of their ability to create and control the resolution of their disputes.¹⁵² Complaining parties often pointed to mediators' aggressive and exclusively legal evaluation of their cases and potential settlement options as the source of their discontent.¹⁵³

150. *Proposed Rule Changes, Florida Rules for Certified and Court-Appointed Mediators*, in RESOL. REP. 1998, at 18 (Fla. Disp. Resol. Ctr., Vol. 13, Jan. 1998) [hereinafter *1998 Proposed Rule Changes*], R. 10.020 Committee Note.

151. *Id.*

152. One commentator has observed that the advisory opinions from Florida's Mediator Qualifications Advisory Panel in 1995 "reveal[ed] a highly restrictive Panel view of mediation—one that appears to forbid even isolated, minor, and useful evaluative action by mediators." Stempel, *supra* note 88, at 963. The Mediator Qualification Board's handling of actual grievances suggests that its view of mediator evaluation was not as restrictive. See *supra* note 26 and *infra* note 153.

153. See, e.g., *Florida MQB* 11 (1994) (summary on file with author) (alleging that mediator had used threats, coercion and prediction regarding judge's decision to induce complainants to cooperate and to forward the agreement); *Florida MQB* 1 (1993) (summary on file with author) (dismissing for lack of jurisdiction allegation that complainant was induced to sign mediation agreement by his health-related need to end prolonged mediation session); *Florida MQB* 97-003 (1997) (summary on file with author) (referring to hearing panel and then dismissing complaint alleging threats, coercion and verbal assaults by mediator); *Florida MQB* 98-010 (1998) (summary on file with author) (dismissing grievance alleging that mediator advised plaintiffs regarding the value of their case and unfairly influenced them into signing settlement agreement).

In 1997, the Florida Supreme Court Committee on Mediation and Arbitration Rules “undertook a year long study program to determine if Florida’s ethical rules for mediators would benefit from review and revision.”¹⁵⁴ Perhaps partly as a result of the national facilitative-evaluative debate as well as the experience of Florida’s Mediator Qualifications Board and Mediator Qualifications Advisory Panel, the rules regarding evaluation by mediators, the definition of self-determination and mechanisms to safeguard self-evaluation emerged as prime candidates for such review and revision. In January, 1998, the Committee solicited comments on proposals for revisions to these rules.

The revisions to Rule 10.037, “Professional Advice,” dealt most directly with the issue of whether or not to permit mediators to provide evaluations.¹⁵⁵ Significantly, the Committee developed two options for this rule upon which it sought comments, signaling its inability to reach consensus on this revision. Although neither option strictly forbade evaluation by mediators, the options began with very different presumptions. Option One began with the presumption that *evaluation was prohibited*,¹⁵⁶ but went on to carve out exceptions, allowing the mediator to “provide information about the process, draft proposals, point out possible outcomes of a case, and help parties explore options.”¹⁵⁷ Option Two began with the presumption

154. FLA. R. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS (2000), available in *In re* Amendments to the Florida Rules for Certified and Court-Appointed Mediators, 762 So. 2d 441, 449 (Fla. 2000) (per curiam) [hereinafter 2000 FLA. RULES], R. 10.200 Committee Note. The Supreme Court of Florida gave final approval to the rules on February 3, 2000. By order of the court, the amendments to the rules became effective on April 1, 2000. See *In re* Amendments to the Florida Rules for Certified and Court-Appointed Mediators, 762 So. 2d 441, 449 (Fla. 2000) (per curiam).

155. The Appendix contains a comparison of the provisions regarding professional advice contained in the 1992 Florida Rules, 1998 Proposed Revisions, and 2000 Florida Rules.

156. Specifically Option One provided: “A mediator shall not provide professional advice or opinions.” 1998 Proposed Rule Changes, *supra* note 150, R. 137(a) Option One.

157. 1998 Proposed Rule Changes, *supra* note 150, R. 137(a) Option One. This Option also allowed the mediator to advise the parties of their rights to seek independent counsel if the mediator determined that either party did not understand the legal effects of an agreement. See *id.* R. 10.037(b) Option One.

that *evaluation was permissible*,¹⁵⁸ but used the principles of impartiality and self-determination to place limits upon evaluation.¹⁵⁹ Both of these options were designed to improve upon the 1992 Rules by making it clear whether mediators were permitted to evaluate or not and, further, by making it clear which particular evaluative activities were permitted and which were not.

While the concept of self-determination had been prominently featured in the 1992 Rules, the Committee's proposed revisions did even more to thread this concept throughout the rules.¹⁶⁰ In revised Rule 10.031, the Committee tackled the question of what self-determination *meant*. Subsection (a) of the rule defined this concept as "[d]ecision-making" and provided that "[d]ecisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties to reach informed and voluntary decisions while protecting their right to make decisions for themselves."¹⁶¹ The Committee Note for Rule 10.031 added that the parties' right to self-determination should be "preserved during all phases of mediation" and self-determination meant "a free and informed choice to agree or not to agree."¹⁶²

158. Specifically, Option Two began by providing: "A mediator shall not provide professional advice or opinions." *1998 Proposed Rule Changes, supra* note 150, R. 137(a) Option Two.

159. The following language established these limits: "However, in providing professional advice or information, a mediator shall not violate impartiality or self-determination of the parties." *Id.* R. 10.037(a) Option Two. The Committee Note accompanying Proposed Rule 10.037 Option Two further clarified the scope and limitations on evaluation by mediators, specifically prohibiting any action by mediators that would "have the effect of overriding the parties' rights of self-determination." *Id.* R. 10.037(a) Option Two Committee Note.

160. *See, e.g., 1998 Proposed Rule Changes, supra* note 150, R. 10.021 (defining mediation as "a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable solution"); *id.* R. 10.022 ("[I]n mediation, decision-making authority rests solely with the parties."); *id.* R. 10.023 (listing "self-determination" as the first among six concepts to be emphasized in mediation); *id.* R. 10.030 (providing that "a mediator's responsibility to the parties . . . includes honoring their right of self-determination . . . and avoiding coercion, improper influence, or conflicts of interest").

161. *1998 Proposed Rule Changes, supra* note 150, R. 10.031(a).

162. *Id.* R. 10.031 Committee Note. In requiring that the party's choice be "free" and "informed," the drafters apparently tried to make informed consent *part* of self-determination. For an articulation of the role of informed consent in mediation, see Nolan-Haley, *supra* note 136.

Ultimately, these proposed revisions regarding the definition of self-determination did not represent a change from the understanding of self-determination incorporated in the 1992 Rules. If anything, the proposed revisions made it even clearer that the drafters' conception of self-determination was the narrower one described *supra*. Their vision was quite consistent with the traditional operation of the courts and lawyers. Party self-determination began and ended with the parties' control over the decision "to agree or not to agree"¹⁶³ to enter into a particular settlement. It was *this* "basic right"¹⁶⁴—the *same* basic right that clients have as their lawyers attempt to negotiate a settlement on their behalf¹⁶⁵—that mediators were not to "compromise"¹⁶⁶ and indeed were expected to "honor"¹⁶⁷ and "protect."¹⁶⁸

In its proposed revisions, the Committee also addressed the mechanisms for safeguarding self-determination from over-aggressive evaluation. As noted *supra*, Options One and Two for Rule 10.037 approached this goal very differently. Option One protected self-determination by beginning with a presumption against the provision of professional advice or opinions and then creating exceptions for evaluative activities which were more likely to be viewed as "neutral" or merely "input." Option Two presumed that the provision of professional advice or opinions was permissible and then named protection of self-determination as an important limit upon evaluative activities. Proposed Rule 10.031, "Self-Determination," also addressed the need to safeguard self-determination by prohibiting those behaviors that were deemed most likely to undermine self-determination. Specifically, the proposed revision prohibited mediator coercion,

163. 1998 Proposed Rule Changes, *supra* note 150, R. 10.031 Committee Note.

164. *Id.*

165. See ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY, Rule 1.2(a) (1995) (stating that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."); see also CHARLES WOLFRAM, MODERN LEGAL ETHICS §4.6.2 at 171-72 (1986) ("All recognize that settlement authority rests in the client and not the lawyer. Courts have also held that it is part of the common-law duty of a lawyer to communicate settlement offers to a client so that the client may exercise the power to decide whether or not to accept").

166. 1998 Proposed Rule Changes, *supra* note 150, R. 10.031 Committee Note.

167. *Id.* R. 10.030.

168. *Id.* R. 10.031(a). One of the most striking and least-noticed proposed revisions appeared in Rule 10.020 regarding the scope and purpose of the rules. There, the Committee tried to elevate the value of ethical conduct above settlement. Perhaps the Committee was trying to counteract settlement as the most potent and influential measurement of success in mediation. Specifically, the Committee's revision provided that "[w]hether the parties involved in a mediation choose to resolve their dispute is secondary in importance to whether the mediator conducts the mediation in accordance with these ethical standards." *Id.* R. 10.020.

improper influence by the mediator,¹⁶⁹ and mediator “attempt[s] to interfere with a party’s self-determination by offering professional or personal opinions regarding the outcome of the case.”¹⁷⁰ Proposed Rule 10.030 mirrored this language, providing: “A mediator’s responsibility to the parties includes honoring their right of self-determination; acting with impartiality; and avoiding coercion, improper influence, or conflicts of interest.”¹⁷¹ The proposed Committee Note to Rule 10.031 provided some elaboration, pointing out:

A mediator must not substitute the judgment of the mediator for the judgment of the parties, coerce or compel an unwilling participant to make a decision, knowingly allow a participant to make a decision based on misrepresented facts or circumstances, or in any other way impair or interfere with the parties’ right of self-determination.¹⁷²

Whether these proposed revisions actually changed the 1992 Rules’ mechanisms for protecting parties’ self-determination from overly aggressive evaluation by mediators ultimately depended upon whether the Committee chose to recommend Option One or Option Two.

As noted *supra*, the Committee solicited comments in Florida and throughout the nation on its proposed revisions in January, 1998. The Committee received many thoughtful and passionate comments in response. For the most part, the comments focused on Rule 10.037, “Professional Advice,” where the Committee had requested input on Options One and Two. Most commentators directed their comments to Option Two, which began with the presumption that mediator evaluation was appropriate but made it clear that such evaluation could not violate the principles of self-determination and

169. Proposed Rule 10.031(b) provided: “A mediator shall not coerce or improperly influence a party to make a decision or continue participating in mediation if the party is unwilling to do so.” *1998 Proposed Rule Changes, supra* note 150, R. 10.031(b). The Committee intended this language as an expansion of the 1992 prohibition against party coercion because it included “participation in the mediation process itself, as well as any decision made during the process.” Petition for Amendment to the Florida Rules for Certified and Court-Appointed Mediators at 8, *In re Florida Rules for Certified and Court-Appointed Mediators*, 762 So. 2d 441 (Fla. 2000) (*per curiam*).

170. *1998 Proposed Rule Changes, supra* note 150, R. 10.031(c).

171. *Id.* R. 10.030.

172. *Id.* R. 10.031 Committee Note. The Committee Note accompanying Option Two for Rule 10.037 used similar language, cautioning: “Mediators shall not adjudicate, substitute their advice or opinions for the true will of the parties or in any way coerce or compel the parties to unwillingly resolve their dispute or accept any particular resolution option.” *Id.* R. 10.037 Option Two Committee Note.

impartiality. Several themes regarding self-determination and effective mechanisms for safeguarding self-determination emerge from a review of these comments.¹⁷³

First, regardless of whether the commentators supported or opposed Option Two, they overwhelmingly espoused (or at least assumed) the importance of something called "self-determination" as the core principle underlying mediation.¹⁷⁴ One commentator, who supported Option Two, referred to self-determination as "the heart and soul of mediation as a dispute resolution procedure . . ." ¹⁷⁵ This commentator, like the others supporting Option Two, saw no conflict *per se* between mediator evaluation and self-determination.¹⁷⁶ Those opposing Option Two, however, largely grounded their opposition in their commitment to self-determination.¹⁷⁷

This leads to the second theme to emerge from the comments. The apparent consensus on the centrality of self-determination was deceptive. As mediators know well, disputants can use the same word and yet mean very different things. This appears to be the case

173. Other very interesting themes emerged as well. For example, those opposing Option Two tended to argue that: mediation simply was *not* evaluation; use of evaluative techniques was unnecessary given the success of the facilitative approach; mediator evaluation was likely to invite lawsuits against mediators by parties claiming they had relied to their detriment on negligent mediator opinions or advice; mediator evaluation would interfere with the attorney-client relationship; mediator evaluation also would impair mediator's impartiality or neutrality; and mediators would be tempted to "rig" their evaluations in order to appeal to repeat players. Those supporting Option Two claimed that: ethical guidelines should be in touch with the marketplace; the market wants evaluation; and mediators are evaluating under the guise of facilitation anyway.

174. Not every commentator embraced self-determination, however. For example, one commentator suggested that the strong emphasis on "self-determination, non-coercion, and independent legal advice" in both versions of Rule 10.037 might be less appropriate to mediation occurring outside of the family law area. Letter from John Leo Wagner, Irell & Manella LLP, to Elizabeth Palpinger, CPR Institute for Dispute Resolution (Feb. 2, 1998) (on file with author) [hereinafter Wagner letter].

175. Lawrence M. Watson, Jr., *Advice and Opinions from Mediators: A Rational Analysis*, in RESOL. REP. 1998, at 13, 14 (Fla. Disp. Resol. Ctr., Vol. 13, Jan 1998).

176. See, e.g., Arden Siegendorf, *A False Premise Leads to a False Conclusion: A Reply to 'Some Hazards of Mediators Providing Opinions and Advice'*, RESOL. REP. (Fla. Dispute Resolution Ctr., Tallahassee, Fla.), Jan. 1998, at 12, 13 (supporting Option Two and arguing that the 'evil' of evaluative mediation lies "not in the providing of information or advice [but rather] in violating the principles of self-determination and impartiality").

177. See, e.g., Letter from Janice M. Fliescher, Florida Conflict Resolution Consortium, to Lawrence M. Watson, Chairman, Florida Supreme Court Standing Committee on Mediation Rules (Jan. 15, 1998) (on file with author) (supporting Option One and stating that the focus on "empowerment and self-determination of the parties . . . must continue to preserve both the process and the independence of the parties").

with the term “self-determination.” Though those opposing and supporting Option Two agreed on the importance of preserving “self-determination,” they disagreed on the meaning of self-determination and the extent to which mediator evaluation could negatively affect their conception of self-determination. Professor John Lande, of the Department of Dispute Resolution at Nova Southeastern University, commenting on the two options for Rule 10.037, eloquently summarized the tension evidenced by the comments:

As I see it, the controversy hinges on what people mean by self-determination and how people think that mediators’ actions affect or impair it. In particular, there is the question of whether mediators’ expression of opinion is considered to impair [self-determination] *per se*. I realize that you all do not have a lot of time for philosophical discussion, but this seems to boil down to fundamental issues of things like what is “free will,” what limits it (to an unacceptable degree), and how one can know whether an action is voluntary and whether it is excessively or inappropriately influenced.¹⁷⁸

Those opposing Option Two feared that important elements of self-determination would be lost if mediators were permitted to evaluate. For example, one opponent predicted:

[T]he proposed rule revision will indirectly serve to unnecessarily reduce the active participation of the parties in mediation Empowerment involves both active involvement in the 1) process of mediation (negotiation) and 2) outcome of mediation (acceptance or rejection of a final agreement). The proposed rules, while generally preserving self-determination, seem likely to have a chilling effect [on] . . . the parties’ participation in mediation [T]he mediator will have more freedom to deviate from the existing rules while the parties will feel less freedom to freely, actively, and openly exercise their right to freely participate in mediation.¹⁷⁹

Another decried the elimination of “the ability of the parties to fully share their story”¹⁸⁰ Other opponents feared that Option Two would “pave the way for mediators . . . to emphasize the legality

178. E-mail from John Lande, Department of Dispute Resolution/SSS, Nova Southeastern University, to Sharon Press, Director, Florida Dispute Resolution Center (Feb. 12, 1998) (on file with author) [hereinafter Lande e-mail] (minor grammatical errors corrected).

179. Letter from Gregory Firestone to Sharon Press, Director, Florida Dispute Resolution Center (Sept. 29, 1998) (on file with author).

180. Letter from Gary Canner, Dade Mediation Associates, to Sharon Press, Director, Florida Dispute Resolution Center (Feb. 16, 1998) (on file with author).

and omit . . . an exploration of . . . feelings”¹⁸¹ or that the disputants would become “reliant on information provided by an ‘expert’ mediator and acquiesce to a settlement based upon what a mediator states.”¹⁸² Overall, the comments of those opposing Option Two echo the vision of self-determination that originally dominated the contemporary mediation movement. For these commentators, party self-determination in mediation required that the parties participate directly and fully in the process of resolving their dispute, define the substantive norms controlling their discussion and decision-making, and both create and control the outcome of the dispute resolution process.¹⁸³

The supporters of Option Two were just as committed to self-determination, and they agreed with Option Two’s opponents that self-determination meant that the parties must have control *over the final outcome* of the mediation session.¹⁸⁴ Beyond this, however, they had a very different vision of self-determination. Rather than viewing the parties as the primary participants in the process and the creators of

181. Letter from Sheldon Finman, Attorney at Law, to Florida Supreme Court Rules Committee (Feb. 12, 1998) (on file with author).

182. Memorandum from Deborah Deratany to Sharon Press, Director, Florida Dispute Resolution Center (Feb. 18, 1998) (on file with author).

183. See, e.g., Letter from Lela Love, Director, Kukin Program for Conflict Resolution, Benjamin N. Cardozo School of Law, to Lawrence M. Watson Jr., Chairman, Florida Supreme Court Standing Committee on Mediation Rules, and Sharon Press, Director, Florida Dispute Resolution Center (Feb. 24, 1998) (on file with author) (“[P]rohibiting certain enumerated types of mediator advice and opinion keeps the responsibility squarely upon the parties to be the evaluators of the fair, proper or likely court outcome.”); Letter from Joseph Stulberg, Director of Advanced Studies, University of Missouri School of Law, to Sharon Press, Director, Florida Dispute Resolution Center, and Lawrence M. Watson Jr., Chairman, Florida Supreme Court Standing Committee on Mediation Rules (Feb. 23, 1998) (on file with author) [hereinafter Stulberg letter] (“[A] mediator should be able to *use* his/her professional insights and knowledge to help people move towards resolution; but in order for the mediator to do that consistent with self-determination, one cannot do it by ‘providing’ professional counsel, advice, etc.”). *But see* Watson, *supra* note 175, at 15 (stating that it is disingenuous to suggest that mediators who take a direct approach are always unethical).

184. See Watson, *supra* note 175, at 14–15 (“The mediator’s primary ethical obligation to the parties, the process and the profession is to serve as an impartial facilitator who preserves, protects and respects the parties’ right to decide for themselves. [I]f the advice or opinions given go beyond mere input and become a determinative factor, the ‘line is crossed’ and an ethical problem arises.”).

their own substantive norms and settlement options, these commentators emphasized the need for “qualified, legal opinion and understanding” and “objective criteria”¹⁸⁵ to inform rational decision-making¹⁸⁶ and to correct power imbalances between the parties.¹⁸⁷ Overall, these commentators seemed to view the parties as consumers (or clients) who needed and wanted¹⁸⁸ to be educated about their pre-packaged (generally legal) options so that they could make an informed choice among them.¹⁸⁹

Thus, two very different foci in understanding how self-determination is defined emerge in the comments on the two options for Rule 10.037. The first, which is reminiscent of the vision that inspired

185. Letter from Michael V. Mattson, attorney at law, to Florida Dispute Resolution Center Rules Committee (Mar. 16, 1998) (on file with author) [hereinafter Mattson letter] (“I and all attorneys I have ever spoken with on this issue strongly believe that it is a most valuable feature that the mediator is able to express, if qualified, legal opinion and understanding. It assists in providing objection [sic] criteria for the parties to make their decisions and compromises.”).

186. See, e.g., Lande e-mail, *supra* note 178 (“[M]uch theory argues that to be truly empowered, principals must thoroughly understand their options and it is the duty of the mediator to firmly make sure that they are educated.”); Siegenderf, *supra* note 176 at 13 (quoting Stark, *supra* note 134, at 487) (“I think it is misguided to argue that a mediator with knowledge of the law should not share her knowledge with the parties in a law-based mediation—especially if the parties are pro se. . . . [W]hen 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.”).

187. See E-mail from Rev. Dr. David P. Jewel, to Sharon Press, Director, Florida Dispute Resolution Center (Feb. 14, 1998) (on file with author) (“[I]n an ‘Attorney-Plaintiff vs. Layman-Defendant’ environment it is not unusual to deal with attorney’s [sic] who purposely use their professional status to try and intimidate the defendant into a winning settlement favoring their client, totally disregarding any spirit of mutual agreement. . . . [A]llowing the Mediator to give an opinion and advice based on their experience, training, and field of expertise, in situations such as the above, will help to overcome that imbalance.”).

188. See Letter from Tom Arnold, Attorney, Arnold, White & Durkee, to Elizabeth Plapinger, CPR Institute for Dispute Resolution (Jan. 27, 1998) (on file with author) [hereinafter Arnold letter] (“The point is that the users want, often expect, often need some major mix of evaluation and advice into the [mediation] process. If the customers want it, who are the providers—or the rules makers for the providers—to play God and say you can’t have it?”).

189. Many commentators supporting Option Two also had very strong feelings about mediation *without* evaluation. See, e.g., Watson, *supra* note 175, at 15 (arguing that mediators would become mere and dreaded “‘message carriers’ who simply repeat what they have been told and offer no new input to the process”); Arnold letter, *supra* note 188 (arguing that prohibiting evaluation would “sterilize the process into impotence”); Mattson letter, *supra* note 185 (arguing that prohibiting the provision of advice would “wrongly emasculate the process”). The gender-invoking language is interesting and perhaps revealing.

many to join the contemporary mediation movement, focuses on parties' self-understanding, their control over the norms to guide decision-making, their active and direct participation in the communication needed to achieve shared understanding and negotiation, and, ultimately, their control over the final decision. The second vision also incorporates parties' control over the final decision but tends to place the parties in the role of consumers who require externally-generated information to inform rational decision-making as they choose among several pre-packaged settlement options.

The third theme to emerge from the comments involves varying degrees of faith in the proposed rules' different mechanisms for safeguarding self-determination. Option Two of Proposed Rule 10.037 named party self-determination as a key limitation upon the scope of the professional advice that could be provided to parties in mediation.¹⁹⁰ Proposed Rule 10.031 specifically prohibited mediator attempts to interfere with self-determination by offering professional or personal opinions regarding the outcome of a case.¹⁹¹ Perhaps due to their different and more passive vision of party self-determination, the commentators supporting Option Two exhibited substantial faith in the effectiveness of naming self-determination to limit the potentially negative effects of mediator evaluation:

In the minds of virtually every member of the Committee, self-determination of the parties and impartiality of the mediator are the *substance* of the mediation process. Adopting a rule which arbitrarily bans a mediation style, technique or method, or even restricts the type of contribution a mediator could make to a mediation, tends to focus on *form* rather than substance. Ethical rules should protect substance, not form.¹⁹²

Those who had the more participatory vision of self-determination, however, were skeptical. One commentator noted, "Without separating the advisory from the prohibited, the draft rules run the risk of being 'preachy' but not precise or clear enough to be enforceable."¹⁹³ Another commentator also raised concerns that it would be difficult to enforce the prohibition against giving professional or personal opinions regarding the outcome of a case if the key question

190. 1998 Proposed Rule Changes, *supra* note 150, R. 10.037 Option Two.

191. *Id.* R. 10.031.

192. Watson, *supra* note 175, at 14.

193. Charles G. Stephens, Circuit and Family Mediator, Comments on Draft Standards of Professional Conduct for Certified and Court Employed Mediators (submitted to Florida Supreme Court Committee on Mediation and Arbitration Rules) (on file with author).

was whether the mediator was attempting to interfere with the parties' self-determination: "Mediator intent is a problematic hinge on which to hang if the Committee's purpose here is to protect self-determination of the parties."¹⁹⁴ A third distilled these thoughts, writing, "The 'safeguard' language in Option Two is all fine and dandy in theory and print, but no one has really come forward to *demonstrate* how it can and should be done; how we are to establish models and train mediators to do it; and how standards can be developed to discipline mediators who don't do it right."¹⁹⁵

As a further means to safeguard party self-determination, the proposed revisions to Rule 10.031 specifically prohibited coercion or improper influence by mediators. The proposed Committee Notes accompanying Rule 10.031 and Option Two of Rule 10.037 cautioned more broadly that: "A mediator must not substitute the judgment of the mediator for the judgment of the parties"¹⁹⁶ and "[m]ediators shall not substitute their advice or opinions for the *true will* of the parties."¹⁹⁷ Fewer commentators addressed these provisions. Of those who did, regardless of whether they were proponents or opponents of Option Two, most seemed to agree that at the very least, self-determination presumed the absence of coercion and that coercion should be expressly banned.¹⁹⁸ These commentators also seemed to assume that a prohibition against "coercion" would be clearer than a prohibition against substituting the mediator's advice or opinions for the "true will" of the parties:

194. Letter from Lela Love, Director, Kukin Program for Conflict Resolution, Benjamin N. Cardozo School of Law, to Sharon Press, Director, Florida Dispute Resolution Center (Sept. 29, 1998) (on file with author) [hereinafter Love letter]. Professor Love was commenting on the next publicized draft of the revised Rule 10.037(c) which provided: "A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue." 1998 Proposed Rule Changes to Florida Rules for Certified and Court-Appointed Mediators (second draft) (August 19, 1998), R. 10.037(c) (on file with author). In her letter, Professor Love added, "I suspect no mediator would ever confess to intending to coerce, direct or decide." Love letter, *supra*.

195. Harry G. Goodheart III, *Some Hazards of Mediators Providing Opinions and Advice*, in RESOL. REP. 1998, at 11, 12 (Fla. Disp. Resol. Ctr., Vol. 13, Jan. 1998).

196. 1998 Proposed Rule Changes, *supra* note 150, R. 10.031 Committee Note.

197. *Id.* R. 10.037.

198. See Letter from John Leo Wagner, Alternative Dispute Resolution Center, Irell & Manella LLP, to Lawrence M. Watson, Jr., Chair, Florida Supreme Court Committee on Mediation and Arbitration Rules (Sept. 29, 1998) (on file with author) [hereinafter Wagner letter] ("I appreciate the express prohibition of coercion and misrepresentation in Rule 10.031. I believe these are wise policy choices that needed to be set out explicitly.")

What could [the] “true will” [of the parties] possibly mean? And how would you ever determine it? This is a metaphysical concept that has challenged plenty of people—why have it in a Committee Note? The basic concept is that you don’t want the mediator to coerce or in some other way denigrate the self-determination of the parties.¹⁹⁹

It is worth noting, however, that a few commentators raised cautionary flags regarding a lack of clarity regarding what *exactly* was prohibited. They questioned whether there was a clear difference between coercion and a party’s “detrimental reliance” on the mediator’s opinion²⁰⁰ and whether a mediator could be accused of coercion even though the parties had *asked* the mediator to “beat up” on them.²⁰¹

Another commentator asked, “What is meant by ‘improperly influence a party?’ Does ‘pressure’ capture what is meant here?”²⁰²

Finally, a few commentators recommended that Florida’s rules prescribe the mediator behaviors or interventions that would protect and even nurture parties’ self-understanding, participation, and control while also permitting mediator evaluation. These suggested behaviors included: seeking the views of the parties before offering an

199. Stulberg letter, *supra* note 183. Other dispute resolution scholars have also equated the *existence* of self-determination with the *absence* of coercion. See, e.g., Menkel-Meadow, *Ethics*, *supra* note 17 at 448-49 (listing as aspects of free choice invoked in discussions of mediation, “informed consent to both process and outcome, and ‘self-determination’ or lack of coercion and abuse in the process” (emphasis added)).

200. See, e.g., Goodheart, *supra* note 195, at 12 (“Change the prohibition against opinions and advice and you open the door for any party who develops ‘buyer’s remorse’ to claim detrimental reliance on a mediator’s allegedly defective opinion or advice. The standard will be one of perception *from the standpoint of the party*, not the intent or recollection of the mediator.”).

201. Arnold letter, *supra* note 188 (“I have heard again and again *from the* [big consumer] *users* [of mediation] expressions like: I want the mediator to beat up on me, because that is the only way I can develop any confidence that he is beating up on the other guy. ‘Beating up on’ is a form of advice and coercion I don’t indulge, but many users want it.”).

202. Charles G. Stephens, Circuit and Family Mediator, Comments on Draft Standards of Professional Conduct for Certified and Court Employed Mediators (submitted to Florida Supreme Court Committee on Mediation and Arbitration Rules) (on file with author).

opinion;²⁰³ disclosing possible effects of mediator evaluation;²⁰⁴ and requiring mediator training on evaluation.²⁰⁵

In summary, the Committee learned from these comments that there was consensus on the central importance of self-determination, but that there were strikingly different visions of party self-determination held by those supporting and opposing Option Two. Those opposing Option Two conceived self-determination as a promise to the parties that their participation, their norms, and their creativity would play the central part in the mediation process. For these commentators, permitting mediators to provide professional advice and opinions violated self-determination *per se*. In contrast, those supporting Option Two perceived mediator evaluation as potentially *furthering* party self-determination because the provision of advice and opinions would inform the parties' decision-making as they chose among the options available to them.

To the extent that mediator evaluation had the potential to threaten party self-determination, the proponents of Option Two believed that self-determination could be safeguarded effectively by expressly prohibiting coercion and making it clear that party self-determination could not be violated. The opponents of Option Two had much less faith in the effectiveness of simply "naming" self-determination as a check upon over-aggressive mediator evaluation but, for the most part, they also agreed that coercion should be prohibited.

On May 4, 1999, the Committee submitted its final draft of the proposed rules to the Florida Supreme Court for adoption.²⁰⁶ On

203. See Facsimile from Michael Lewis to Elizabeth Plapinger, CPR Institute for Dispute Resolution (on file with author) ("One way to reduce the likelihood that the mediator will substitute her judgment for that of the parties is to ensure that she seeks the views of the parties before offering her own opinion. In other words, the mediator's first obligation should be to attempt to get the parties themselves to develop workable solutions."). *But see* Stempel, *supra* note 88, at 956 ("Although there should probably be a presumptive preference for requiring mediators to first exhaust facilitative approaches before turning evaluative, mediators should have some discretion to make evaluative moves if necessary, and that choice should be given wide deference by the courts.").

204. See Lande e-mail, *supra* note 178 ("[A] possibly better option would be to mandate certain types of disclosure and discussion. . . . While this would certainly not be a complete solution to the problem, I suspect that it would be more effective than trying to regulate mediators' styles by official rules.").

205. See Arnold letter, *supra* note 188 ("[M]ediators should be trained on when and how to use evaluation and advice, not instructed to deny this often valuable service.").

206. See Petition for Amendment to the Florida Rules for Certified and Court-Appointed Mediators, *In re* Florida Rules for Certified and Court-Appointed Mediators, 762 So. 2d 441 (Fla. 2000) (per curiam).

February 3, 2000, after providing an opportunity for additional comments,²⁰⁷ the Florida Supreme Court adopted the new rules with only minor changes.²⁰⁸ Although the Committee made many revisions between the first and final drafts of the 2000 Rules, most of these revisions were stylistic rather than substantive.²⁰⁹ Self-determination continued to be an important theme threaded throughout the rules.²¹⁰

Obviously, however, the Committee had been required to make a choice regarding Rule 10.037. Despite all of the questions and concerns raised by the opponents of Option Two, the Committee was persuaded by the arguments of those who supported that option. In the second and final draft revisions of the 1992 Rules, the Committee opted to permit mediators to offer their personal or professional "opinions" (not "advice"²¹¹) and to engage in evaluation ranging from the provision of "information" to pointing out possible outcomes of the case and discussing the merits of a claim or defense.²¹²

207. The Supreme Court received comments from only Gregory Firestone, Ph.D. and the Committee itself. *See In re Amendments to the Florida Rules for Certified and Court-Appointed Mediators*, 762 So. 2d 441 (Fla. 2000) (per curiam).

208. *See id.*

209. The most significant stylistic change was an alteration in the numbering of the rules in the final version. For example, Proposed Rule 10.020 became Rule 10.200; Proposed Rule 10.021 became Rule 10.210, etc. *See* 2000 FLA. RULES, *supra* note 154.

210. In addition, Proposed Rule 10.020, which became Rule 10.200, continued to identify ethical mediator conduct as more important than settlement. *See id.* R. 10.200.

211. Some commentators had expressed concerns about the reference to "advice." *See, e.g.,* Wagner letter, *supra* note 174 ("I don't like either [option . . . to the extent that they both refer to the rendering of 'professional advice' Giving 'professional advice' comes dangerously close to crossing the line to where the mediator could be said to be acting in a representational capacity.>").

212. In its entirety, the final draft revision of Rule 10.370 "Professional Advice and Opinions" (previously numbered Rule 10.037) and its Committee Note read:

(a) PROVIDING INFORMATION. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.

(b) INDEPENDENT LEGAL ADVICE. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent counsel.

(c) PERSONAL OR PROFESSIONAL OPINION. A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination, however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

Committee Notes

Clearly, however, the Committee had heard the concerns raised by those who opposed Option Two. In its second and final draft revision of Rule 10.370 (previously numbered Rule 10.037), the Committee made it absolutely clear that self-determination was paramount and its preservation placed limits upon the personal or professional opinions offered by mediators. Specifically, the rule provided: “*Consistent with the standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide . . . [and] may point out possible outcomes of the case and discuss the merits of a claim or defense.*”²¹³

In Rule 10.370, the Committee also identified two specific situations in which offering a personal or professional opinion would violate *per se* self-determination. First, the mediator was prohibited from offering a “personal or professional opinion *intended* to coerce the parties, decide the dispute, or direct a resolution of any issue.”²¹⁴ Second, the mediator was prohibited from offering “a personal or professional opinion as to how the court in which the case has been filed

[Note referring to the Florida Bar Committee on Professional Ethics omitted.]

1998 Revision: The primary role of the mediator is to facilitate a process which will provide the parties an opportunity to resolve all or part of a dispute by agreement if they choose to do so. A mediator may assist in that endeavor by providing relevant information or helping the parties obtain such information from other sources. A mediator may also raise issues and discuss strengths and weaknesses of positions underlying the dispute. Finally, a mediator may help the parties evaluate resolution options and draft settlement proposals. In providing these services however, it is imperative that the mediator maintain impartiality and avoid any activity which would have the effect of overriding the parties' rights of self-determination. While mediators may call upon their own qualifications and experience to supply information and options, the parties must be given the opportunity to freely decide upon any agreement. Mediators shall not utilize their opinions to decide any aspect of the dispute or coerce the parties or their representatives to accept any resolution option.

While a mediator has no duty to specifically advise a party as to the legal ramifications or consequences of a proposed agreement, there is a duty for the mediator to advise the parties of the importance of understanding such matters and giving them an opportunity to seek such advice if they desire.

2000 FLA. RULES, *supra* note 154 R. 10.370.

213. *Id.* R. 10.370(c) (emphasis added).

214. *Id.* (emphasis added).

will resolve the dispute.”²¹⁵ The revisions to Rule 10.031, “Self-Determination,” also evidenced the Committee’s awareness of the concerns expressed by opponents of Option Two. There, the Committee added to the Committee Note that “[s]pecial care should be taken to preserve the parties’ right to self determination if the mediator provides input to the mediation process.”²¹⁶

Ultimately, the Committee’s recommendations (and Florida’s new rules) reflect: 1) the Committee’s comfort with and decision to recommend institutionalization of the thinner vision of self-determination which focuses exclusively on preserving the parties’ control over the outcome of the mediation session, 2) the Committee’s rejection of a more expansive vision of self-determination anchored in party empowerment, 3) the Committee’s conclusion that mediator evaluation and the thinner vision of party self-determination can co-exist, and 4) the Committee’s faith in the effectiveness of protecting self-determination by repeatedly asserting this concept’s importance *and* prohibiting mediator coercion.

B. *The Development of Minnesota’s Ethical Guidelines*

After years of work and experimentation by mediation advocates, district courts, and committees and task forces established by the Minnesota State Bar Association and the Minnesota Supreme Court,²¹⁷ the Minnesota Legislature passed Minn. Stat. Section 484.76(1) in 1991. This legislation established a statewide ADR program for most civil cases filed with Minnesota’s courts, gave Minnesota’s judges the authority to order parties into mediation and other non-binding ADR processes, and required the Minnesota Supreme Court to adopt rules governing practice, procedures, and jurisdiction for ADR programs adopted under the statute. In 1993, based upon the recommendations of the ADR Implementation Committee, the Minnesota Supreme Court promulgated Rule 114 of the Minnesota

215. *Id.* This provision apparently was resurrected from the 1992 Rules, perhaps due to the peculiar potency of a prediction as to how a particular judge will decide an issue or case.

216. 2000 FLA. RULES, *supra* note 154, R. 10.310 (formerly numbered 10.031) Committee Note.

217. See generally McAdoo & Welsh, *Does ADR Really Have a Place on the Lawyer’s Philosophical Map?*, *supra* note 91, at 376; Barbara McAdoo & Nancy Welsh, *The Times They Are A’Changin’—Or Are They? An Update on Rule 114*, HENNEPIN LAWYER, Jul.-Aug. 1996, at 8-9; Nancy Welsh & Barbara McAdoo, *Alternative Dispute Resolution (ADR) in Minnesota—An Update on Rule 114 in COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS 203* (Edward J. Bergman & John G. Bickerman eds., 1998); Welsh & McAdoo, *The ABCs of ADR*, *supra* note 85, at 11.

General Rules of Practice for District Courts, which included definitions of the ADR processes covered by the rule²¹⁸ and established “mandatory consideration” of ADR in most civil cases, a roster of qualified neutrals (including mediators), and an ADR Review Board.²¹⁹

It is noteworthy that Minnesota’s definition of mediation in Rule 114 focused upon the facilitation of “communication between the parties” with the ultimate goal of promoting settlement. Thus, Minnesota’s definition was relatively consistent with the vision arising out of the contemporary mediation movement and arguably should have signaled the courts’ adoption of a participatory understanding of self-determination. However, it is just as noteworthy that this definition was not the subject of any substantial debate among members of the ADR Implementation Committee.²²⁰ Instead, it is quite likely that this language was borrowed from a definition that had been developed and promoted by an ADR non-profit organization, The Mediation Center. Thus, it is unclear whether all of the members of the ADR Implementation Committee agreed that “communication between parties” was of paramount importance and equally unclear whether the definition of mediation contemplated communication between the disputants themselves rather than between their attorneys.

In 1996, at the direction of the Minnesota Supreme Court, the ADR Review Board began more than a year’s worth of work developing a code of ethics for mediators and other ADR neutrals providing services pursuant to Rule 114. The Board reviewed many other states’ codes of ethics, as well as the Model Standards of Conduct developed jointly by the Society of Professionals in Dispute Resolution, the American Bar Association, and the American Arbitration Association.²²¹ By June, 1996, the Board had developed a draft to be circulated among Minnesota’s attorneys, judges, and ADR neutrals for their feedback. Like the drafters of Florida’s ethical guidelines, the

218. Rule 114.02 includes the following definition of mediation:

“A forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties.” MINN. GEN. R. OF PRACTICE FOR DIST. CT., R. 114.02(a)(7) (1999).

219. *See id.* R. 114.01, R. 114.05.

220. As a member of the Minnesota ADR Implementation Committee, the Author participated in these discussions.

221. As a member of the Minnesota ADR Review Board, the Author participated in this review.

members of the Minnesota Review Board believed that self-determination was the key principle underlying mediation. They also believed that this principle was unique to mediation. Therefore, one section of the proposed code was devoted exclusively to mediation and provided:

SELF-DETERMINATION. A mediator shall recognize that mediation is based on the principle of self-determination by the parties. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. The primary responsibility for the resolution of a dispute and the shaping of a settlement agreement rests with the parties. Any party may withdraw from mediation at any time.²²²

In the comments to this provision, the ADR Review Board addressed the national facilitative-evaluative debate. Specifically, Comment 1 provided:

The mediator may provide information about the process, raise issues, draft proposals, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties should be given the opportunity to consider all proposed options. *It is acceptable for the mediator to suggest options or to offer opinions about the case, in response to parties' requests for such options and opinions.*²²³

Thus, the ADR Review Board proposed, much like the drafters of Florida's ethical guidelines, that Minnesota's mediators be permitted to evaluate but that such evaluation not be permitted to violate the parties' self-determination. Like the drafters in Florida, the Minnesota ADR Review Board seemed to adopt the narrow vision of self-determination by defining it as "the ability of the parties to reach a voluntary, uncoerced agreement" with "primary responsibility for resolution of a dispute . . . rest[ing] with the parties."²²⁴ Importantly, however, Minnesota's drafters took one step beyond Florida's drafters

222. Minnesota Alternative Dispute Resolution Review Board, Rule 114 Code of Ethics, 5 (proposed June 5, 1996) (on file with author).

223. *Id.*

224. Interestingly, Minnesota's definition also may have incorporated some elements of the more expansive vision of self-determination which had been rejected in Florida. Specifically, Minnesota's proposed definition of self-determination provided that "[t]he primary responsibility for the *shaping* of a settlement agreement rests with the parties." MINN. GEN. R. OF PRACTICE FOR DIST. CT., R. 114 app. (1999) (emphasis added). This language could suggest that the ADR Review Board perceived self-determination as involving parties' direct and active participation in the mediation process, as well as party control over the substantive norms which will guide their decision-making. Unfortunately, there was no debate regarding this language which could help to clarify its intended meaning or effect. Further, even if this language hints at party empowerment, the actual implementation of Rule 114 strongly

and encouraged particular conduct to protect and nurture self-determination. Specifically, the proposed comment made it clear that a mediator should withhold his/her suggestions or opinions until after the parties had requested this evaluative service.

Surprisingly, this provision of the proposed Code of Ethics did not draw as much attention as other proposed rules. Less surprisingly, there were those who supported this provision in its entirety, those who opposed permitting mediators to provide evaluations, and those who opposed placing any limitations on the mediator's ability to evaluate.²²⁵

Those who opposed evaluation raised concerns about its effect on parties' self-determination: "The last sentence of Comment #1, specifically 'to offer opinions about the case' appears to contradict the definition of mediation in Rule 114.02(4), which prohibits the mediator from imposing [the mediator's] own judgment on the issues brought forth by the parties."²²⁶ Indeed, some commentators proposed specific revisions to the proposed rule in order to make it clear that mediators should strive for agreements reflecting the underlying interests of all the parties and should restrain themselves from offering opinions or engaging in any judgmental conduct or communication.²²⁷

suggests that aspects of evaluative mediation are being institutionalized in Minnesota's courts. See McADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 104.

225. Some even opposed the provision allowing the parties to withdraw from mediation at any time. Two commentators wrote: "If they [the parties] are given that opportunity, many mediations would never start (or proceed very far)." Letter from Brian Short, 1014 Property Company, and Thomas Fraser, Fredrikson & Byron, P.A., to ADR Review Board (Aug. 15, 1996) (on file with author).

226. Letter from D.M. Boulay et al., on behalf of the Minnesota Association of Mediators, to Alanna Moravetz, ADR Review Board (Aug. 15, 1996) (on file with author). Some also commented that permitting mediators to provide opinions endangered their impartiality. See Letter from John Lundblad, President, Midwest Mediation, Inc., to Alanna Moravetz, ADR Review Board (Aug. 15, 1996) (on file with author).

227. See, e.g., Memorandum and Comments from the Conflict Management and Dispute Resolution Section of the Minnesota State Bar Association to Alanna Moravetz and Lynae Olson (August 15, 1996), Proposed Revised Rule 114 Code of Ethics, app. A. (on file with author) [hereinafter Memorandum and Comments]. The Section proposed the following revisions to the rule and the first comment (new language is italicized):

SELF-DETERMINATION IN MEDIATION. A mediator shall recognize that mediation is based on the principle of self-determination. *This principle requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement which, so far as possible, accommodates*

As in Florida, those who opposed the proposed rule's limitation on mediators' ability to evaluate emphasized the value of the information provided by the evaluative mediator:

I am concerned that the Code as drafted discourages neutrals from rendering an opinion if the opinion is requested. The proposed code also discourages evaluation of parties' positions if the opinion is unrequested. There is an ongoing debate whether, when and to what extent evaluation (i.e., an opinion) is appropriate during mediation. The draft on "mediation" endorses one side of the debate, which is inappropriate. This is a Code of *Ethics*, not an instruction manual. Almost all the mediators in my cases have expressly or impliedly made their opinions known to varying degrees at some point (usually late) in the process and usually without my asking for their opinion. [In one case,] [t]he claim was weak on damages and the client needed to work through th[e] type of analysis [provided by the mediator]. Whether or not sharing these types of "opinions" comports with others' theoretical definition of mediation, in practice it is a common occurrence. Therefore, I do not think it would be prudent to call such behavior unethical. There is nothing immoral about privately providing an unsolicited opinion. If rendering any form of an opinion to any extent is objectionable, then this should be taught, not branded as unethical.²²⁸

Ultimately, the rule which the ADR Review Board proposed and the Minnesota Supreme Court promulgated²²⁹ endorsed mediator evaluation even more strongly than the proposed rule which was circulated in June of 1996. The rule's comments clearly permit mediators to "raise issues, offer opinions about the strengths and

the underlying interests of all parties. The primary responsibility for the resolution of a dispute rests with the parties. Any party may withdraw from mediation at any time.

Comment 1: A mediator may provide information about the process, raise issues, draft proposals and help parties explore options. The primary role of a mediator is to facilitate a voluntary resolution of a dispute *and not to impose his or her preferred solution.* Parties should be given the opportunity to consider all proposed options. It is acceptable for a mediator to suggest options, *but not to coerce the parties to accept any particular option.* A mediator shall be non-judgmental. *For example, the mediator shall not seek to determine which party is likely to prevail in litigation and to persuade the parties to accept the mediator's opinion of an appropriate settlement.*

Id.

228. Letter from Dean Thomson, Fabyanske, Suoboda, Westra & Hart, to Alanna Moravetz, ADR Review Board (June 17, 1996) (on file with author).

229. The Code of Ethics was promulgated by the Supreme Court as an appendix to Rule 114 of the Minnesota General Rules of Practice for District Courts. MINN. GEN. R. OF PRACTICE FOR DIST. CT., R. 114 app. (1999).

weaknesses of a case,” and suggest options for settlement.²³⁰ The limitations placed on these evaluative activities look much like those developed in Florida. The mediator is required to behave in a manner consistent with party self-determination, and the mediator may not coerce parties to accept any particular option. Minnesota’s drafters were more prescriptive than the drafters in Florida in only one significant respect. The Comments to the provision make it clear that a mediator should wait for a request from a party before suggesting an option for settlement.²³¹

C. *Summary of Florida’s and Minnesota’s Processes: Placing Their Trust in the “Fine and Dandy” Words of Self-Determination*

For very good reasons, particularly given the court-connected context which was their focus, the drafting committees in Minnesota and Florida determined that mediator evaluation should be permitted. As noted *supra*, mediator evaluation has the potential to aid party self-determination by insuring that the parties who have invoked the law and legal institutions are adequately informed regarding their choices. But legitimate concerns about the potential negative impact of such evaluation existed. Both committees responded by endorsing a thinner vision of self-determination, naming self-determination as a core principle, and prohibiting coercion. Both committees apparently assumed that these measures would successfully counterbalance the temptation to push inappropriately for settlement in mediation.

230. MINN. GEN. R. OF PRACTICE FOR DIST. CT., R. 114 app. (1999). *See also* Memorandum and Comments, *supra* note 227, Comment 1.

231. In full, the final rule provides:

SELF-DETERMINATION. A mediator shall recognize that mediation is based on the principle of self-determination by the parties. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. The primary responsibility for the resolution of a dispute and the shaping of a settlement agreement rests with the parties. A mediator shall not require a party to stay in the mediation against the party’s will.

The 1997 Advisory Task Force Comments provide:

1. The mediator may provide information about the process, raise issues, offer opinions about the strengths and weaknesses of a case, draft proposals, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties should be given the opportunity to consider all proposed options. It is acceptable for the mediator to suggest options in response to parties’ requests, but not to coerce the parties to accept any particular option.

MINN. GEN. R. OF PRACTICE FOR DIST. CT., R. 114 App. (1999).

The committees' choices leave us with important questions: How likely is it that these measures will effectively safeguard the admittedly "fundamental" principle of self-determination, even in its narrowed form? Will these measures be effective in keeping permissible mediator evaluation from becoming "inappropriate pushing?" The answers to these questions will depend upon how courts and ethical boards respond to claims that mediators violated disputants' self-determination by engaging in evaluation or persuasion that was so aggressive that it effectively coerced the disputants into reaching settlement agreements.

The issue of coercive evaluation by third parties is not entirely new. Courts have addressed similar claims when litigants have come to them with arguments that aggressive evaluation by judges or magistrates in judicially-hosted settlement conferences had the effect of coercing settlement agreements.²³² The next section of this Article will examine the courts' handling of these cases and will demonstrate that courts have rarely been persuaded that "mere" judicial evaluation or "mere" suggestions regarding settlement constitute coercion, even when litigants may legitimately fear that their failure to accede to judges' wishes could result in unfavorable rulings or even sanctions. This strongly suggests that if aggressive evaluation is not coercive when a judge does it, the courts are unlikely to find it coercive when their court-approved and court-certified mediators use aggressive evaluation or aggressive persuasive techniques to deliver settlements.²³³ After all, unlike judges, mediators do not have the power to decide issues in cases, to decide the ultimate outcomes of cases, or to assess penalties. If a judge's evaluation and settlement proposals are not viewed as coercive, the powerless mediator's evaluation or settlement proposals are even less likely to be deemed coercive. It is

232. Other commentators have also noted the similarity between the role and ethics of judges in settlement conferences and the role and ethics of mediators in mediation sessions. See Stempel, *supra* note 88, at 970 (recommending that mediators consider mimicking the "alternating evaluative-hybrid-facilitative tactics of the judge [which] appear to bring about fair, effective, and lasting settlements"); JONA GOLDSCHMIDT & LISA MILORD, JUDICIAL SETTLEMENT ETHICS: A JUDGE'S GUIDE 1, 6 (1996) ("Depending on the judge's settlement 'style,' such a [settlement] conference often resembles mediation. [N]onjudicial codes developed for the mediation context contain useful principles for judges to consider in the study of ethics of settlement conferences."). *But see* Evans v. State of Florida, 603 So. 2d 15 (Fla. Ct. App. 1992) ("The function of a mediator and a judge are conceptually different . . . [M]ediation should be left to mediators and judging to judges.").

233. Although related, this is a different question than asking whether the courts are likely to find that non-attorney mediators are engaged in unauthorized practice of law if they provide evaluations or use legal information to explain their proposals for settlement.

also unlikely that courts (or the ethical boards they have established) will perceive that the commitment to self-determination in mediation somehow changes the definition of coercion, particularly when self-determination is either ill-defined or defined so narrowly that it is no longer anchored in a vision of party participation and empowerment. Thus, in reviewing the courts' handling of claims of coercion by judges and magistrates, the next section raises substantial doubts regarding the effectiveness of the choices made by the Minnesota and Florida drafting committees to promote and protect party self-determination in court-connected mediation.

V. SETTLEMENT IN THE COURTS AND THE RUSH TO CLOSURE

A. *Deference to Settlement as the Expression of Parties' Free Will*

Generally, today's courts prefer that civil cases settle.²³⁴ Indeed, at least one court has declared that settlements represent the "best justice."²³⁵ Why do courts view settlement in this way? Many note that "the salutary effect of settlements on our overtaxed judicial and administrative calendars . . . is an undeniable benefit."²³⁶ Courts also are concerned about the delay and expense suffered by litigants involved in full-scale litigation.²³⁷ Philosophically, some courts have observed that "voluntary compliance [with the law] is preferable to court action."²³⁸ Courts also are quite aware that Congress has clearly expressed a preference for private settlement in various statutes.²³⁹ Finally, research has indicated that parties' compliance with their own settlement agreements is greater than their compliance

234. This was not always so. Increasing dockets, the language of Rule 16 of the Federal Rules of Civil Procedure, and Congress' direction in the Civil Justice Act help to explain the courts' change in attitude toward settlement—and many courts' embrace of alternative dispute resolution. Some also have hypothesized that the prevalence of settlement is the result of other factors such as the smaller percentage of attorneys who have trial experience, the increasing number of new and unknown judges, and the increasing number of complex causes of action. See Bundy, *supra* note 24, at 28-37.

235. *Cottman Transmission Sys., Inc. v. Metro Distrib. Inc.*, No. CIV. A. 92-2131, 1993 WL 481555 at *1 (E.D. Pa. Nov. 19, 1993). Many commentators have expressed concern about the courts' apparent willingness to abandon their responsibility for determining public norms. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

236. *Peskin v. Peskin*, 638 A.2d 849, 856 (N.J. 1994) (citing *Dep't. Of Pub. Advocate v. N.J. Bd. of Pub. Util.*, 503 A.2d 331 (1985)).

237. See quotation from Chief Justice Burger, *supra* note 87.

238. *Dent v. St. Louis-S.F. Ry. Co.*, 406 F.2d 399, 402 (5th Cir. 1969).

239. See *United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980) (noting that Congress has put an "extremely high premium on voluntary settlement of

with court orders, thus reducing the likelihood that they will need to turn to the court for enforcement.²⁴⁰

Beyond this, however, courts indicate that they defer to agreements reached by the parties because "the parties to the dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone."²⁴¹ This language suggests that the courts, like those involved in regulating mediator ethics, are concerned about party self-determination. Settlement permits the parties to be directly involved in and to control the assessment of their interests and the shaping of a settlement agreement that meets those interests or, at the very least, is "least disadvantageous to everyone."

It seems reasonable that if the courts defer to settlements because they express the parties' self-determination, then the courts must be sure that the settlements actually express such self-determination. Courts do not seem to see it this way. First, the courts are unfamiliar with the language of "self-determination" in the context of settlement.²⁴² Instead, the courts concern themselves more narrowly with whether or not parties "freely entered into"²⁴³ the agreement.

Title VII suits"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected [by Congress] as the preferred means for achieving [the goal of elimination of unlawful employment discrimination].")

240. See McEwen & Maiman, *supra* note 89, at 237 (reporting that compliance with mediated results was higher than compliance with adjudicated results).

241. *City of Miami*, 614 F.2d at 1322.

242. Indeed, courts appear to discuss "self-determination" as it applies to settlement agreements only in the context of challenges to tribes' right to self-government. See, e.g., *Penobscot Indian Nation v. Key Bank of Me.*, 112 F.3d 538, 546, 554-55 (1st Cir. 1997); *Houlton Band of Maliseet Indians v. Maine Human Rights Comm'n*, 960 F. Supp. 449, 453 (D. Me. 1997). Interestingly, mediation advocates also have invoked self-government—and particularly the underlying values of *democracy*—to explain the importance of self-determination in mediation. See Menkel-Meadow, *Ethics*, *supra* note 17, at 452 ("As I have argued for the substantive justification of ADR (and settlement) on the basis of democratic, party-empowering participation, consent and quality of solutions, and outcomes, then so must the ethics (and justice) of ADR be judged by these goals and purposes . . ."); Stulberg, *supra* note 79, at 1001 ("Concepts of participation and empowerment are not idle pleasantries . . . but are central principles of a democratic society and critical features of consensual decision-making processes, of which mediation is traditionally thought to be a prime example."); FOLBERG & TAYLOR, *supra* note 3, at 35 ("Using mediation to facilitate conflict resolution and encourage self-determination thus strengthens democratic values and enhances the dignity of those in conflict."). See also Alex Wellington, *Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism*, 12 CAN. J. L. & JURISPRUDENCE 297 (1999) (arguing that liberal pluralistic democratic theory provides coherent context for understanding and defending value of alternative dispute resolution).

243. *Casto v. Casto*, 508 So. 2d 330, 334 (Fla. 1987).

In other words, did the parties' "manifestation of assent"²⁴⁴ to the settlement agreement result from the exercise of their "free will?"²⁴⁵ Was it the product of a "free and untrammelled mind?"²⁴⁶

Second and very importantly, the courts hold a nearly-unshakable presumption that any settlement actually represents the exercise of parties' free will. Indeed, it is the party who claims that he or she was deprived of the exercise of his or her "free will" in entering into a settlement agreement who bears the burden of proof.²⁴⁷ This burden is generally not met by pointing to evidence that the party was unaware of relevant legal information or lacked counsel.²⁴⁸ The courts tend to conclude that, if a party was aware that he or she had the right to consult with an attorney, then that party made "free, calculated, and deliberate choices"²⁴⁹ in deciding *not* to seek independent legal information or counsel.²⁵⁰ It also does not matter to the

244. See RESTATEMENT (SECOND) OF CONTRACTS, §§ 164, 175 (1981).

245. It is worth noting here the similarity between this focus and the definition of self-determination contained in Florida's revisions to its rules described *infra*. Both the courts and the drafters of the revised rules narrowly focus on the point at which the parties make and manifest their decision to agree or not to agree.

It is also worth noting that, outside the context of settlement agreements, courts have tended to avoid the term "free will" in examining whether parties entered into contracts under duress. Instead, they have tried to determine whether the alleged victim of duress had "no reasonable alternative" but to acquiesce to entering into the contract. See *Machinery Hauling, Inc. v. Steel of W. Va.*, 384 S.E.2d 139, 142 (W. Va. 1989); see also RESTATEMENT (SECOND) OF CONTRACTS, §175(1) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.").

246. *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1149 (N.D. Cal. 1999).

247. See *Petracca v. Petracca*, 706 So. 2d 904, 912 (Fla. Dist. Ct. App. 1993) ("In order to avoid an agreement settling a dissolution of marriage action in which the parties were adversaries, the challenging spouse is limited to showing fraud, misrepresentation in the discovery, or coercion."); *Clooten v. Clooten*, 520 N.W.2d 843, 845 (N.D. 1994) (party challenging judgment entered pursuant to contractual stipulation has "burden of showing that, under the law of contracts, there is justification for setting the contract aside").

248. See *Steward v. Rahr*, 435 N.W.2d 538, 539 (Minn. 1989) (lack of legal representation, without more, insufficient to show mistake); *Casto*, 503 So. 2d at 334; *Bubenik v. Bubenik*, 392 So. 2d 943 (Fla. Dist. Ct. App. 1980); *Cowen v. Cowen*, 95 So. 2d 584 (Fla. 1957). See also *Tenneboe v. Tenneboe*, 558 So. 2d 470, 473 (Fla. Dist. Ct. App. 1990) (recognizing that a lack of legal representation is not, by itself, a ground to vacate an agreement, but is "one factor for the court to consider and weigh" when determining claims of fraud, misrepresentation and overreaching).

249. *Fleck v. Fleck*, 337 N.W.2d 786, 791 (N.D. 1983).

250. See *Clooten*, 520 N.W.2d at 845 ("[L]ack of legal representation of one of the parties to a marital settlement agreement is just one factor for the court to consider and weigh when claims of fraud, undue influence, or other actionable misconduct are made[.]"); *Cleghorn v. Scribner*, 597 So. 2d 693, 696 (Ala. 1992) (holding that in the absence of evidence of misrepresentation or concealment of material fact, release will be given effect even though plaintiff did not have an attorney and was having "serious

courts that a settlement represents a poor bargain for one of the parties.²⁵¹ The power to exercise free will is accompanied by responsibility for the consequences, whether they be for good or for ill. The courts will not permit parties to rescind agreements simply because they are suffering "buyer's (or seller's) remorse,"²⁵² had a "change of heart,"²⁵³ or became "unhappy"²⁵⁴ with the deal they struck.

The law, however, does provide disgruntled parties with a few narrow avenues for overcoming the presumption that they exercised free will in reaching their settlement agreement. First, because settlement agreements are contracts, parties can assert the general contract defenses of fraud,²⁵⁵ misrepresentation,²⁵⁶ mutual mistake,²⁵⁷ coercion or duress,²⁵⁸ and undue influence.²⁵⁹ Second, under certain circumstances, disgruntled parties can argue that they belong to a sort of "protected class" whose exercise of "free will" cannot be assumed, either because they lacked the mental capacity to enter into a settlement agreement²⁶⁰ or because they entered into a settlement agreement in a situation that invited patently unfair bargaining.²⁶¹

financial difficulties" when he signed the release since the record did not show that the plaintiff "was discouraged or somehow prevented from seeking legal advice").

251. See *Petracca*, 706 So. 2d at 910 ("[F]reedom to contract is fundamental, and the contracts of capable people are enforced by courts even when the bargain is difficult."); *Casto*, 508 So. 2d at 334 ("[T]he fact that one party to the agreement apparently made a bad bargain is not sufficient ground, by itself, to vacate or modify a settlement agreement.").

252. See *Rosevear v. Rosevear*, 76 Cal. Rptr. 2d 691, 699 (Cal. Ct. App. 1998).

253. *Ovadia v. N.Y. Ass'n for New Americans*, Nos. 95 Civ. 10523(SS), 96 Civ. 330(SS), 1997 WL 342411 at *11 (S.D.N.Y. June 23, 1997).

254. *Stoelting v. Stoelting*, 412 N.W.2d 861, 864 (N.D. 1987).

255. See RESTATEMENT (SECOND) OF CONTRACTS § 164 (1979).

256. See *id.* §§ 162-64.

257. See *id.* § 152.

258. See *id.* § 175. See also *Machinery Hauling, Inc. v. Steel of W. Va.*, 384 S.E.2d 139 (W. Va. 1989) (discussing generally defenses of duress in contract enforcement actions).

259. See RESTATEMENT (SECOND) OF CONTRACTS §177 (1979).

260. Minors and persons suffering from mental incapacity fit into this category. See, e.g., *Dengler v. Crisman*, 516 A.2d 1231 (Pa. Super. Ct. 1986) (involving settlement of a minor's action).

261. Seamen, members of class actions, and shareholders in shareholder derivative suits fall in this category. See *Castillo v. Spiliada Maritime Corp.*, 937 F.2d 240, 243 (5th Cir. 1991) (holding that the district court erred in ruling that seamen's releases were valid as a matter of law, and noting that "seamen have enjoyed a special status in our judicial system because they occupy a unique position. A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer."); *United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980) (noting that settlements of class actions and shareholder derivative suits are unique because absent class members or shareholders are involved and such settlements "may benefit

In these “exceptional situation[s],”²⁶² statutes or court rules do not presume that settlement agreements represent the exercise of the parties’ free will. Instead they require court review of the reasonableness of the terms of settlement agreements,²⁶³ closer scrutiny of the fairness of the process used to negotiate these settlements,²⁶⁴ or a combination of both.²⁶⁵

the class representatives or their attorneys at the expense of absent class members or shareholders”).

262. *City of Miami*, 614 F.2d at 1331.

263. In determining whether to approve a settlement of a minor’s action, a court is required to review the terms of the settlement agreement and determine whether the rights and best interests of the minor are adequately protected. *See, e.g.*, *Klein v. Cissone*, 443 A.2d 799 (Pa. Super. Ct. 1982). In most jurisdictions, the judges are required to review divorce agreements for fairness or lack of unconscionability, but in practice there is minimal judicial oversight. *See Eileen Bryan, The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931, 937 (1997); *see also Engler, supra* note 133, at 2018-21.

264. In a settlement agreement with a seaman, the ship owner bears the burden of establishing the validity of the seamen’s release of claims and must show that the release “was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights.” *Castillo*, 937 F.2d at 244 (citing *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942)). *See also infra* note 334.

265. For proposed class action settlements, proposed settlements of shareholder derivative suits, and proposed settlements of claims in bankruptcy court, the standards for judges’ approval of settlements have been described positively (i.e., requiring the court to find the settlement “fair, adequate, and reasonable”) and negatively (i.e., requiring court approval of a settlement provided that the terms are “not unlawful, unreasonable or inequitable”). *See City of Miami*, 614 F.2d at 1330 (providing a general discussion). In determining whether a settlement is “fair, reasonable and adequate,” courts examine factors relating to both the substantive terms of the settlement and the dynamics of the negotiation process. Specifically, the factors include: the existence of fraud or collusion behind the settlement; the complexity, expense and likely duration of the litigation; the stage of the proceedings and the amount of discovery completed; the probability of plaintiff’s success on the merits; the range of possible recovery; and the opinions of the class counsel, class representatives and absent class members.” *See EEOC v. McDonnell Douglas Corp.*, 894 F. Supp. 1329, 1333 (E.D. Mo. 1995).

The courts’ general discomfort with determining whether settlement agreements are fair, reasonable, and are the result of informed decision-making is suggested by the court in *Petracca v. Petracca*, 706 So. 2d 904 (Fla. Dist. Ct. App. 1993). There, a divorced wife moved to invalidate an agreement settling the dissolution of marriage litigation. She argued that the court was required to determine whether the agreement made “an unfair or unreasonable provision for the [challenging] spouse” and whether she had adequate knowledge of the defending spouse’s finances at the time the agreement was reached, based on a line of cases involving challenges to prenuptial and postnuptial agreements. *Id.* The court also declared that this line of cases was inapplicable to settlement agreements, noting:

This litigation settlement presumption arises from the special treatment that courts give to voluntary settlements of lawsuits. [I]t ought to be very difficult to unsettle an agreement settling litigation. Settlements of civil lawsuits merit the greatest protection from judges. In short, it is the policy of this state to encourage settlements and enforce them whenever it is possible

Despite the existence of these defenses, it remains very difficult for parties who wish to rescind a settlement agreement to overcome the presumption that they exercised free will. It becomes even more difficult when a party claims that his or her free will was violated by the language or behavior of a judge in a settlement conference. The courts' handling of allegations of coercion by judges and other judicial officers involved in settlement conferences may be both instructive and troubling for those who are working to protect party self-determination in court-connected mediation.²⁶⁶

B. *Distinguishing Between Explicit and Implicit Coercion: The Courts' Definition of "Acceptable Pressure"*

The Commentary for Canon 3B(8) of the ABA Model Code of Judicial Conduct (1990)²⁶⁷ clearly condemns coercion as a means to settle cases. Specifically, it provides that: "A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts."²⁶⁸ Yet, it is acknowledged that "judicial officers acting as mediators . . . [make] occasional use of inappropriate techniques."²⁶⁹ Indeed, there is substantial empirical evidence that judges wield a

to do so. If one of the settling parties can have the court later inquire into its reasonableness and fairness, there would be little incentive for courts to encourage settlements.

Id. at 912.

266. Professor Menkel-Meadow has raised concerns about the apparent disconnect between the ethics of mediation and the contract principles which are used to determine whether to enforce settlement agreements, writing: "In ADR ethics we must be concerned about whether consent [to a settlement agreement] is real and thus, will have to carefully scrutinize and perhaps go beyond simple contract enforcement standards or important process issues will be merged (and lost) in contract doctrine (as I believe has already happened with Supreme Court arbitration jurisprudence)." Menkel-Meadow, *Ethics, supra* note 17, at 451, n.198. Specifically, she has urged: "Outcomes should not be coerced (there must be real consent); parties should feel as if they have been given a fair opportunity to choose (self-determination) and participate in their proceedings (democratic participation); and the process should be conducted by parties and neutrals who behave fairly (and without partisanship as third parties, even if they can not be totally neutral and detached)." *Id.* at 451-52.

267. FED. R. CIV. P. 16; MODEL CODE OF JUDICIAL CONDUCT CANON 3A(5), COMMENTARY (2000); *see also* Laura Margolis Warshawsky, *Objectivity and Accountability: Limits on Judicial Involvement in Settlement*, 1987 U. CHI. LEGAL F. 369 (1987) (urging that judges should encourage settlement only if they can do so without using their position coercively).

268. FED. R. CIV. P. 16; MODEL CODE OF JUDICIAL CONDUCT CANON 3A(5), COMMENTARY (2000).

269. *In re Fee*, 898 P.2d 975, 978 (Ariz. 1995).

wide range of potentially coercive tools to persuade parties to settle.²⁷⁰ Although there is no evidence that the use of coercive tools is the norm among judges, a review of the cases and survey data does reveal judges who have:

- sanctioned parties for their failure to accept the settlement suggested by the court;²⁷¹
- sanctioned parties for their failure to settle by a deadline;²⁷²
- sanctioned attorneys for their failure to make a settlement offer;²⁷³
- sanctioned parties for waiting to settle within a court-recommended settlement range until after trial commenced;²⁷⁴

270. See Daisy Hurst Floyd, *Can The Judge Do That?—The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 53-54 (1994) (One empirical study identified approximately seventy settlement techniques that had either been observed or used by judges and lawyers. These techniques ranged from fairly benign interventions (e.g., setting a settlement conference upon request) to more directive techniques (e.g., calling a certain figure reasonable or arguing logically for concessions) to explicitly coercive measures (e.g., penalizing or threatening a lawyer for refusal to settle). Approximately 10 percent of the federal and state judges responding to another survey indicated that they “intervene aggressively—through the use of direct pressure” in settlement.

The more coercive techniques used by judges include reminding litigants of the possible adverse consequences of not reaching an agreement. One judge reported that he sometimes encourages litigants to talk settlement at the final pretrial conference by belittling the case with an observations such as ‘You don’t want to go to trial with this!’ Others suggest the possibility that defendant might invoke Rule 68 and submit an offer of judgment, which could expose plaintiff to paying the costs of continuing the litigation.

Id. (citing James A. Wall, Jr., *Judicial Participation in Settlement*, 1984 J. DISP. RESOL. 25 and JOHN P. RYAN, *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE*, 77 (1980)); see also Stacey Burns, *The Name of the Game Is Movement: Concession Seeking in Judicial Mediation of Large Money Damage Cases*, 15 MEDIATION Q. 359 (1998) (examining the obstacles to settlement encountered by public and private judge-mediators and skills and tactics used to overcome these obstacles).

271. See Nat’l Ass’n of Gov’t Employees, Inc. v. Nat’l Fed’n. of Fed. Employees, 844 F.2d 216 (5th Cir. 1988) (vacating a district court’s order to impose sanctions under Rule 11, Fed. R. Civ. P. on a plaintiff for not accepting settlement at pretrial conference or at the close of the case).

272. See *Newton v. A.C. & S., Corp.*, 918 F.2d 1121 (3d Cir. 1990) (holding that, while the district court had authority to impose fines for failure to settle by deadline, fines also constituted civil contempt and the court could not impose fines without affording the parties due process rights of adequate notice and prior hearing).

273. See *Dawson v. United States*, 68 F.3d 886 (5th Cir. 1995) (reversing and vacating the trial court’s imposition of sanctions upon two Assistant United States Attorneys for their failure to make a settlement offer, and holding that making a settlement offer was not required as part of good faith effort to settle).

274. See *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985) (remanding and vacating sanctions imposed on defendant by the trial court which reasoned “that it was ‘determined to get the attention of the carrier’ and that ‘the carriers are going to have to wake up when a judge tells them that they want [sic] to settle a case and they don’t want to settle it’”).

- accelerated the date of trial due to a party's refusal to settle;²⁷⁵
- threatened to report parties' or their attorneys' uncooperative conduct to the trial judge;²⁷⁶
- threatened to consider a party's refusal to settle when evaluating the other party's petition for fees;²⁷⁷
- threatened to make undesirable rulings during trial.²⁷⁸

It is important to note that when parties have alleged and been able to show that judges engaged in the explicitly coercive behaviors listed above for the purpose of coercing settlement or punishing a failure to settle, appellate courts have been willing to vacate the sanctions and, occasionally, vacate settlement agreements.²⁷⁹ However, appellate courts have been much less willing to recognize and provide relief to parties who have claimed more subtle, implicit coercion by a judge, such as aggressively evaluating a party's case, strongly urging a party to settle, or advocating for a particular settlement.²⁸⁰

275. See *Wolff v. Laverne Inc.*, 233 N.Y.S.2d 555 (N.Y. App. Div. 1962) (allowing a motion to vacate the trial court's advancement of an action to the head of next term's calendar after defendant refused to offer an additional \$1,000 to settle case); *Innis v. Innis*, 616 N.E.2d 837 (Mass. App. Ct. 1993) (affirming the trial court's refusal to undo a judgment incorporating a stipulation after a party alleged that the judge had coerced her into agreeing to the stipulation by threatening to hold immediate trial, which would have been too much for party due to her condition of depression and recent diagnosis of Parkinson's disease); *Chomski v. Alston Cab Co.*, 299 N.Y.S.2d 896, 897 (N.Y. App. Div. 1969) (reversing and vacating the trial court's advancement of a case on the trial docket due to defendant's "dilatatory foot-dragging" tactics and refusal to agree to court's view of settlement); *Mitchell v. Iowa Cab Co.*, 294 N.Y.S.2d 749 (N.Y. App. Div. 1968) (reversing the trial court's advancement of the case for finding that defendants' response of \$35,000 to plaintiff's demand for \$125,000 was not realistic).

276. See *In re Fee*, 898 P.2d 975, 976 (Ariz. 1995) (reviewing settlement judge's threat that if case did not settle, he would advise the trial judge that the failure to settle was due to plaintiff's attorneys' "greed").

277. See *Peskin v. Peskin*, 638 A.2d 849 (N.J. Super. Ct. App. Div. 1994) (vacating the judgment entered on a settlement agreement after finding that trial judge had improperly coerced a defendant suffering from clinical depression into settling).

278. Floyd, *supra* note 270, at 55 (citing James A. Wall, Jr., *Judicial Participation in Settlement*, 1984 J. DISP. RESOL. 25, 38-39). Participants in an empirical study were asked to identify settlement techniques used by judges to facilitate settlement and were asked whether they thought each particular technique observed was ethical. Seventeen of the seventy techniques identified were thought to be unethical. These included penalizing a lawyer for not settling [e.g., with dismissal or mistrial], threatening the lawyer for not settling [e.g., with dismissal or mistrial], threatening to declare a mistrial if a decision is not returned by a certain time during the time the jury is deliberating, and transferring the case to another district on the day of the trial, to force settlement rather than to have the trial far away. See *id.*

279. See *supra* notes 255-65 and accompanying text.

280. See *infra* notes 307-22 and accompanying text.

This tendency can appear reasonable. A judge's decision to share his/her negative evaluation of a party's case or strongly urge the parties to settle at a particular amount may not appear very coercive when such behavior is compared to imposing outright sanctions or making threats for refusing to settle. Indeed, there is substantial evidence that attorneys prefer judges who share their reasoned evaluations of each party's case.²⁸¹ A consequence of this, as will be shown *infra*, is that courts do not demonstrate much sympathy for parties who claim they were coerced into settlement by the judge's aggressive encouragement to settle or as a result of the judge's attack upon the strength of the party's legal arguments.

Nonetheless, when a trial judge shares his/her evaluation of a party's case, the potential for coercion remains. If a party refuses to accept the judge's evaluation, there is fear that the judge's rulings, instructions to the jury, and general behavior will be influenced by the party's refusal to cooperate.²⁸² In addition, parties can be at various stages of qualitative psychological development, with very different abilities to withstand a judge's disapproval.²⁸³ Under these circumstances, it is questionable whether the resulting settlement agreement is an expression of free will. It is also questionable

281. See D. MARIE PROVINE, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* 35-36 (1986) (noting that attorneys prefer a settlement judge who points out evidence or law that attorneys misunderstand or are overlooking); Dale Rude & James Wall, *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 *JUDICATURE* 175, 176-77 (1988) (reporting that attorneys prefer judges to inform them regarding how similar cases have settled and to argue logically for concessions, but do not prefer judges to share their evaluations of the case with clients or discuss with the lawyers the high risk of going to trial); see also Stempel, *supra* note 88, at 971 ("[I]n my view, the best judges lean toward the evaluative side of the scale.").

282. See *Krattenstein v. G. Fox & Co.*, 236 A.2d 466, 469 (Conn. 1967) ("For a judge in chambers to solicit or receive the opinion of counsel as to the dollar value of a court case which he is to hear; to express not only his opinion as to that dollar value but, after that opinion has been conveyed to a party, to persist in his efforts at settlement by requesting counsel again to convey it to his client; and, on further refusal of the litigant to accede to the judge's proposal, to hear the case and render judgment is a procedure which inevitably raises in the minds of litigants, as well as counsel, as it did in this instance, a suspicion as to the fairness of the court's administration of justice."); Warshawsky, *supra* note 267, at 371 (arguing that, because a judge ultimately may make a decision on the merits of a case, his/her evaluations and statements of opinion about the law or facts become opportunities for judicial coercion, while a mediator's substantive suggestions will have no such coercive force).

283. See Jeffrey Seul, *How Transformative is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 *OHIO ST. J. DISP. RESOL.* 135 (1999) (discussing three most common stages of adult development to assess, from a constructive-developmental perspective, the ability of transformative mediation to promote individual moral development).

whether a party who agrees to settle due to fear of reprisal is truly exercising self-determination.

Most of the time, the courts do not perceive evaluation by judges—even with the unspoken threat of reprisal hanging in the air—as undermining parties' free will. The following case will illustrate the courts' aversion to finding coercion when a judge uses techniques which may be described as "high pressure" or "strong arm" tactics, but which do not include explicit threats or the imposition of sanctions. This case and those like it should raise concerns about the effectiveness of protecting party self-determination simply by proclaiming "thou shalt not coerce." Coercion, much like self-determination, is in the eyes of the beholder.

C. *The Judicial Settlement Conference in Associates Financial Services Company of Hawaii, Inc. v. Mijo*²⁸⁴

This case, like *Allen v. Leal*, involves another set of unlucky parents and their son. Warren Mijo needed capital for his business. In August, 1987, he persuaded his parents, Roy and Kimie, to put up their home as security for a mortgage in favor of Associates Financial Services Company of Hawaii, Inc. (AFSCH). Prior to that time, the Mijos' home was essentially unencumbered. In 1988, AFSCH brought an action to foreclose on the mortgage, claiming that the Mijos owed approximately \$134,000. The Mijos counterclaimed and alleged eight causes of action in connection with the refinancing agreement.

On October 15, 1991, a settlement conference was held before then circuit court Judge Thomas Kaulukukui in his chambers. AFSCH offered to allow the Mijos to execute a new note and mortgage for \$100,000, while the Mijos demanded that AFSCH pay them \$150,000, wipe the mortgage debt clean, and restore title to their home. The case did not settle.²⁸⁵

Three days before the week for which the trial was scheduled, the parties' attorneys met for a pretrial conference with the trial judge, Judge Wendell Huddy. The conference lasted for nearly four hours. During this time, Mr. and Mrs. Mijo and their son "waited outside in the hallway, apparently unaware of the nature or substance of the discussions in conference."²⁸⁶ As noon approached, the Mijos' attorney "emerged from the conference and informed Warren

284. 950 P.2d 1219 (Haw. 1998).

285. *Mijo*, 950 P.2d at 1221.

286. *Id.* at 1221.

[Mijo] that AFSCH had made an offer to settle the case for \$82,500. [The Mijos' attorney] also advised Warren that "this would probably be the best [they] could get, and [they] should take it."²⁸⁷

Warren then accompanied the attorney into the judge's chambers. Roy and Kimie, whose home was at issue, continued to wait outside. In his chambers, presumably in order to persuade Warren and his parents to accept AFSCH's settlement offer, Judge Huddy "discussed with Warren the possible damages the jury might award and recommended to Warren that the Mijos settle."²⁸⁸ Warren later testified: "[A]t first I felt that since he was going to be the trial judge the following week and he's the one that's going to decide what's going to happen, and with my lawyer telling me that this is the best we can get, I was pretty much pressured to think that's all I could get."²⁸⁹

"Three or four minutes" after they were first told about the settlement and with no opportunity to confer with their attorney, the Mijos accompanied their son and their attorney into the courtroom where the case was called.²⁹⁰ Counsel for AFSCH read the terms and conditions of the settlement into the record. The judge then asked Roy, Kimie, and Warren a series of questions to determine that they agreed to the settlement terms, agreed that it was a voluntary settlement, and understood the terms and conditions of settlement.²⁹¹

In the colloquy between the judge and the Mijos that followed, it is noteworthy that Roy and Kimie ultimately answered "Yeah" or "Mh-hm" at the points when the judge needed something on the record verifying the existence of the agreement and the Mijos' agreement to the terms and conditions.²⁹² However, it is just as noteworthy that the Mijos continually asked questions themselves, strongly suggesting that either they had not agreed to this settlement or did not understand it. Their questions went unanswered as the judge pressed forward with his questions and the responses he needed for the record:

THE COURT: Roy Mijo, do you understand the terms and conditions? You understand the settlement?

DEFENDANT ROY MIJO: Yeah.

THE COURT: Do you have any questions about the settlement?

287. *Id.* at 1221-22.

288. *Id.* at 1222.

289. It also appears that the judge then met "briefly" with Roy and Kimie, but it was not clear exactly what was said. *Id.*

290. *Mijo*, 950 P.2d at 1225.

291. *Id.* at 1222.

292. *Id.* at 1222-23.

[ROY]: No, I—

THE COURT: About the terms?

[ROY]: No, only thing I want to know is I want to have the lowest monthly payment, and I could keep up with the payment so we don't get into trouble like—that we have now.

THE COURT: Do you understand the terms though?

[ROY]: Yeah.

THE COURT: You understand that it's going to be another loan for \$82,500? You understand that?

[ROY]: Yeah, I understand.

THE COURT: And that you understand that it's a 10-percent interest?

[ROY]: Yeah.

THE COURT: You understand that half the interest is payable, and the rest is going to be deferred to the end? You understand that?

[ROY]: Yeah.

THE COURT: And you understand that the period is 15 years or the death of you and your wife, whichever takes place first? You understand that?

[ROY]: Yeah.

THE COURT: And you understand that you're giving up any and all claims against the plaintiff?

[ROY]: Yeah.

THE COURT: Okay. And they're giving up any and all claims against you and your wife and your son. You understand that?

[ROY]: Yeah.

THE COURT: Is anyone forcing you, putting any kind of pressure, or threatening you to go into this settlement agreement?

[ROY]: What do you mean?

THE COURT: Do you understand the question?

[ROY]: No. I don't.

THE COURT: Are you being forced—is someone forcing you to go into the settlement?

[ROY]: No.

THE COURT: That's all. And, Kimie Mijo, you understand the settlement?

DEFENDANT KIMIE MIJO: Not quite.

THE COURT: Okay, what don't you understand about it?

[KIMIE]: Why we have to pay more.

THE COURT: You understand that on this settlement, you're agreeing to a new loan of \$82,500? You understand that?

[KIMIE]: That we owe that much yet?

THE COURT: No, you understand by settling this case, you're agreeing to a new loan of \$82,500, and everything in the past is being wiped out?

[KIMIE]: I think so.

THE COURT: You understand that?

[KIMIE]: (Nods head)

THE COURT: And you understand that this loan—the period of the loan is 15 years or the death of you and your husband, which ever happens first? You understand that?

[KIMIE]: Okay.

THE COURT: The interest, 10 percent, you understand that?

[KIMIE]: (Nods head)

THE COURT: Now, the payments, half the interest only with the balance to come at the end with the principal, you understand that part?

[KIMIE]: (Nods head)

THE COURT: And then you understand that you're giving up any and all claims that you may have against them, and they're giving up any and all claims that may have against you? You understand that?

[KIMIE]: Yes.

THE COURT: What I've given you is the general terms of the settlement. You understand me?

[KIMIE]: Mh-hm.

THE COURT: Is anyone forcing you, putting any kind of pressure, or threatening you to enter into this settlement with the terms?

[KIMIE]: No.

THE COURT: Thank you. You may have a seat. And, Mr. Warren Mijo, you understand the terms and conditions?

DEFENDANT WARREN MIJO: Yes.

THE COURT: Do you agree with those terms and conditions?

[WARREN]: Yes.

THE COURT: Is anyone forcing you, putting any kind of pressure, or threatening you to enter into those terms and conditions?

[WARREN]: No.

Counsel No. 1 [Mijos' attorney] also stated on the record that he agreed to the terms and conditions of the settlement. Prior to adjourning the session, Judge No. 2 [Huddy] told the parties:

THE COURT: I know you folks are not happy, you know. It's unfortunate that it came to this situation. But as I indicated, you know, to you, this is the best under the circumstances. And I want to thank you folks for coming to court this morning, taking time and bringing this matter to a settlement. I know both sides

are not happy. But I think this settlement is best under the circumstances.²⁹³

When the Mijos received the Settlement Documents, they refused to sign them and claimed that they had been pressured by both their attorney and Judge Huddy into the settlement agreement.²⁹⁴ AFSCCH filed a motion to enforce the settlement.²⁹⁵

Judge Huddy, the same judge who had presided over the pretrial conference, heard and ruled on the motion to enforce. The judge ordered that the settlement agreement be enforced, finding that: Warren Mijo was the "primary mover" and showed "sophistication," the Mijos relied upon their son, the terms of the agreement were explained to the Mijos, they testified that they agreed and understood, and they failed to reject the terms by the trial date.²⁹⁶ On appeal, Hawaii's Intermediate Court of Appeals concluded that the trial court erred in enforcing the settlement agreement because Judge Huddy "had exerted an implied threat upon the Mijos, amounting to duress, in obtaining their assent to the settlement agreement."²⁹⁷ Accordingly, the ICA vacated the enforcement order and remanded the case for trial. The Supreme Court of Hawaii granted certiorari.²⁹⁸

Perhaps surprisingly in light of the facts of this case, the Supreme Court of Hawaii ruled that the trial judge had not coerced Roy and Kimie Mijo into accepting the settlement agreement. Although the court was careful to note that "[s]ettlement can be coerced, either by the power of the parties, by a strong judge in a settlement conference, or by inexorable trial dates"²⁹⁹ and that "[t]hroughout [the settlement] process, the judge must guard against indirectly coercing a settlement by 'nudging' or 'shoving' the parties toward a settlement,"³⁰⁰ the court did not find coercion here.

Instead, the court first pointed to the strong judicial policy favoring "the resolution of controversies through compromise or settlement rather than by litigation."³⁰¹ Second, the court observed that "a

293. *Id.* at 1222-23.

294. *Mijo*, 950 P.2d at 1224.

295. *Id.*

296. *Id.* at 1224-27.

297. *Id.* at 1229.

298. *See Mijo*, 950 P.2d at 1228.

299. *Id.* at 1228 (citing Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485, 505 (1985)).

300. *Id.* (citing Comment, *Let's Make A Deal: Effective Utilization of Judicial Settlements in State and Federal Courts*, 72 OR. L. REV. 427, 448 (1993)).

301. *Id.* at 1230 (citing *Sylvester v. Animal Emergency Clinic of Oahu*, 825 P.2d 1053, 1056 (Haw. 1992)).

judge should encourage settlement throughout the case and particularly on the eve of trial. By encouraging the Mijos to settle, Judge [Huddy] acted completely within the bounds of propriety."³⁰² Third and very significantly, the court could find no evidence of explicit coercion. Judge Huddy had not "*overtly made improper threats* to influence the result of the trial had the parties decided to try the case."³⁰³

Because the court found no evidence of overt coercion, it had to address the question of whether the judge's evaluation alone constituted coercion. The court could not bring itself to find coercion, observing that "[t]he Commentary to Hawaii's Revised Code of Judicial Conduct, Canon 3(B)(8) provides that '[a] judge should encourage and seek to facilitate settlement,' keeping in mind that 'parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.'"³⁰⁴ The court went on to say that it did "not agree, therefore, that a judge should refrain from offering his or her assessment of a case on the eve of trial, solely to avoid the appearance of impropriety. *Such a policy would effectively render meaningless a judge's role in the settlement process.*"³⁰⁵ Therefore, the court held that "[a] judge who is conducting a settlement conference acts within the bounds of propriety when he [or she] offers his [or her] assessment of a case as he [or she] understands it and recommends a settlement."³⁰⁶

In addition, the court refused to see the Mijos' forced march into the courtroom or the questioning by the judge on the record as constituting coercion. Instead, the court reasoned that the Mijos had never asked for more time and that the record contained nothing "but affirmative responses" by the Mijos to the judge's questions.³⁰⁷

302. *Mijo*, 950 P.2d at 1230.

303. *Id.* at 1229 (emphasis added).

304. *Id.* at 1229-30. This language from the Hawaii Revised Code is nearly identical to the Commentary to Canon 3 (B)(8) of ABA Model Code of Judicial Conduct which provides: "A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts." MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(8) Commentary (2000). The Canon itself provides: "A judge shall dispose of all judicial matters promptly, efficiently, and fairly." *Id.* at Canon 3(B)(8).

305. *Mijo*, 950 P.2d at 1230 (emphasis added).

306. *Id.* at 1228 (citing *Herzfeld v. J & M Realty Assoc.*, 542 N.Y.S.2d 374 (N.Y. App. Div. 1989)).

307. *Id.* at 1231.

D. *The Court's Aversion to Finding Coercion Unless It Is Overt / Explicit / Blatant*

The *Mijo* case is not an aberration. Courts generally have refused to find pressure or coercion by judicial officers in settlement conferences, unless the judicial officers make outright threats or impose sanctions for parties' or attorneys' failure to cooperate by settling.³⁰⁸ In other words, the coercion or pressure must be explicit. For example, courts have not found it coercive when judicial officers have predicted to unrepresented parties that they will lose their lawsuits and their businesses will be closed,³⁰⁹ or when trial judges have told stories about other cases "where the court had attempted to negotiate settlement but was unable to get the parties to agree and subsequently the court's decision resulted in a substantially lesser award to the party who objected to the settlement terms."³¹⁰ Similarly, courts have refused to find coercion when parties have alleged that the judicial officer presiding over a settlement conference made them

308. This also seems to be true when parties have sought to avoid the enforcement of a settlement agreement by alleging that their attorneys coerced them into the agreement. See *Fortenberry v. Parker*, 754 So. 2d 561 (Miss. Ct. App. 2000) (affirming the result reached by the chancellor, even though the chancellor failed to pursue the client's allegation of coercion by her attorney after the client testified before him that she did agree to the terms of the settlement and court determined that the client had authorized the attorney to enter into the settlement on her behalf). But see *Jones v. Feiger, Collison & Killmer*, 903 P.2d 27, 34 (Colo. Ct. App. 1994) *rev'd* 903 P.2d 1244 (Colo. 1996) (finding that provisions of representation agreement prohibiting client from unreasonably refusing to settle and permitting law firm to withdraw in the event of client's unreasonable refusal to settle, together with provision for calculating attorneys fees, were unenforceable).

309. See *Cottman Transmission Sys. Inc. v. Metro Distrib., Inc.*, No. CIV. A. 92-2131, 1993 WL 481555 (E.D. Pa. Nov. 19, 1993). See also *Polin v. Polin*, 367 S.E.2d 433, 434 (S.C. Ct. App. 1988) (finding that the trial judge did not engage in coercion when complaining party expressed reservations on the record regarding one of the terms of the settlement agreement, and the trial judge commented, "I could hear the whole thing and you might come out worse when I heard it. I don't know. Or, you might come out better. But, do you want to accept the agreement?"); *Fagala v. Sanders*, 488 N.E.2d 1093, 1094 (Ill. 1986) (noting trial judge's statement during settlement negotiations that the defendant was "in a risky position"); *Lyons v. Sockwell*, 91 A.2d 847 (D.C. 1952) (noting trial judge's pretrial conference remarks that the case could go either way, that the plaintiff might easily receive nothing, and that plaintiff should try to settle).

310. *Dutton v. Dutton*, 713 N.E.2d 14, 17 (Ohio Ct. App. 1998).

feel that they must make an immediate decision regarding settlement,³¹¹ or when a trial judge has excluded parties' attorneys from his settlement discussions with the parties.³¹²

The courts often explain their decisions by finding that the complaining party's allegation of coercion, duress, or pressure was not adequately substantiated and "falls well short of demonstrating by clear and convincing evidence that [the complaining party] was 'deprived of the exercise of . . . free will.'"³¹³ In other words, the courts are unlikely to brand anything as coercion unless they can "see" it in the record.

Specifically, courts have pointed to the following justifications in refusing to find coercion: that the judge made no explicit threats,³¹⁴ that the complaining parties' perception of coercion is a "subjective feeling [that] is fatally conclusory and wholly unsupported by specific factual averments,"³¹⁵ that the complaining parties are sophisticated

311. See *Porter v. Chicago Bd. of Educ.*, 981 F. Supp. 1129, 1132 (N.D. Ill. 1997) (stating that a party had "felt' pressured by the Magistrate Judge" to enter into the agreement, because, the party claimed, "[t]he judge made me feel like I could not go home and think about it—that I had to say yes on the spot.'").

312. See *Dutton*, 713 N.E.2d at 15 (describing a situation in which the judge excluded the parties' attorneys from four-hour settlement meeting and permitted them to consult with their attorneys only after the meeting, even though one of the parties was himself an attorney and the other was not). See also *In re Judicial Complaint No. 91-9026*, Unreported Memorandum and Order (Chief Judge of the 4th Cir., Sept. 26, 1991) cited in JONA GOLDSCHMIDT & LISA MILORD, JUDICIAL SETTLEMENT ETHICS: JUDGES' GUIDE 44 (1996) (describing a situation in which a district judge told the complainant that she would receive nothing if she did not accept a settlement offer that had been made to her, and then convinced complainant's attorney to advise the complainant that she had to accept the settlement offer).

313. *Porter*, 981 F. Supp. at 1132. See also *Willgerodt v. Hohri*, 953 F. Supp. 557, 558 (S.D.N.Y.1997) (finding that the transcript of the proceeding showed that the magistrate "encouraged the parties to settle but did not unduly pressure or coerce" defendant who claimed that she was suffering from postpartum depression and was in an "unstable mental and emotional state").

314. See *Cottman Transmission Sys.*, 1993 WL 481555 at *3. ("[T]here were no threats . . .").

315. *Porter*, 981 F. Supp. at 1132.

or outspoken and thus could not have been coerced,³¹⁶ that the complaining parties failed to raise their concerns in a timely manner,³¹⁷ or that the complaining parties' agreement to the settlement can be found in black-and-white in the court record.³¹⁸ What is most striking about these cases is the outrage expressed by courts that a judge's evaluation of a party's case might permit that party to undo a settlement. In one case where the parties alleged that a magistrate's evaluation of their case coerced them into settling, the district court reviewing the magistrate's conduct wrote:

It would be a *travesty of justice* if Judges conducting settlement conferences participated in by parties who were not represented by counsel but who are competent businessmen would be permitted to walk away from a settlement agreement that was entered into voluntarily and was memorialized on the record

316. See *Cottman Transmission Sys.*, 1993 WL 481555 at *3 (describing a situation in which defendants were "three sophisticated business executives" who operated their own transmission repair businesses, owned a majority of the stock in their companies and were presidents of their companies). See also *Horton v. Hevia*, No. CIV. A. 86-3346-LFO, 1988 WL 12493 at *1 (D.D.C. Feb. 5, 1988) (finding that a plaintiff was not coerced by her attorney into settlement, and observing that the plaintiff "had been quite outspoken in the prosecution of her claim both in several conferences before the Magistrate and in correspondence with him . . . [s]he did not impress [the Magistrate] as a person who would have agreed to a settlement 'due to coercion of another person, or if she had felt coerced, would have refrained from informing the Magistrate, especially when asked directly.'"); *Dutton*, 713 N.E.2d at 18 (noting the complaining party is "a forty-eight-year-old well-educated individual").

317. See *Porter*, 981 F. Supp. at 1129; *Rosevear v. Rosevear*, 76 Cal. Rptr. 2d at 691; see also *Horton*, 1988 WL 12493 at *2 ("[I]t is more likely than not likely that [the plaintiff] could have obtained counsel if she had made known to the Magistrate her dissatisfaction with [her counsel during the settlement conference].").

318. See *Cottman Transmission Sys.*, 1993 WL 481555 at *3 ("As the record shows they each agreed to settle upon the terms and conditions which were memorialized in the Transcript."); *Rosevear*, 76 Cal. Rptr. 2d at 691.

The transcript at the settlement conference contains no hint of coercion or duress. To the contrary, Temporary Judge McCreadie took extraordinary pains to ensure that Carol's agreement was freely, knowingly and voluntarily given. He specifically asked her about the spousal support issue more than once. Carol was clearly and expressly given sufficient opportunity to complain or object. If she had truly felt coerced or pressured to agree at the time of the settlement conference, surely some indication would appear in the reporter's transcript.

Id. See also *Dutton v. Dutton*, 713 N.E.2d 14, 20 (Ohio Ct. App. 1998) (Waite, J. concurring) ("the record shows that appellant unhesitatingly [sic] entered into the settlement agreement. In fact, she swore in open court that she was agreeing to the settlement terms of her own free will and was not under any type of coercion.").

before the Judge who conducted the settlement conference in his court.³¹⁹

It is also noteworthy that, unless the complaining party can demonstrate that the judicial officer made an outright threat or imposed a sanction for failure to cooperate in reaching settlement, the courts are quite likely to belittle any claims of coercion.³²⁰ Indeed, courts often describe claims of coercion simply as the expression of

319. *Cottman Transmission Sys.*, 1993 WL 481555 at *4. See also *Porter*, 981 F. Supp. at 1131 n.4. The Magistrate Judge who presided over the settlement conference at which coercion was alleged expressed similar outrage when he stated:

that the settlement was reached 'after an extended settlement conference at which [attorney for Plaintiff's] client was present and after which time we went on the record. Everybody confirmed that there was an agreement. *I am not going to let people renegotiate the agreement. There was an agreement. There is an agreement, and I am going to enforce it.*'

Id. (emphasis added); see also *Horton*, 1988 WL 12493 at *2 (involving claim of coercion by plaintiff's attorney based in part on attorney's response that plaintiff should "get another attorney" or words to that effect" when she requested advice regarding whether to accept a settlement, and acknowledging that: "If this were a criminal case in which plaintiff was guaranteed by Constitution a right to adequate counsel, it might be appropriate to set aside a plea of guilty made in the circumstances described here. However, this is a civil case."). But see *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 670 (7th Cir.1989) (Manion, J., dissenting) ("where coercion does succeed in producing a settlement, it is unlikely that success will advance the cause of justice or the federal court's image as a neutral forum.").

320. There are a few exceptions under certain extreme circumstances, of course. In the case of *Dodds v. Commission on Judicial Performance*, 906 P.2d 1260, 1266-67 (Cal. 1996), the California Supreme Court affirmed the conclusion of the Commission on Judicial Performance that a judge's settlement-related behavior in four cases constituted "prejudicial conduct." In one of these cases, involving allegations of sexual harassment, the judge "abruptly and repeatedly interrupted the plaintiff," argued with the plaintiff, "pressed the plaintiff for a settlement figure," and in response to such settlement figure "threw up his arms and yelled, 'Get out, it will not settle.' The plaintiff cried at the time, and cried again when asked to recount the incident as part of this [disciplinary] proceeding." The court found these and other acts by the judge to be "clearly unjudicial" and bringing "disrepute upon the judicial office." The judge had argued that his "assertive" judicial 'style' enabled him to "effect settlements in difficult cases." *Id.* at 1270. But the California Supreme Court responded:

Petitioner's argument betrays an understanding of the judicial role that places too much emphasis on the efficient disposition of cases and too little emphasis on the dignity of litigants. The judicial system is not concerned only with the resolution of disputes. It also permits individuals and entities to participate in the process by which the state determines to exercise its power. Thus, due process affords a litigant a right to be heard, 'not only because he might contribute to accurate determinations, but also because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.' [cite omitted] Even an otherwise just settlement, if imposed summarily and coercively, is likely to disserve justice by leaving the parties with a lingering resentment of one another and the judicial system.

Id.

“buyer’s or seller’s remorse”³²¹ or “a ‘morning after’ effort to retreat from an agreement now thought to be ill-advised.”³²² As discussed earlier, the courts will not permit parties to rescind their agreement to settle, simply because they have a change of mind or now believe they made a poor bargain.

The range of “persuasive” tools available to judges and magistrates clearly is much broader than the range of tools available to mediators. Judges have the power to decide cases, assess penalties, and enforce their decisions. The blatantly coercive nature of these tools, coupled with the courts’ strong preference for settlement,³²³ may help to explain courts’ aversion to categorizing “mere” judicial evaluation or “mere” suggestions regarding settlement as coercive. This review of the courts’ handling of allegations of coercion suggests further, however, that courts (and the ethical boards they have appointed) will find it equally difficult (or perhaps even more difficult) to view a powerless mediator’s aggressive evaluation as coercive. If a trial judge’s evaluation and advocacy for a particular settlement are not viewed as coercive, it is hard to comprehend how even the evaluative interventions used by the mediator in *Allen v. Leal* could be deemed coercive. Under these circumstances, the choice of the drafting committees in Minnesota and Florida to protect self-determination by repeatedly asserting the importance of this principle and banning coercion appear well-meaning but doomed.

In order to protect self-determination in mediation, modifications must be made to the framework within which court-connected mediation operates. The next section will discuss and assess the effectiveness of several possible modifications. It will also identify the proposal that the author believes is most likely to be effective.

VI. MODIFYING THE FRAMEWORK WITHIN WHICH MEDIATION OPERATES IN ORDER TO PROTECT SELF-DETERMINATION AND PREVENT COERCION

In searching for an effective means of protecting self-determination, it is important to remember that high-pressure settlement tactics, or muscle mediation, are not effective in a vacuum. Rather, these tactics *derive* their effectiveness from the framework within which they operate. They are effective because: 1) self-determination

321. *Rosevear*, 76 Cal. Rptr. 2d at 696 n.5.

322. *Innis v. Innis*, 616 N.E.2d 837, 839 (Mass. App. Ct. 1993).

323. Admittedly, settlement also is the goal of many of the parties who participate in mediation.

is now understood quite narrowly as a party's power to choose to agree or not to agree to a settlement; 2) this narrowed vision is consistent with courts' and attorneys' understanding of parties' free will; 3) courts are eager to enforce settlements and have established a strong presumption that a settlement reflects the exercise of parties' free will (or self-determination); and 4) courts require a strong showing to overcome this presumption and generally perceive coercion only in its most blatant forms.

This suggests that in order to protect parties' self-determination in mediation—even in the narrower sense—something within this framework requires modification. What follows are several options, as well as reasons for favoring one of those options.³²⁴

A. *Clarifying the Definition of Self-Determination in Mediation*

As described earlier, mediation proponents have varying understandings of the core principle of self-determination. Part of the confusion is the result of unclear drafting of statutes, rules, and ethical guidelines. In some statutes, "mediation" is defined as facilitation of "settlement" while others define it as facilitation of "communication between the parties" in order to discuss settlement. Different definitions can lead to different perceptions regarding the appropriate goal

324. Some have suggested that it is inevitable that court-connected mediation will be transformed into the traditional settlement conference and equally inevitable that the unfamiliar concept of party self-determination will be transformed into the more familiar and comfortable concept of free will. Although the parties will lose the opportunity to play the central role in a court-connected dispute resolution process, settlement of their cases will still be achieved. If this co-optation of mediation is inevitable, it is pointless to worry about protecting a vision of self-determination that is unique to mediation. For clarity, however, such a court-connected process should be called a settlement conference, and parties and their attorneys should expect the neutral in this process to behave much as a judge or magistrate. See SHEILA PURCELL & HEATHER ANDERSON, *JUDGES GUIDE TO ADR 27* (1996), which includes both "mediation" and "settlement conference" as alternative dispute resolution process available in California. A settlement conference is described as:

[T]he parties meet with a neutral third party to explore settlement options. Settlement conferences are generally informal, and procedures vary from neutral to neutral and from dispute to dispute. Neutrals commonly use techniques similar to those used in mediation and neutral evaluation. However, in a settlement conference the neutral generally takes a more active role in trying to guide the parties to a resolution. Typically, the neutral makes an independent evaluation of the case based on knowledge of the law and prior experience and then seeks to persuade the parties to change positions and move toward a compromise settlement. The neutral does not render a decision; the ultimate decision regarding whether and how to resolve the dispute is left to the parties.

Id. See also Kovach & Love, *Mapping Mediation*, *supra* note 53, at 96 (proposing that mediators offer and distinguish between mediation and neutral evaluation services).

and role of mediators. Similarly, ethical guidelines seem to define "self-determination" solely as the ability of a party to decide to agree or not to agree—making this concept synonymous with free will—while many mediation proponents view self-determination as something more.

In response to the concern that the original rich vision of self-determination is being lost, there may be a need to clarify the definition of self-determination in statutes, rules and ethical guidelines. It must be made clear that self-determination is different than parties' free will and requires more protection than parties' free will has received in traditional negotiation or in judicially-hosted settlement conferences. Specifically, statutes, rules, and ethical guidelines regarding self-determination could be rewritten to include: the parties' active and direct participation, communication, and negotiation;³²⁵ the parties' identification and selection of the interests and substantive norms which should guide the creation of settlement options; the parties' creation of potential settlement options; and the parties' control over the final outcome. In other words, the definitions should reference the indicia of party empowerment.

There is reason to suspect, however, that these semantic changes are unlikely to have much effect³²⁶ and will lead to new questions of interpretation. For example, questions will arise as to how much direct participation by parties will be considered enough, or how the system will judge whether a mediator adequately solicited parties' interests and norms, or what will constitute adequate consideration of parties' interests and norms in the creation of a settlement. Ultimately, it is not clear how this redefinition of self-determination ought to be enforced.

325. With exceptions for cases in which direct participation is impossible (e.g., very large multi-party cases, labor-management negotiations, negotiations over treaties). Notably for many of these categories of cases, representatives participate in the mediation but the agreement is not final until ratified by those with authority.

326. I should note, however, that some mediators and directors of court-connected programs believe that, if courts understand the meaning of self-determination in mediation, they will enforce it more strictly with mediators (particularly if they are not attorneys) than they might with judges or magistrates presiding over settlement conferences. See Telephone Interview with Geetha Ravindra, Director of Dispute Resolution Services for the Administrative Office of the Supreme Court of Virginia (July 19, 1999) (on file with the author). The relationship between the courts and arbitrators (who often are not attorneys) provides a muddy precedent. Clearly, the courts defer to arbitrators and their decisions. On the other hand, arbitrators' awards have been overturned based on partiality under circumstances that would not have led to the reversal of a judicial decision.

These are significant concerns and lead to the conclusion that focusing on changing the language in statutes, rules, and ethical guidelines is unlikely to succeed in safeguarding self-determination.

B. *Clarifying the Definition of Mediation and Self-Determination
By Educating the General Public*

Frequently, mediators speak of the need for more extensive and more effective public education as a means to assure that disputants understand the mediation process.³²⁷ Such public education would incorporate a vision of self-determination. The concept of increased public education has tremendous appeal, particularly for mediators who are concerned about and wish to serve the public good. But it ignores the difficulty of reaching a mass audience and delivering a rather subtle message. To date, mediation has been institutionalized most effectively by reaching and responding to the needs of society's professional gatekeepers—lawyers, judges, counselors, therapists, ministers, managers—who then educate their clients, congregants, or employees. Obviously, these gatekeepers bring their own professional biases, which tend to influence the message.³²⁸ It is unlikely that public education regarding the meaning of self-determination will ever be able to reach a mass audience effectively. Therefore, this option also appears unlikely to safeguard self-determination.

C. *Clarifying the Relationship Between Self-Determination and
Mediator Evaluation By Educating Mediators*

Some mediators believe that the key to safeguarding self-determination lies in educating mediators in techniques designed to protect and nurture self-determination. This helps to explain the number of articles that have been written and sessions that are being taught regarding effective evaluation by mediators.³²⁹ The authors

327. See Kovach & Love, *Mapping Mediation*, *supra* note 53, at 95 (suggesting that courts and mediators educate parties about the facilitative nature of the mediation process and non-litigation-bound outcomes of mediation). See also Symposium, *State of the States: CARDOZO ONLINE J. CONFLICT RESOL.* (last visited Mar. 30, 2000) at http://staging-cardozo.mc.yu.edu/cojcr/state_edit2.html (using a "thought experiment"—the establishment of a high technology "Institute of Dialogue and Justice"—to suggest desirability of educating the larger public about mediation).

328. See Lande, *supra* note 62 at 154-55 (describing normative isomorphism).

329. See Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 62 (1996). See also Marjorie Corman Aaron, *Strategies, Tactics, and Techniques for Effective Evaluation: Conducting Risk Analysis with Parties*, General Skills Training Workshop at Conference of the American Bar Association Section of Dispute Resolution (Apr. 6-8, 1999); Barbara McAdoo, et

of these articles and the leaders of the workshops are quick to mention the importance of party self-determination in mediation. As a result, they advocate evaluation designed to “educate” the parties, not to coerce them into an agreement.

Unquestionably, mediators have much to learn from these articles and workshops, from research exploring the effect of particular evaluative tools,³³⁰ and from research and articles examining lawyers’ and parties’ decision-making.³³¹ By themselves, however, these workshops, articles, and research projects can do no more than establish an informed, aspirational standard for mediator conduct. They cannot regulate mediator conduct or be used directly to protect party self-determination. Thus, this third option by itself cannot effectively safeguard self-determination.

D. *Modifying the Presumption Against Coercion*

Currently, the courts prefer settlement and presume that a settlement agreement represents the expression of free will.³³² The

al., *Could We Discuss What’s Good About Evaluative Mediation?*, Training Program at Conference of the Heartland Mediators Association (Feb. 19, 2000).

330. See WISSLER, *supra* note 136.

331. See Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999); see also Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997); Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC’Y. REV. 123 (1980-81).

332. It seems quite likely that mediators who are required to testify will affirm the courts’ presumption. In one such case, *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d. 1110 (N.D. Cal. 1999), the court acknowledged this:

[A] mediator might have interests or motives that could affect the accuracy of his or her testimony in a setting like this. It is safe to assume that mediators would like their work to be productive or ‘successful,’ and that some mediators measure success by whether or not the parties reached a settlement. A mediator who so measures his success might have a vested psychological interest in testifying that the mediation process led the parties to enter a settlement contract. Moreover, it is reasonable to assume that at least some mediators want to perceive themselves as both sensitive and fair—so they would be unhappy if the court found that they had failed to understand that a party to the mediation was in acute or disabling emotional distress at the decisive juncture in the mediation, or was mentally incompetent to make the kinds of decisions and commitments the mediator called upon the party to make. Similarly, we should expect good mediators not to want a court to find that they had permitted a truly disabled party to sign a contract under duress, or to execute an agreement whose essentials they did not understand, or to be unfairly victimized by an obviously more powerful or sophisticated opponent. So when a party to the mediation claims not to have understood the document she signed, or to have been emotionally and or physically incapacitated when called upon to decide whether to enter into an

party alleging coercion bears the burden of producing enough evidence to persuade the court that the coercion occurred. A party's subjective feeling that he or she did something he or she did not really want to do is not enough. A fourth option for protecting a richer version of party self-determination is to modify the burden of proof that is borne by the party alleging coercion.³³³ First, the burden might be changed to require only that the party alleging coercion make a showing that satisfies a probable cause standard. A party's subjective feeling that he or she was coerced, coupled with evidence of a mediator's negative evaluation or strong support for a particular settlement proposal, might be able to meet this standard. If the court found probable cause, the court could require the mediator to prove either that he or she did not engage in coercive behavior or that the party's agreement was free and voluntary.³³⁴

This modification obviously would reduce the burden currently borne by parties alleging coercion, and it would acknowledge that mediators can engage in effective and coercive manipulation without making outright threats or imposing sanctions. However, this provision could have several very unfortunate consequences. Fewer people might be willing to serve as mediators if they realized that they might be forced to prove that they did not coerce parties into settlement. Mediation itself could become the source of much litigation.

agreement, or to have been overborne by her opponent and the circumstances, it would not be surprising if one of a mediator's reactions was defensive. A natural reaction by a mediator to such claims would be denial—an assertion that the mediator would never let something like that happen. Such a defensive reaction could infect testimony. It also is important to emphasize, however, that there is a substantial difference between possibility and actuality—that possibility and inevitability are quite different things.

Id. at 1127, n.22.

333. Reducing the burden of proof borne by a party alleging violation of self-determination and/or mediator coercion was the intent of some of the revisions contained in the 2000 Florida Rules. See Telephone Interview with Sharon Press, Director, Dispute Resolution Center, Tallahassee, Fla (Jan. 10, 2000) (on file with the author).

334. This is loosely patterned after the Florida courts' review of challenges to prenuptial and postnuptial agreements. If such an agreement is determined by the court to make unfair provision for the challenging spouse, the court adopts the presumption that the favored party engaged in fraud. The favored party is then required to make a showing proving that s/he did not engage in fraud. See *Casto v. Casto*, 508 So. 2d 330, 333 (Fla. 1987); see also *supra* note 265. Somewhat similarly, in the Older Workers Benefit Protection Act, Congress provided that if a worker waives her age discrimination rights and a dispute later arises, the party asserting the validity of the waiver bears the burden of proving that the waiver was knowing and voluntary. See *infra* note 368.

Finally, it is difficult to imagine how confidentiality could be protected under these circumstances.³³⁵ For all of these reasons, this option would probably not be most effective in safeguarding self-determination.

E. *Changing the Focus from Coercion to Undue Influence*

This article has primarily discussed the contract defense of coercion because Florida's and Minnesota's ethical guidelines have specifically banned coercion and because parties challenging agreements that have arisen in judicial settlement conferences and mediation generally have raised the defense of coercion. However, there is another, related contract defense which parties may use to void a contract, and this defense may apply quite well to mediation, particularly if mediators are considered to have a fiduciary relationship with the parties.³³⁶ This is the defense of "undue influence," and the use of this defense offers a fifth option for better safeguarding self-determination in mediation.

Undue influence is "unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that person will not act in a manner inconsistent with his welfare."³³⁷ Undue influence has been described as "a milder form of pressure than duress"³³⁸ or coercion, "overpersuasion,"³³⁹ and "high pressure, a pressure which works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion."³⁴⁰ The existence of a relationship or position of dominance, which helps to explain why a party's "apparent will . . . [was] in fact the will of the dominant person,"³⁴¹ distinguishes the defense of undue influence from the defense of coercion. No showing of use or threats of force is required.³⁴²

335. See *Olam*, 68 F. Supp. 2d at 1110.

336. See Nolan-Haley, *supra* note 136, at 825 n.235 (describing mediators as fiduciaries).

337. RESTATEMENT (SECOND) OF CONTRACTS § 177(1) (1979).

338. *Id.* ch. 7, introductory note.

339. *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 539 (Cal. Ct. App. 1966).

340. *Id.*

341. *Id.* at 540. See generally Lonnie Chunn, Note, *Duress and Undue Influence—A Comparative Analysis*, 22 BAYLOR L. REV. 572, 576-77 (1970).

342. It has also been noted that "overpersuasion is generally accompanied by certain characteristics which tend to create a pattern," including:

(1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side

Ultimately, the defense of undue influence “affords protection in situations where the rule . . . of duress give[s] no relief.”³⁴³

Mediators are supposed to honor, protect, and nurture parties’ self-determination. Mediation—and the mediator presiding over this process—is supposed to “empower” the parties, “enable” them to be “ultimate decision makers” and “satisfy” them.³⁴⁴ Under these circumstances, it would be reasonable for parties in a mediation to assume that their mediator has a type of fiduciary relationship with them. The existence of this relationship could help to explain how “the free play of a man’s will [might be] overborne”³⁴⁵ by a mediator’s repeated and insistent evaluation, even though the mediator made no threats and imposed no sanctions. All of this suggests that mediator codes of ethics might be revised to prohibit undue influence by the mediator and to make it clear that such undue influence will constitute a violation of party self-determination.

Despite the apparent suitability of the defense of undue influence and the difference between the showings required for coercion and undue influence, there is cause for concern that in practice, courts, and ethical boards will not distinguish between these defenses as they work to preserve settlement agreements, particularly if they find that the settlement agreements are not unreasonable. Indeed, the recent case of *Olam v. Congress Mortgage Co.*³⁴⁶ supports this contention. There, the plaintiff invoked the doctrine of undue influence as a defense to a settlement agreement reached in a court-connected mediation. The court required the plaintiff to prove a combination of “undue susceptibility in the servient person and excessive pressure by the dominating person” and found that even if the plaintiff’s version of events were true—that the mediation lasted from 9:00 a.m. until 1:00 a.m.,³⁴⁷ the end of the session was “hurried,”³⁴⁸ the plaintiff did not read or understand the settlement document,³⁴⁹ the plaintiff was in considerable pain and was very hungry,³⁵⁰ and the

against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys. If a number of these elements are simultaneously present, the persuasion may be characterized as excessive.

Odorizzi, 54 Cal.Rptr. at 541; see also *Olam*, 68 F. Supp. 2d at 1142.

343. RESTATEMENT (SECOND) OF CONTRACTS § 177, Comment and Illustration (b).

344. See Rosenberg, *supra* note 90, at 467.

345. *Odorizzi*, 54 Cal. Rptr. at 540.

346. 68 F. Supp. 2d at 1110.

347. See *id.* at 1142-43.

348. See *id.* at 1143.

349. See *id.*

350. See *id.*

plaintiff understood the mediator to raise and “accent” the point that “if she went to trial and lost she would lose both her homes and be unable to get them back”³⁵¹—her evidence nonetheless “would fall short of satisfying the test”³⁵² for excessive pressure.

In addition, the option of using an undue influence standard raises the likelihood of the same unfortunate consequences this article discussed when examining the possibility of modifying the burden of proof borne by parties alleging coercion. Mediation itself, and particularly the mediator’s actions or statements designed to persuade a party to change her position, will become the cause of litigation. And *Olam* demonstrates the difficulty of protecting the confidentiality of communications and conduct occurring during a mediation session when the court must determine whether a mediator (or other parties to a mediation) engaged in undue influence.³⁵³ Although this option—prohibiting undue influence by the mediator—has some appeal, its effectiveness is also questionable.

F. *Modifying the Presumption that a Mediated Settlement Agreement is Immediately Binding*

Many mediation advocates, including the author, have urged courts to treat settlement agreements arising out of mediation processes in precisely the same way that they treat settlement agreements arising out of unassisted negotiation between litigants and/or their attorneys. Many mediation advocates have bristled at additional requirements that legislators and courts have imposed upon mediated settlement agreements before they will be considered enforceable, such as requiring that mediated settlement agreements be in writing,³⁵⁴ requiring stipulations regarding the binding nature of the agreement,³⁵⁵ or requiring mediated settlement agreements to be signed by all parties *and* their attorneys.³⁵⁶ Perhaps many mediators have reacted in this way because they have perceived

351. *Olam*, F. Supp. 2d at 1142.

352. *Id.* at 1144.

353. See *Olam*, 68 F. Supp. 2d 1131-32 (finding that under California law, court may require mediator to testify regarding communications made in mediation session, despite mediation privilege).

354. See *Murphy v. Padilla*, 49 Cal. Rptr. 2d 722, 725 (Cal. Ct. App. 1996); *Ryan v. Garcia*, 33 Cal. Rptr. 2d 158, 162 (Cal. Ct. App. 1994).

355. See CAL. BUS. & PROF. CODE § 467.4 (West 1990); see also *Haghighi v. Russian-American Broad. Co.*, 577 N.W.2d 927, 929 (Minn. 1998) (applying section 572.35 of the Minnesota Statutes, which has since been amended).

356. See *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515, 517 (Fla. Dist. Ct. App. 1994).

these requirements as betraying skepticism—even outright distrust—by legislators, lawyers and judges. As Robert Dingwall recently observed, many mediation professionals have spent years eagerly “seek[ing] a niche in the shadow of the dominant profession [e.g., the legal profession], asking only to be recognized as offering a useful and legitimate supplement to its services.”³⁵⁷

Perhaps in their eagerness to attain this legitimacy, however, many mediators have too quickly assumed that the enforcement of mediated agreements must be made in the image of negotiated agreements. The potentially dangerous consequences of this assumption can be glimpsed in the fates of Mr. and Mrs. Allen in *Allen v. Leal*³⁵⁸ and Mr. and Mrs. Mijo in *Associates Financial Services Company of Hawaii, Inc. v. Mijo*.³⁵⁹ As shown *supra*, “self-determination” is not part of the lexicon regarding the enforcement of negotiated settlement agreements. The standards currently used to determine whether parties exercised their “free will” in reaching a negotiated agreement are likely to fall short in protecting the fundamental principle of self-determination. Therefore, it may be necessary to *embrace and advocate* for a protection that holds court-connected mediation to a higher standard than traditional negotiation.³⁶⁰ The protection that would be most effective is the imposition of a three-day non-waivable cooling-off period before mediated settlement agreements, whether oral or written, become binding. This is the sixth and final option this article will discuss to protect self-determination in court-connected mediation.

Cooling-off periods are not new. They are used in other contexts in which it has become clear that high pressure sales tactics are being

357. ROBERT DINGWALL, *Divorce Mediation as a Social Movement in SOCIOLOGY OF LAW, SOCIAL PROBLEMS AND LEGAL POLICY* 371 (1999).

358. See *supra* Part I.A.

359. See *supra* Part V.C.

360. There are some who will object that rather than holding mediation to a higher standard, we should change the standard that applies to traditional bilateral negotiations and negotiations occurring within judicially-hosted settlement conferences. See Telephone Interview with John Lande (Mar. 10, 2000). This suggestion is intriguing but beyond the scope of this article. In addition, there certainly is precedent for the concept that particular contexts can require more stringent ethical standards. For example, Rule 4.1 of the Model Rules of Professional Conduct may require attorneys to make more extensive disclosures in transactions to which federal securities laws apply than in sales of more common goods under the Uniform Commercial Code. See Peter Jarvis & Bradley Tellam, *A Negotiation Ethics Primer for Lawyers*, 31 GONZ. L. REV. 549, 553 (1995-96); James White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, AM. B. FOUND. RES. J. 926, 929 (1980).

used to persuade unwilling parties to “manifest” their “assent” to contracts. For example, in the home solicitation context, because legislators and regulators concluded that “in a significant proportion” of these sales, “consumers [had been] induced to sign a sales contract by high pressure techniques,”³⁶¹ they decided to provide consumers with a three-day cooling-off period during which they have the unilateral right to rescind their purchase agreements without penalty.³⁶² As one court explained: “no longer subject to the hypnotic power of the pitchman in his home, [the consumer] may act on sober second thought about the wisdom of making the purchase or hiring the services on the terms agreed to.”³⁶³

Cooling-off periods have been applied in other contexts as well. Many state legislatures have enacted “consumer-oriented”³⁶⁴ statutes providing either seven or fifteen-day cooling-off periods before agreements to purchase condominiums become binding.³⁶⁵ The U.S. Congress has imposed a twenty one-day cooling-off period before older workers may enter into agreements to waive age discrimination rights,³⁶⁶ “reflect[ing] concern about the conditions (of knowledge and free choice) surrounding the making”³⁶⁷ of such contracts. When such waivers are contained in settlement agreements, the older worker must be given a “reasonable period of time within which to consider the settlement agreement.”³⁶⁸ Cooling-off periods have even

361. U.C.C.C. § 2.501 cmt. 1 (1968).

362. See 16 C.F.R. §§ 429.1, 429.2 (1999); U.C.C.C. § 2.502(1) (1968); U.C.C.C. § 3.502(1) (1974); MO. ANN. STAT. § 407.710 (West 1990); NEB. REV. STAT. § 69-1603(1) – 1605 (1996); N.Y. PERS. PROP. LAW § 425, 427, 429 (McKinney 1992); N.C. GEN. STAT. § 25A-39(a) – 40 (1999).

363. *Donaher v. Porcaro*, 715 N.E.2d 464, 466 (Mass. App. Ct. 1999).

364. See *Enfield v. FWL, Inc.*, 607 A.2d 685, 689 (N.J. Sup. Ct. 1991).

365. See UNIF. CONDOMINIUM ACT (1977, amended 1980) § 4-108; N. M. STAT. ANN. § 47-7D-8 (A) (Michie 1978); FLA. STAT. ANN. § 718.503(1)(a)(1) (West 1988). These have been designed to “protect the public in general from high pressure . . . sales situations [b]y allow[ing] the purchaser to review or check out the contents of the prospectus or offering statement . . . to seek the advice of an attorney, or simply to reconsider the decision.” *Asbury Arms Dev. Corp. v. Florida Dep’t of Bus. Regulations*, 456 So. 2d 1291, 1293 (Fla. Dist. Ct. 1984).

366. The Act requires that older workers have at least twenty one days to consider the agreement and further provides that, after the execution of the agreement, the older worker may revoke the agreement for a period of at least seven days and the agreement does not become effective or enforceable until after the revocation period has expired. See 29 U.S.C. § 626(f)(1)(F)–(G) (1994).

367. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 432 (1998) (Breyer, J., concurring).

368. 29 U.S.C. § 626(f)(2)(B)(1994). Furthermore, if a dispute later arises, the party asserting the validity of the waiver bears the burden of proving that the waiver was knowing and voluntary. See *id.* § 626(f)(3).

been applied to particular types of mediation. In Minnesota, for example, a mediated settlement agreement between a debtor and creditor is not binding until seventy two hours after it has been executed and during this time either party may revoke the agreement.³⁶⁹

Cooling-off periods have been introduced when it is known that high pressure tactics are being used with some frequency, when there are concerns that the people subjected to such behavior are not truly exercising free choice in entering into agreements, and when it is not possible to regulate effectively the use of high pressure tactics. Under these circumstances, the introduction of a cooling-off period serves as an effective antidote to high pressure tactics, both because the cooling-off period protects those who have already been subjected to high pressure tactics *and* because the threat of easy rescission makes it less likely that rational actors will choose to use high pressure tactics (thus producing a “normative shift”³⁷⁰ in behavior). In the mediation context, both of these likely effects suggest that the introduction of a cooling-off period represents an effective means to protect the important principle of party self-determination.

It is fairly easy to anticipate the objections to this proposal. Some will argue that a mediator—even a mediator using “muscle mediation” tactics—cannot be compared to a “pitchman” in a home solicitation sale. These critics will point out that in the home solicitation context, consumers unexpectedly confront salespeople on their doorsteps and, as a result they have “not yet prepared [themselves] for the negotiation process or braced [themselves] for the possibility of high-pressure sales tactics. The consumer is therefore in a uniquely vulnerable position and is susceptible to an unwanted sale.”³⁷¹ In contrast, parties in a mediation generally plan for the process, are accompanied by their lawyers and travel to a courthouse or office building.

369. See MINN. STAT. § 572.35(2) (1988). See also FLA. FAMILY L. R. P. 12.740(f)(1) (providing for a ten day cooling-off period for agreements reached in family mediation, if attorneys do not accompany parties); CAL. INS. CODE § 10089.82(c) (West 2000) (providing a three day cooling-off period for insured to rescind mediated agreement reached regarding earthquake insurance disputes, provided that insured was not accompanied by counsel at the mediation and the settlement agreement is not signed by her counsel).

370. My thanks to Christopher Honeyman for his thoughts regarding the likelihood of this “normative shift.” See E-mail from Christopher Honeyman, President, CONVENOR Dispute Resolution Consulting, to Nancy Welsh (Aug. 10, 2000, 16:45:00) (on file with author).

371. *Brown v. Jacob*, 454 N.W.2d 226, 230 (Mich. Ct. App. 1990) (Griffin, P.J., dissenting). The reasoning in this dissent was later adopted in *Brown v. Jacob*, 476 N.W.2d 156, 157 (Mich. 1991).

Initially, these may appear to be worthwhile distinctions between the average court-connected mediation and the average home solicitation sale. Yet, we must remember that some mediators do not just view themselves as “educating” parties regarding their options; rather, these mediators describe their task as “selling” a settlement proposal.³⁷² The distinction between such a mediator and a “pitchman” may be difficult to draw. Further, we must remember that many litigants do not voluntarily travel to the courthouse or an office building for their mediation; they are ordered to participate in the process. Beyond this, mediation has often been described to these litigants as a process that will “promote mutual respect”³⁷³ while also “empowering” them and allowing them “to reach agreements that take into account important facts that are often ignored in judicial decision making.”³⁷⁴ These descriptions are unlikely to prepare parties for the tactics of the muscle mediator.

Another set of objections is likely to center on the practicality of this proposal. For example, there may be problems with a cooling-off period if a court-connected mediation occurs on the eve of trial. Of course, there are circumstances that demand exceptions to the general rule. In the home solicitation context, the cooling-off period does not apply if a buyer makes a written request for immediate delivery of goods or services and the seller substantially begins performance of the contract in good faith, and in the case of goods, they cannot be returned to the seller in substantially as good a condition as when the buyer received them.³⁷⁵ Similarly, here, if the parties enter into an agreement in mediation less than three days before trial, both parties immediately inform the court that the case has been settled and the court then removes the case from its trial calendar, perhaps the cooling-off period should not apply. Careful thought and drafting could respond to this concern.

Another exception may be required when the parties in a mediation are sophisticated businesspeople who have been involved in court-connected mediation several times, are represented by very able counsel, knowingly selected a mediator known for his “muscle

372. See Diane Smith, *Mediation: New Rules and New Rights*, 40 ORANGE COUNTY LAWYER 16, 47 (1998) (describing essential mediator skills, including “the ability to evaluate risks and sell solutions that may only be ‘better than we might otherwise have received’”).

373. 1992 FLA. RULES, *supra* note 144 at R. 10.060.

374. Rosenberg, *supra* note 90, at 467.

375. See U.C.C.C. § 3.502(5) (1974).

mediation” tactics, and wish to be bound immediately by any settlement agreement they reach. We may again refer to the home solicitation context for guidance in responding to these circumstances. There, legislators and regulators defined “home solicitation sales” to differentiate between the “types of transactions which have been the subject of particular abuse and those which have not.”³⁷⁶ They were less concerned about the likelihood of coercion if the buyer had already established a relationship with the seller by having a pre-existing open-ended account or had previously negotiated with the seller regarding the disputed transaction at the seller’s business establishment. Therefore, the cooling-off period did not apply in these cases.³⁷⁷ Similarly, it may be possible to craft reasonable exceptions to a cooling-off provision for court-connected mediation for the types of parties and circumstances described above.

By far, however, the most significant objection to the imposition of a cooling-off period is that it would permit parties to back out of agreements much more easily, possibly based only on buyers’ or sellers’ remorse. This could reduce mediation settlement rates³⁷⁸ which may, in turn, lead to reduced use of mediation. This concern squarely raises the challenge of “walking the talk” of self-determination. If self-determination—not settlement—is the fundamental principle underlying mediation, the benefits provided by this cooling-off proposal clearly outweigh the possible risks. First, a cooling-off period—unlike many of the other options discussed *supra*—is relatively straightforward, easily-administrable, and unlikely to invite litigation and/or intrusions upon the confidentiality of mediation.

Much more importantly, however, this option would reward mediators who view their role as primarily facilitative and penalize mediators who use techniques designed to force an agreement. Mediators who use facilitative techniques are more likely to build parties’ investment in and likely compliance with a settlement that they view as *theirs*, an expression of *their* self-determination. The

376. U.C.C.C. § 3.501 cmt. 2 (1974).

377. See U.C.C.C. § 3.501 and cmt. 3 (1974).

378. Although it is beyond the scope of this Article, it would be quite helpful to gather empirical data to determine the likelihood of this feared result. In Florida, where there is a ten day cooling-off period provided for agreements reached in family mediation if attorneys do not accompany the parties, anecdotal evidence and a paucity of reported appellate cases suggest that very few agreements have been rescinded. See E-mail from Sharon Press, Director of Dispute Resolution Center, to Nancy Welsh (September 5, 2000, 08:28:21) (on file with author). More data might be available in other contexts where mediated agreements are already subject to cooling-off periods or where mediated agreements require ratification before they become final (e.g., collective bargaining agreements, treaties). See *supra* note 369.

parties will be less likely to rescind their agreements during the cooling-off period, even if they may do so without penalty. Evaluation will be one of the tools in these mediators' toolboxes but they will have an incentive—keeping their settlements—to use this tool so that it supports (rather than threatens) party self-determination. The cooling-off period will discourage mediators' coercive use of evaluation, or muscle mediation, because these behaviors would be more likely to result in parties' repudiation of their agreements.

How might a cooling-off period influence the conduct of a mediator who is trying to help the parties reach settlement in a case like *Allen v. Leal*? Of course, answering this question requires pure speculation. Yet it is quite possible that the mediator who knows that the parties have a brief period of time within which they can rescind their agreement without penalty will spend substantial time probing for and developing an understanding of the concerns and goals of the grieving parents, the police and the representatives of the city. The mediator may ask the parties to communicate directly with each other regarding the impact of the young man's death upon their lives. The mediator will ask the parents, the police and the city to participate in crafting meaningful, creative settlement terms that respond to their most important concerns. If the mediator shares his evaluation of the parties' legal case, he will do so only in response to their request for this type of input and he will focus on educating the parties, rather than on persuading them to accept his view of the case. If he perceives that any party is entering into an agreement because he or she feels forced to do so, he will pause and explore this with the party. Ultimately, all of the mediator's interventions will be designed to build the parties' comfort with and investment in the settlement *they* reach in order to forestall the possibility of rescission during the subsequent three-day cooling-off period.

If a cooling-off period has the effects posited above, this option³⁷⁹ will be quite effective in reducing coercion and, as importantly, in protecting both the narrowed understanding of self-determination and the understanding that first inspired many to join the contemporary mediation movement.

CONCLUSION

Self-determination has been identified as the fundamental, core characteristic of the mediation process. Nonetheless, this article has

379. This could be complemented perhaps with education of mediators in how to use evaluation to aid party self-determination. See *supra* at Part VI.C.

attempted to demonstrate that the existence and meaning of self-determination cannot be taken for granted. Indeed, current trends in the institutionalization of court-connected mediation are challenging courts and mediation advocates to clarify the meaning of “self-determination” and to develop effective mechanisms to protect it. If mediation advocates and courts fail to develop these mechanisms, the concept of self-determination will become a largely irrelevant relic from the early days of the contemporary mediation movement. On the other hand, if courts and mediation advocates act now to define and protect self-determination, mediation may yet become a process that is qualitatively different and better than the traditional dispute resolution processes found within the courts. The days of romance for mediation advocates and the courts are not over³⁸⁰ but, as with most relationships, we must be willing to make the choices and undertake the work required to keep the flame alive.

380. See Menkel-Meadow, *Ethics*, *supra* note 17, at 408 (“The romantic days of ADR appear to be over”); Lela P. Love, *Mediation: The Romantic Days Continue*, 38 S. TEX. L. R. 735, 743 (1997) (“The romantic days of mediation continue because the paradigm it embodies, its underlying values and vision, are as compelling and laden with potential as ever.”).

APPENDIX

The Evolution of Florida's Rule On Party Self-Determination

1992 Version

Rule 10.060

- (a) **Parties Right to Decide.** A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties themselves.
- (b) **Prohibition of Mediator Coercion.** A mediator shall not coerce or unfairly influence a party into a settlement agreement and shall not make substantive decisions for any party to a mediation process.
- (c) **Prohibition of Misrepresentation.** A mediator shall not intentionally or knowingly misrepresent material facts or circumstances in the course of conducting a mediation.
- (d) **A Balanced Process.** A mediator shall promote a balanced process and shall encourage the parties to conduct the mediation deliberations in a non-adversarial manner.
- (e) **Responsibility to Nonparticipating Parties.** A mediator shall promote consideration of the interests of persons affected by actual or potential agreements who are not represented at the bargaining table.
- (f) **Mutual Respect.** A mediator shall promote mutual respect among the parties throughout the mediation process.

First Draft

Rule 10.031

- (a) **Decision-making.** Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties to reach informed and voluntary decisions while protecting their right to make decisions for themselves.
- (b) **Coercion Prohibited.** A mediator shall not coerce or improperly influence a party to make a decision or continue participating in mediation if the party is unwilling to do so.
- (c) **Professional or Personal Opinions.** A mediator shall not attempt to interfere with a party's self-determination by offering professional or personal opinions regarding the outcome of the case.
- (d) **Misrepresentation Prohibited.** A mediator shall not intentionally or knowingly misrepresent material facts or circumstances in the course of conducting a mediation.

- (e) **Postponement or Cancellation.** If a party is unable to exercise the right of self-determination for psychological, physical or other reasons, a mediator shall postpone or cancel mediation until such time as all parties are willing and able to resume.

Final Draft and Adopted Rule

Rule 10.310

- (a) **Decision-making.** Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination.
- (b) **Coercion Prohibited.** A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation.
- (c) **Misrepresentation Prohibited.** A mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting a mediation.
- (d) **Postponement or Cancellation.** If, for any reason, a party is unable to freely exercise self-determination, a mediator shall cancel or postpone a mediation.

The Evolution of Florida's Rule on Professional Advice or Opinions

1992 Rules

Rule 10.090

- (a) **Generally.** A mediator shall not provide information the mediator is not qualified by training or experience to provide.
- (b) **Independent Legal Advice.** When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel.
- (c) **When Party Absent.** If one of the parties is unable to participate in a mediation process for psychological or physical reasons, a mediator should postpone or cancel mediation until such time as all parties are able and willing to resume. Mediators may refer the parties to appropriate resources if necessary.
- (d) **Personal Opinion.** While a mediator may point out possible outcomes of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

First Draft - Option One

Rule 10.037

- (a) **General Prohibition; Exception.** A mediator shall not provide professional advice or opinions. However, a mediator may provide information about the process, draft proposals, point out possible outcomes of a case, and help parties explore options.
- (b) **Independent Legal Advice.** If a mediator determines that a party does not understand how an agreement affects legal rights or obligations, the mediator shall advise the party of the right to seek independent advice.

First Draft - Option Two

Rule 10.037

- (a) **Limitation on Information or Advice.** A mediator may provide information or advice that the mediator is qualified by training or experience to provide. However, in providing professional advice or information, a mediator shall not violate impartiality or self-determination of the parties.
- (b) **Independent Legal Advice.** If a mediator determines that a party does not understand how an agreement affects legal rights or obligations, the mediator shall advise the party of the right to seek independent advice.

Final Draft and Adopted Rule

Rule 10.370

- (a) **Providing Information.** Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.
- (b) **Independent Legal Advice.** When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.
- (c) **Personal or Professional Opinion.** A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.