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Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must be Changed

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ALTERNATIVE DISPUTE RESOLUTION HAS MORPHED INTO MEDIATION: STANDARDS OF CONDUCT MUST BE CHANGED

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INTRODUCTION

Alternative Dispute Resolution (ADR)[1] has been championed for years as a preferred alternative to litigation.[2] Commentators have praised the benefits of various ADR methods[3]—such as negotiation—where the parties "join . . . in a dialogue to educate one another about their needs and interests . . . and create a solution."[4] Other forms of ADR involve a third party. For example, in early neutral evaluation a disinterested person studies the case and provides an opinion as to its strengths and weaknesses.[5] In arbitration, a neutral person, usually chosen by the disputants, is given authority to collect information, listen to all parties, and decide the case.[6] Arbitration can be either binding or nonbinding.[7] In summary trial, a neutral person, usually hired by both parties, listens to all of the evidence in a trial atmosphere and decides the outcome. In facilitation, an impartial third party provides guidance to design and manage the communication process.[8] Finally, in mediation, a neutral third

1. *See* Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 903 (1998). "The use of . . . [mediation] has become so increasingly pervasive that the 'alternative' of ADR is . . . being dropped. . . ." *Id.* Instead terms such as "additional" or "appropriate" may be used. *Id.* Commentators have also stated that the term "ADR" is a misnomer. They recommend changing the acronym to DRA (Dispute Resolution Alternatives) because litigation should be considered only one of several methods to solve disputes. *See* S. Glenn Sigurdson, Speech at SPIDR Conference (Oct. 17, 1998).

2. *See, e.g.*, Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1086-87 (1990).

3. *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT, at xiii (2d ed. 1996). *See generally* WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED (1988).

4. KATHRYN GIRARD & SUSAN J. KOCH, CONFLICT RESOLUTION IN THE SCHOOLS: A MANUAL FOR EDUCATORS 138 app. A (1996).

5. *See* Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX L. REV. 669, 670, 673 (1997). A recent Florida Advisory Ethics opinion addressed whether mediation could be described "as a dispassionate evaluation by a neutral third party." *Id.* at 673 (citing Fla. Mediator Qualifications Advisory Bd., Ethics Op. No. 95-007 (1995)). The issue was raised by a postcard sized advertisement that stated: "When the survival of your client's case requires a dispassionate evaluation by a neutral party, consider the benefits of an early mediation." *Id.* (quoting Fla. Mediator Qualifications Advisory Bd., Ethics Op. No. 95-007 (1995)). The opinion stated "that mediation and early neutral evaluation . . . are two separate and distinct resolution processes" and that "[i]t is misleading for mediators to advertise that they are providing evaluation services under the guise of mediation services." *Id.*

6. *See* GIRARD & KOCH, *supra* note 4, at 135; *see also* Joan B. Kelly, *Serving as a Special Master: A Multi-Faceted Dispute Resolution Process*, THE FAM. DISP. RESOL. CONTINUUM (Ass'n of Fam. & Conciliation Courts, Madison, Wis.), Oct. 30, 1998, at 49 (unpublished conference program, on file with author).

7. *See id.*

8. *See* POLICY CONSENSUS INITIATIVE, STATES MEDIATING CHANGE: USING CONSENSUS TOOLS IN NEW WAYS 2 (1998). This report describes the use of mediated approaches by state

person encourages and facilitates dispute resolution.[9]

Despite these distinct choices, the lines between and among various types of ADR blur into one choice, mediation.[10] Perhaps when ADR was first introduced, its myriad varieties were viewed discretely; mediation was a single point of light. Now, however, mediation is as multifaceted as a kaleidoscope.

Commentator David Strawn recently asked, "Should we have more than one form of mediation? One in which adversary process and principle is applied, with the expectation that the mediator will provide an unenforceable award? Another in which all the reasons for mediation's historical success are emphasized. . . ."[11] I believe Strawn's question is, unfortunately, moot. Several types of mediation already exist.[12] I realize

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officials through case studies that involve negotiation, mediation, and work group facilitation. *See also* Janice M. Fleischer & Zena D. Zumeta, *Group Facilitation*, DISP. RESOL. MAG., Summer 1998, at 4 (describing group facilitation as a new way to address problems collaboratively and avoiding conflict).

9. FLA. STAT. § 44.1011(2) (1997) defines 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." FLA. STAT. § 44.1011(2)(1997). *See generally* John G. Mebane III, Comment, *An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts*, 71 N.C. L. REV. 1857 (1993) (describing the mediation process).

10. *See* MOORE, *supra* note 3 at 18-19; Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 8 (1996). The variety of mediator roles may include: (1) "opener of communication channels, who initiates communication," (2) "legitimizer, who helps all parties recognize the right of others to be involved in negotiations," (3) "process facilitator, who provides a procedure" and may chair the session, (4) "trainer, who educates novice, unskilled, or unprepared negotiators in the bargaining process," (5) "resource expander, who provides procedural assistance . . . and links them to outside experts," (6) "problem explorer, who enables people in dispute to examine a problem and look for options," (7) "agent of reality who helps" facilitate a "reasonable settlement and questions and challenges parties who have . . . unrealistic" expectations, (8) "scapegoat, who may take some of the responsibility or blame," and (9) "leader, who takes the initiative to move the negotiations forward." MOORE, *supra* note 3, at 18-19.

The current discussion of mediation centers on whether it should be evaluative or facilitative, or somewhere on a continuum between these two points. *See* John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1 (1997); Kimberlee K. Kovach, *What Is Real Mediation, and Who Should Decide?*, DISP. RESOL. MAG., 1996, at 5 (asking what is mediation, settlement brokering, and case evaluation, and deciding that additional research is needed); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1887 (1997); Riskin, *supra*, at 17; Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. 1165, 1169-70 (1997).

11. David Strawn, *Does a Mediator Have an Affirmative Duty to Assure That Consent to Settle Is Truly Informed*, JUST RESOLUTIONS, Jan. 1998, at 1, 7.

12. *See* MOORE, *supra* note 3, at 41. Moore describes five types of mediators. (1) The "Social Network Mediator" has "[p]rior and expected future relationship[s] to [the] parties [and is] tied into their social network;" thus, "promoting . . . long-term relationships between parties." *Id.* at 42. (2) The "Benevolent Mediator" "[m]ay or may not have a . . . relationship with [the] parties" and is

many in the mediation profession harbor serious reservations about recognizing the myriad faces of mediation. Nevertheless, we need to recognize that the morphing of ADR into mediation is occurring.

This morphing of ADR into mediation is caused by three parallel developments that have occurred over the last ten years. First, the term "mediation" was used generally as an all-purpose term for ADR. Second, mediation was co-opted by the legal profession, and third, there was a proliferation of types of mediation.

Because "mediation" may now reference any form of ADR, standards of professional conduct for mediators should be changed.[13] While any overarching standards must be very general to accommodate all facets of mediation, states should develop specific standards for discrete types of mediation. In addition, standards that control the mediation process are needed. Process standards may include: (1) identifying and naming the form of mediation being provided; and (2) ensuring that all parties involved in the mediation know exactly what type of mediation will be employed by having all parties sign an agreement before the mediation. Furthermore, both courts and professions that provide mediators should promulgate regulations for mediation.

After discussing the status of mediation in general and its co-option by the legal profession, this article will review four types of mediation programs found in Florida that exemplify the proliferation of mediation. They include circuit civil, family, county, and agricultural mediation. This article then reviews Florida's efforts to establish a comprehensive regulation of mediation practice. This article concludes that because of ADR's morphing into mediation, an overarching regulation will not be sufficient. Finally, this article recommends specific standards for discrete types of mediation, suggests process standards for mediation, and discusses professional regulations.

I. STATUS OF MEDIATION

The morphing of ADR into mediation is evident in the general use of the term "mediation."[14] For instance, on an episode of the program

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generally impartial. *Id.* (3) The "Administrative/Managerial Mediator" "[g]enerally has [an] ongoing authoritative relationship[] with the parties [both] before and after [the] dispute; thus often "[h]as authority to advise, suggest, or decide." *Id.* (4) The "Vested Interest Mediator [h]as either a current or expected future relationship;" thus "[s]eeks solution[s] that meet[] mediator's interests and . . . those of a favored party." *Id.* (5) The "Independent Mediator" is "neutral . . . regarding relationships;" thus seeks a "solution developed by the parties" that is jointly acceptable. *Id.*

13. *See, e.g.*, Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 706 (1994).

14. *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 15-20 (1994) (stating there

Seinfeld, Kramer and Elaine were arguing over a bicycle.[15] Jerry suggested "mediation," and Elaine and Kramer agreed to "mediate."[16] Instead of visiting a neutral facilitator, Elaine and Kramer visited Newman, and Newman, acting as an arbitrator, decided their dispute.[17]

A recent article in *Time* magazine stated that, "[a] tough mediator might be able to force the necessary concessions."[18] *Time* appeared to reference an arbitrator rather than a neutral facilitator. Kofi Annon, Secretary General of the United Nations recently mediated a crisis with Iraq over U.N. weapons inspection.[19] Mistaking a mediator for a hearing officer, a local newspaper ran a headline stating, "Mediator will hear issue over turnpike route."[20] Another, similarly inaccurate headline in our paper read, "Mediator to force union, U S West to talk."[21] When the City of Gainesville recently hired a "mediator" to help settle a dispute between a bar owner and the city over an ordinance banning nudity, the "mediator" represented the city and negotiated with the bar owner, rather than serving as a neutral facilitator.[22]

Initially, mediation was defined as facilitation of dispute resolution by a neutral third party.[23] The undefined word in the definition is "facilitation." Does facilitation mean that the neutral party—the mediator—merely conveys information from party to party? Or can the

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are many ways to describe mediation, including facilitative, evaluative, and transformative). Mr. Bush has been very interested in the conflict between promoting party self-determination through facilitative mediation and employing directive interventions. *See* Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 44-45; *see also* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997) (listing and discussing the problems of evaluation in mediation).

15. *See Seinfeld: The Seven* (NBC television broadcast, Feb. 1, 1996).

16. *See id.*

17. *See id.*

18. Massimo Calabreisi, *Kosovo Smolders*, TIME, May 11, 1998, at 37, 38.

19. *See* Tom Masland, *Hardly a Hero's Welcome*, NEWSWEEK, May 18, 1998, at 45; *see also* Moore, *supra* note 3, at 50 (stating that "the clearest examples of vested interest mediators . . . are . . . found in the international arena," using Kissinger during the "Arab-Israeli disengagement negotiations in August 1975" and Carter in the Camp David Egyptian-Israeli peace talks as examples).

20. Bruce Ritchie, *Mediator Will Hear Issue Over Turnpike Route*, GAINESVILLE SUN, Jan 26, 1997, at 1B.

21. *Mediator to Force Union, U S West to Talk*, GAINESVILLE SUN, Aug. 23, 1998, 3A, col. 6. The article goes on to say that "[a] federal mediator ordered US West and its employees' union to return to the bargaining table as the strike affecting the phone company's service in 13 states enters its second week." *Id.*

22. Interview with Paula DeLaney, Mayor of Gainesville, Florida, in Gainesville, Fla. (Sept. 20, 1998). *Cf.* BARBARA GRAY, COLLABORATING 165 (1989) (stating that "mediators . . . are typically not totally disinterested parties").

23. *See, e.g.*, FLA. STAT. § 44.101 (Supp. 1994).

mediator be evaluative[24] or provide information[25] about such things as alternative programs, existing statutes, or child support guidelines? Can the mediator give advice regarding the status and probable outcome of the case?

The issue of what "facilitation" includes is highly controversial, and has been debated by scholars on all sides.[26] Commentator Leonard L. Riskin identified the "bewildering variety of activities that fall within the broad, generally-accepted definition of mediation."[27] Riskin discussed the confusion and contention surrounding the issue of evaluative versus facilitative mediation.[28] He found the confusion "especially pernicious because many people do not recognize it; they describe one form of mediation and ignore other forms, or they claim that such forms do not truly constitute mediation."[29] Riskin developed classifications based on the goals of mediation and the mediator's activities.[30] Thus, he developed a continuum with strategies and techniques that promote negotiation on one end and strategies and techniques for evaluation on the other.[31]

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24. *See* Moberly, *supra* note 5, at 670. Professor Moberly discusses the spectrum of commentators, including Dean James Alfini, who "states that lawyer-mediators should be prohibited from offering legal advice." *Id.* at 670. Professors Kimberlee Kovach and Lela Love find "[e]valuative mediation is an oxymoron." *Id.* (citing Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is an Oxymoron,* 14 ALTERNATIVES TO HIGH COSTS LITIG. 31 (1996)). On the spectrum's opposite end are commentators who support evaluation. Mediator Gerald Clay argues that effective mediation requires mediator analysis of each party's position. *See id.* Professor Moberly concludes that evaluative mediation should not be "considered unethical under all circumstances, with all parties, and in every mediation." Moberly, *supra* note 5, at 671.

25. *See* Moberly, *supra* note 5, at 675. Professor Moberly first distinguishes between giving "legal advice" which is usually not permitted, and giving "legal information" which is generally allowed. *Id.* Florida rules provide that a mediator may give "information that a mediator is 'qualified by training or experience to provide.'" *Id.* at 676 (quoting FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS Rule 10.090 (1992)).

26. *See* Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation,* 33 WILLAMETTE L. REV. 703 (1997); Riskin, *supra* note 10, at 9.

27. *See* Riskin, *supra* note 10, at 8.

28. *See id.* (citing James Alfini & Gerald S. Clay, *Should Lawyer-Mediators Be Prohibited from Providing Legal Advice or Evaluations?,* DISP. RESOL. MAG., Spring 1994, at 8). Clay argues that effective mediation "almost always requires some analysis," but Alfini disagrees arguing that "legal advice or evaluations" "should be prohibited." *See id.*

29. *Id.* (finding that proponents of one mediation orientation sometimes disdain other orientations) (citing Susan S. Sibley, *Mediation Mythology,* 9 NEG. J. 349, 352 (1993)).

30. *See id.* at 17.

31. *See id.*; *see also* Jeffrey Krivis & Barbara McAdoo, *A Style Index for Mediators,* 15 ALTERNATIVES TO HIGH COSTS LITIG. 164, 164-68 (1997) (providing a test that will help the mediator classify the mediator's style); Ellen Waldman, *Seeking Clarity for Ethical ADR Practice,* 15 ALTERNATIVES TO HIGH COST LITIG. 137, 137 (1997) (stating there are "numerous dichotomous approaches to . . . mediation [such as]: bargaining vs. therapeutic, directive vs. passive, broad vs. narrow, aggressive vs. regular, settlement vs. transformative, and evaluative vs. facilitative").

The director of the Iowa Agricultural Mediation Program suggests an additional mediator duty.

Professor Robert Baruch Bush echoed this position in a proceeding sponsored by the *Ohio State Journal of Dispute Resolution.*[32] He found a growing body of research "on the actual practice of mediation" suggests, that "despite . . . [its] image . . . reflecting self-determination and a . . . humanistic face, actual practice follows more of a problem-solving, . . . technocratic approach, . . . [which is] a directive approach to the process".[33]

II. LAWYER CO-OPTION

Mediation has been co-opted by legal advocates and become part of the adversary process, often providing "liti-mediation" where lawyers see mediation as merely a step in the litigation process.[34] A colleague of mine recently "won" a mediation. A recent "Practice Tips" in *Just Resolutions*, the publication of the Dispute Resolution Section of the American Bar Association was entitled, "Advocacy in Mediation: Ten Pointers for Success."[35] An advertisement in a subsequent issue invited readers to a one-day program that would teach them "How to Win With Mediation."[36] The presentation included: "Mediation Advocacy: Preparation and Performance for You and Your Client . . . Heavy Hitters—Learn the Secrets of Making ADR a Success; and Hot Ethical Issues Faced by Advocates in Mediation."[37] Courses in mediation advocacy are offered.[38] Finally, the Dispute Resolution Section of the American Bar Association is "developing a moot court competition for advocates in mediation!"[39]

He believes mediators should encourage agreements that the parties will comply with after the mediation. *See* Interview with Mike Thompson, Director of Iowa Agricultural Mediation Program, in Atlanta, Ga. (July 9, 1998).

32. *See* James Alfini et al., *What Happens When Mediation Is Institutionalized?: To the Parties, Practitioners and Host Institutions*, 9 OHIO ST. J. OF DISP. RESOL. 307, 309 (1997).

33. *Id.* at 310.

34. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841 (1997).

35. David Hoffman, *Advocacy in Mediation: Ten Pointers for Success*, JUST RESOLUTIONS, Oct. 1997, at 8. The ten pointers include: (1) Design the process by carefully selecting the mediator, and scheduling properly; (2) Prepare; (3) "File a brief position paper with the mediator;" (4) "Protect confidentiality;" (5) "Set a friendly, cooperative (but persuasive) tone;" (6) "Ask questions;" (7) "Principled negotiation-focus on interests, not positions;" (8) "Documents and exhibits speak louder than words. (Show the mediator the key document);" (9) Let the client talk - but decide in advance whether in joint or caucus sessions;" and (10) "Bring a draft settlement agreement to the mediation and get it signed." *Id.*

36. *See* JUST RESOLUTIONS, Jan. 1998, at 5.

37. *Id.*

38. *See* Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1615-16 (1997).

39. Kimberlee K. Kovach, *New Ethics for the New Lawyer: Fitting the Standards to the Process*, DISP. RESOL. MAG., Winter 1997, at 2.

In Florida, a mediation is called a "hearing"[40] or an "arbitration."[41] Michigan has an interesting form of evaluative mediation.[42] A panel of three attorneys reviews the case and determines a settlement value.[43] If the plaintiff does not accept this value and the case goes to trial, the judgment must be ten percent higher than that recommended by the panel.[44] If it is less than ten percent, the plaintiff must pay the other party's costs.[45] Ohio now offers "Super Mediation," where a magistrate not assigned to the discrete case undergoing mediation assists the parties in making informed decisions. The magistrate may opine, "If I were hearing this case, based on what I have heard, I would decide . . . ."[46] In California, mediation-arbitration is used; if the parties do not reach agreement, the mediator makes a recommendation to the court.[47] Similarly, in New York, citizen dispute centers may use either mediation or mediation-arbitration.[48] Thus, by employing arbitration or mediation-arbitration as mediation, the legal process has propelled mediation beyond the evaluative-facilitative continuum.[49]

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40. Mediation is called a "hearing" in Jacksonville, Florida. Interview with Claudia Wright, in Orlando, Fla. (June 18, 1998). Ms. Wright mediates for the State Attorney's Office in Jacksonville. She described a process where the "hearing" officer/mediator conducts victim-offender mediations and provides participants with a list of solutions from which the participants can choose. *See id.*

41. In the First District State Attorneys office, juvenile mediations are called arbitrations. Interview with Marci Levin Goodman, Assistant State Attorney for the First District of Florida, in Gainesville, Fla. (Sept. 17, 1998).

42. *See* MICH. R. CIV. P. 2.403-.404.

43. *See id.* at 2.403 (D), (K).

44. *See id.* at 2.403 (O).

45. *See id.*; conversation with Doug VanEpps, Director, Community Dispute Resolution Program, Mich. (June 29, 1998).

46. Teresa M. Kosier & Cynthia A. Schuler, *The Process of a "Super-Mediation,"* THE FAM. DISP. RESOL. CONTINUUM (Ass'n of Fam. & Conciliation Courts, Madison, Wis.), Oct. 30, 1998, at 107, 109 (unpublished conference program, on file with author). Florida's proposed committee notes for rule 10.031 provide in part: "On occasion, a mediator may be requested to serve as a decision-maker. Compliance with this request results in a change in the dispute resolution process impacting self-determination, impartiality, confidentiality, and other ethical standards. Before providing decision-making services, therefore, the mediator shall ensure that all parties understand and consent to those changes." (quoting FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS Rule 10.031 (1992)).

47. *See* Alfini, et al., *supra* note 32, at 311.

48. *See id.*

49. *See, e.g.*, James Alfini, *Trashing, Bashing and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66-73 (1991) (exploring mediation strategies); Kenneth Kressel et al., *The Settlement Orientation vs. The Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67, 72, 75 (1994) (setting out "settlement-oriented" mediation style and "problem-solving" style for custody mediation); Susan Sibley & Sally Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 19 (1986) (suggesting "bargaining" and "therapeutic" styles of mediator behavior).

Lawyers are often involved in mediation. The practice of law is a business and this affects their involvement. Professor Jonathan Hyman writes that lawyers must be fully involved in changes to the mediation process.[50] Professor Hyman also noted that lawyers reported that seventy percent of the cases they experienced settled by positional, not problem-solving methods.[51] He points out that there is substantial risk that lawyers will keep replicating the same things they have always done and take control of the new system.[52]

Just how do lawyers approach the mediation process? There are no clear guidelines.[53] Commentator Carrie Menkel-Meadow argues that there has been a "'co-option of some of the original goals of ADR with strategic use by advocates seeking to maximize client gain' or by courts [wishing] to clear their dockets."[54] Specifically, although mediation offers an "interest-based collaborative approach,"[55] settlements may be "entered into coercively and secretly without the protection of the rule of law."[56]

Zealous advocacy may not mix well with the concept of creative solutions and the goal of joint rather than individual gains. Good lawyering tactics may damage the potential of resolution in mediation.[57] Scholars argue that advocates and other parties participating in this new process were expected to automatically change their behavior to conform to the new process.[58] Thus, the behavior of lawyers co-opted mediation and

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50. *See* Alfini et al., *supra* note 32, at 323.

51. *See id.* at 324.

52. *See id.*

53. *See* Frank Evans & Teresa Stanton Collett, *The Lawyer's Duties and Responsibilities in Dispute Resolution,* 38 S. TEX. L. REV. 375, 376 (1997) (noting that lawyers "are among those involved in creating [] new methods and procedures" for mediation); Kimberlee K. Kovach, *Good Faith in Mediation-Requested, Recommended, or Required? A New Ethic,* 38 S. TEX. L. REV. 575, 579 & n.30 (1997) (citing ERIC R. GALTON, REPRESENTING CLIENTS IN MEDIATION at vii-xi (1994) as a source providing help to trial lawyers in the mediation process). *See generally* JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS (2d ed. 1996) (focusing on the role of lawyers in alternatives to litigation, such as negotiation, mediation and arbitration); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities,* 38 S. TEX. L. REV. 407 (1997) (discussing at length the problems of adversaries and mediation); David Plimpton, *Mediation of Disputes: The Role of the Lawyer and How Best to Serve the Client's Interest,* 8 ME. B.J. 38, 40-44 (1993) (discussing the evolving role of ADR and providing a brief overview of various ADR options to help focus the role of the lawyer in mediated dispute).

54. *See* Robert Schuwerk, *Reflections on Ethics and Mediation,* 38 S. TEX. L. REV. 757 (1997) (quoting Menkel-Meadow, *supra* note 53, at 418).

55. Kovach, *supra* note 53, at 581.

56. Schuwerk, *supra* note 54, at 758.

57. *See, e.g.,* Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith,* DISP. RESOL. MAG., Winter 1997, at 9; Edward F. Sherman, *"Good Faith" Participation in Mediation: Aspirational, Not Mandatory,* DISP. RESOL. MAG., Winter 1997, at 14.

58. *See* Kovach, *supra* note 53, at 579-80.

hastened the morphing of ADR into mediation.

III. PROLIFERATION OF TYPES OF MEDIATION

Many different issues are mediated. Because Florida is a national leader in the development of mediation, I will use Florida as a model to demonstrate mediation's proliferation. Mediation has been utilized by Florida's courts for over twenty years.[59] Through July 1997, at least 9761 individuals have completed the Supreme Court of Florida's "certified mediation training programs."[60] The Supreme Court of Florida has "certified 1858 county mediators, 1633 family mediators, and 1903 circuit mediators."[61] More than 76,000 mediations were held in Florida in 1996.[62] Discrete types of mediation found in Florida include circuit, family, county, and agricultural.[63] These are discussed below.

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59. *See* Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1042 (1992-93). Mediation was used to resolve "minor" criminal and civil cases in the 1970s. *See* Alfini et al., *supra* note 32, at 50-51. In 1975, Florida's first court-connected mediation programs were established to resolve community disputes. *See* Press, *supra*, at 1042.

60. *See* SHARON PRESS ET AL., FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM, at v (10th ed. 1997).

61. *See id.*

62. *See id.* at vii.

63. *See id.* For discussion of agricultural mediation, see *infra* notes 73-88 and accompanying text. Another type of mediation is the Citizen Dispute Settlement (CDS) Program which is "connected to state attorneys' offices, the courts, private non-profit corporations, or local bar associations." *See* PRESS ET AL., *supra* note 60, at 44. Referrals may "come from a variety of sources including law enforcement agencies, state attorneys' offices, the courts or individuals." *Id.* The parties do not have to pay a court filing fee to bring a case to a CDS. *See id.* Most parties do not employ attorneys for CDS mediation. *See id.* Furthermore, "[t]here are no formal educational or experiential requirements for CDS mediators." *Id.* They are "generally volunteers . . . from varied backgrounds." *Id.*

Mediation is also used in dependency mediations which

> provide an opportunity for the parents, social services counselors for the Department of Health and Rehabilitative Services, guardians ad litem, attorneys for parents and agencies, and other key participants (such as relatives) to engage in a facilitated discussion about the case. There are no restrictions on the . . . issues . . . [that may] be addressed during a mediation and parties may come to either partial or full agreement on [issues such as:] child placement; custody; terms of a case plan; visitation; [abuse or neglect determinations;] medical or therapeutic treatment; child support; independent living for teens; and long term foster care.

Id. at 109. Mediators must complete a 40-hour course certified by the Supreme Court of Florida. *See id.* at 206.

A. *Circuit Civil Mediation*

In Florida, circuit civil mediation is used for non-domestic civil cases that have a value over $15,000.[64] These cases usually involve multiple parties who are represented by attorneys.[65] Participants may choose a mediator, or have the court choose a certified mediator, who must either be a member of the Florida Bar for a minimum of five years, or a retired judge.[66] In addition, "certified circuit civil mediators must complete a . . . [forty-]hour training course certified by the Supreme Court of Florida and complete a mentorship" program.[67]

Topics mediated may include: auto negligence, condominium issues, contracts, personal injury damages, equitable relief, lien/mortgage foreclosure, product liability, professional malpractice, and eminent domain.[68] The wide variety of issues invites a wide variety of mediation styles. Attorneys often prefer an evaluative mediator who will give an opinion about the value or outcome of the case.

B. *Family Mediation*

Mediation is especially helpful in family disputes because of the unique nature of family law. Family matters involve both the law and individual personal feelings.[69] An increase in the number of divorces[70] has caused states to seek methods other than litigation to solve family disputes involving child visitation and financial matters.[71] The mediation process

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Mediation may also be incorporated into statutes and required for other issues including mobile homes, worker's compensation, environmental matters, and land use.

64. *See id.* at 91.

65. *See id.*

66. *See id.*

67. *Id.* The mentorship consists of two circuit mediation observations and the conducting of two supervised circuit mediations. *See id.*

68. *See id.* at 102-05. The parties are free to select "a mediator who does not meet the certification requirements . . . but who . . . is . . . qualified by training or experience to mediate" the issues of a particular case. FLA. R. CIV. P. 1.720 (f)(1)(B) (1998).

69. *See* Anne Milne, *Mediation—A Promising Alternative for Family Courts*, 42 JUV. & FAM. CT. J. 61, 61 (1991).

70. The number of divorces per 1000 of population was 3.5 in 1970, 5.3 in 1981, and 4.7 in 1992. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES, 64, tbl. 80 (112th ed. 1992).

71. *See* Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L. J. 272, 272 (1992). "California established court-connected conciliation services in 1939." Milne, *supra* note 69, at 62. "The initial focus . . . was to provide marriage counseling aimed at reconciliation." *Id.* "In 1974, O.J. Coogler, an attorney and marriage and family counselor, established the Family Mediation Center in Atlanta, Georgia." *Id.* "Coogler helped popularize the . . . [concept] of divorce mediation" in his 1978 book, *Structured Mediation in Divorce Settlements:*

helps to reduce both the parties' hostility and the children's trauma from the divorce process.[72] This is particularly significant when the parties are parents and will remain in contact after the marital relationship ends.[73]

Individuals may be a Supreme Court of Florida Certified Family Mediator if they possess "a master's degree or doctorate in social work, mental health, behavioral or social science," or qualify as "a physician certified to practice psychiatry," or are "an attorney or certified public accountant licensed to practice in any U.S. jurisdiction."[74] They must have "at least four years practical jurisdiction."[75] The mediator must also "complete a minimum of . . . [forty] hours in a family mediation training program [that is] certified by the Supreme Court of Florida."[76]

Topics mediated include modification of child support, equitable distribution of marital assets, spousal support, child custody and visitation, child support, domestic violence, and attorney's fees. Parties are often not represented by attorneys. Family law mediation rules designate several professions that may mediate, and each profession brings a unique background of experiences and values to mediation.

C. *County Civil Mediation*

In Florida, county mediation programs receive case referrals for cases valued at $15,000 or less.[77] "Generally, the parties mediate without attorneys;" nevertheless, the small claims court "rules allow for attorneys to appear without their clients."[78] County court mediators are usually volunteers who come from all walks of life. To be certified, mediators must complete a minimum of [twenty] hours in a training program certified by the Supreme Court of Florida, "be of good moral character, and

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A Handbook for Marital Mediations. See id.; see also Charlene E. Depner et al., *Report 4: Mediated Agreements on Child Custody and Visitation,* 33 FAM. & CONCILIATION CTS. REV. 87 (Jan. 1995) ("describ[ing] mediation clients and the agreements that they form in court-annexed mediation," and stating that "clients and outcomes are far too diverse to conform to simplistic generalizations"); Joan B. Kelly et al., *Mediated and Adversarial Divorce: Initial Findings from a Longitudinal Study,* DIVORCE MEDIATION RES. & ANALYSIS, 453, 466 (reporting a range of settlement rates from 22-97%, with most falling between 40% and 70%).

72. *See* Milne, *supra* note 69, at 64. Improved relationships were noted for almost one-third of the participants in the Denver Custody Mediation Project. *See id.*

73. *See* Gary W. Paquin, *The Development and Organization of Domestic Relations Mediation in a Multi-Function Mediation Center in Kentucky,* 81 KY. L. J. 1133, 1133 (1992-93).

74. PRESS, ET AL., *supra* note 60, at 65.

75. *Id.*

76. *Id.* Additional requirements include "observ[ing] two family mediations conducted by a certified family mediator and conduct[ing] two family mediations under the supervision and observation of a certified family mediator . . . and be[ing] of good moral character." *Id.*

77. *See id.* at 7.

78. *Id.*

complete a mentorship program."[79] Issues mediated include: assault and battery, employer-employee disputes, auto nuisance cases, theft, worthless checks, trespass, neighbor disputes, minor criminal matters, juvenile cases, breach of contract, landlord/tenant, auto repair, consumer cases, minor property damage, and recovery of money or property.[80]

D. *Florida Agricultural Mediation Service*

Florida is the most recently certified of twenty states to have a United States Department of Agriculture Certified Agricultural Mediation Program.[81] Agricultural mediation was created by Congress[82] in response to the plight of farmers.[83] The Secretary of Agriculture was directed to

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79. *Id.* The mentorship program consists of "observ[ing] four county court mediation sessions conducted by a certified mediator and conduct[ing] four county court mediation sessions under the observation of a certified mediator." *Id.*

80. *See id.* at 27.

81. *See Background Information: Agricultural Mediation Program,* (Farm Serv. Agency, U.S. Dep't of Agric., D.C.), June 1998, at 3 [hereinafter BACKGROUND INFORMATION]. Florida was granted certification in 1997. The other certified states are: Alabama, Arkansas, Arizona, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, Wisconsin, and Wyoming. *See id.* Texas, Oregon, and New York previously had certified programs. *See* Interview with Chester A. Bailey, Director of Agricultural Mediation Programs, Atlanta, Ga. (July 9, 1998).

82. *See* 7 U.S.C. §§ 5101-5106 (Supp. 1998).

> Section 502 of the Agricultural Credit Act of 1987 (P.L. 100-233) authorized the Secretary of Agriculture to help States develop the Department of Agricultures's (USDA) Certified State Mediation Programs and participate in those programs.
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> . . . .
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> The . . . appropriation of $7,500,000 for each of the fiscal years through 1991, with matching grants limited to the lesser of 50% or $500,000 each year. . . . Actual appropriations have been less than the authorization.
>
> The Food, Agriculture, Conservation and Trade Act of 1990 (P.L. 101-624) extended this authority through FY 1995. The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (P.L. 103-353) further extended this authority through FY 2000.
>
> The Agriculture Credit Improvement Act of 1992 (P.L. 102-554) raised the matching grant level from 50 percent to 70 percent.

See id., Background Information, at 1.

83. *See* Jeffrey R. Kayl, Student Paper, *Farm Credit Amendments Act of 1985: Congressional Intent, FCA Implementation, and Courts' Interpretation (and the Effect of Subsequent Legislation on the 1985 Act)*, 37 DRAKE L. REV. 271, 280-82 (1987-88); *see also* Chester A. Bailey, *The Role of Mediation in the USDA*, 73 NEB. L. REV. 142 (1994) (providing an extensive overview of agricultural mediation).

encourage states to develop mediation programs.[84] The issues that can be mediated include agricultural loans, wetland determinations, compliance with farm programs, agricultural credit, rural water loan programs, grazing on National Forest System lands, pesticides, and any other issue that the Secretary of Agriculture considers appropriate.[85] Although in several states mediation is mandated by state statute,[86] Florida has no such statutory provision.

States providing agricultural mediation differ on the definition of mediation. Some states use the USDA mediation grant money for pre-mediation service programs.[87] Kansas employs an extensive support network and "a unit of the Kansas Board of Agriculture helps the farmers prepare for mediation."[88] North Dakota assigns "negotiators" to help farmers prepare for mediation.[89] Commentator Leonard Riskin, in his analysis of agricultural mediation, considers this provision of help and services as part of the mediation process to be "broad" mediation.[90] This contrasts with "narrow" mediation where the scope of mediation is limited.[91] In evaluating the two approaches, Riskin found the broad approach generally preferable because it was more congenial, and produced superior outcomes.[92] In a later article, Riskin stated that these two approaches "differed so radically that they could both be called mediation only in the sense that noon meals at McDonald's and at Sardi's could both be called lunch."[93] However, he concluded that "[c]hoosing one . . .

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84. *See* 7 U.S.C. § 5102 (a) (Supp. 1998).

85. *See id.* § 5101 (c)(1) (Supp. 1998). The number of mediated issues was expanded by § 282 of the 1994 Federal Crop Insurance Reform and Department of Agriculture Reorganization Act. *See* Martine Morr & John M. Lynn, The USDA Certified State Agricultural Mediation Programs: The Future for Agricultural Disputes in Florida 6 n.31 (1998) (unpublished manuscript, on file with the *Florida Law Review*).

86. Arizona, Indiana (now repealed), North Dakota, Oklahoma, South Dakota, and Wisconsin all require mediation. *See* Interview with Chester A. Bailey, Director, Agricultural Mediation Program, in Atlanta, Ga. (July 9, 1998).

87. *See* Morr & Lynn, *supra* note 85, at 13. Alabama, Iowa, Kansas, Minnesota, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, and Wyoming offer some sort of pre-mediation assistance. *See id.* at app. A (depicting information in a table "USDA Certified State Programs").

88. Leonard L. Riskin, *Two Concepts of Mediation in the FmHA's Farmer-Lender Mediation Program,* 45 ADMIN. L. REV. 21, 39 (1993).

89. *See id.*

90. *Id.* at 48-49. Kansas "provides farmers with extensive financial and legal counseling." *Id.* at 49 "Mediators average about five hours plus travel time preparing for, conducting, and wrapping up each mediation." *Id.* "[T]he unit of the Rural Assistance Corporation that operated the mediation program until late 1990" used "processors" who were financial specialists, not mediators to help the participants. *See id.* These processes sometimes put in four hours per mediation. *See id.*

91. *See id.* at 50-54.

92. *See id.* at 60.

93. Riskin, *supra* note 10, at 11-12.

approach[] may boil down to a question of values."[94]

In agricultural mediation some states use volunteer mediators; however, in Florida the mediators were chosen from those previously certified as supreme court circuit civil mediators, and then provided with additional training in agricultural issues. Since Riskin researched agriculture mediation, the Office of Inspector General (OIG) has issued its report discouraging "broad" mediation.[95] The OIG interpreted "mediation" to be the facilitation of dispute resolution and found provision of other services such as financial counseling to be outside the purview of the grant.[96] Therefore, Florida's Agricultural Mediation Services provides facilitative mediation.

IV. RECOMMENDED STANDARDS OF CONDUCT: OVERARCHING STANDARDS

The changes in mediation, its co-option by lawyers, and its proliferation are clear. To keep pace with mediation's evolution, the Florida Rules of Certified and Court-Appointed Mediators were adopted in 1992 by the Supreme Court of Florida.[97] These rules are currently being revised by the Supreme Court Committee on Mediation and Arbitration Rules. Especially interesting is the struggle among mediators as they decide where on the evaluative-facilitative continuum Florida's standards of conduct should be. Existing rule 10.020(c) provides in part:

> Mediator's Role. 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 issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach voluntary agreements.[98]

Florida's rule 10.060 further provides in part:

> (a) Parties' Right to Decide. A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions

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94. Riskin, *supra* note 88, at 60.

95. *See* OFFICE OF THE INSPECTOR GENERAL, REP. NO. 03081-23-TE, FARM SERVICE AGENCY OVERSIGHT OF STATE-ADMINISTERED MEDIATION PROGRAMS NEEDS STRENGTHENING (Mar. 1997).

96. *See id.*

97. *See* Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators, 604 So. 2d 764, 764 (Fla. 1992).

98. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.020(C); *see also* Moore, *supra* note 3, at 353 (stating that the first codes of ethics were developed by the Federal Mediation and Conciliation Service of the U.S. government, and the first state code was developed in Colorado).

> 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.[99]

The Committee notes state:

> 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.[100]

Another current Florida rule provides in part:

> Rule 10.090 Professional Advice
> (a) Generally. A mediator shall not provide information the mediator is not qualified by training or experience to provide.
> . . . .
> (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.[101]

Due to the previously discussed changes in the use and expectations of mediation, these rules are being revisited. The Committee's recent draft revision takes the previously stated sections and changes them to read, in part, as follows:

> 10.031 Self-Determination
> (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.
> . . . .
> (c) Professional or Personal Opinions. A mediator shall not

99. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.060(a)-(b).
100. *Id.* 10.060 (committee notes).
101. *Id.* 10.090(a), (d).

> attempt to interfere with a party's self-determination by offering professional or personal opinions regarding the outcome of the case.[102]

Finally, the Committee offered two options for the most contested issue—whether the mediator could provide advice to the parties.

> Rule 10.037 Professional Advice or Opinions
> Option 1
> (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.[103]
>
> Or
>
> Option 2
> (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.[104]

For two years the Committee members have hotly debated which option to choose.[105] It appears that the committee has finally chosen the following language:

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102. *Id.* 10.031(a), (c) (Tentative Draft 1998).

103. *Id.* 10.037(a) Option 1 (Tentative Draft 1998).

104. *Id.* 10.037(a) Option 2 (Tentative Draft 1998).

105. *See Academy Gives Its "Opinion" on Rule 10,* CAUCUS, Spring 1998, at 1, 3. First the Academy of Professional Mediators ("Academy") decided "the best interests of mediation . . . would be served by no change . . . [in] the existing rule regarding opinions given by mediators." *Id.* at 1. Then the Academy changed its mind in response to the two options suggested by the Rules Committee. *See id.* The Academy submitted the following proposal:

> A mediator shall not provide professional advice or opinions. However, a mediator may provide information the mediator is qualified by training or experience to provide. A mediator may assist the parties in exploring options and drafting proposals and, while the mediator may point out possible outcomes of a case, under no circumstances may a mediator offer a personal or professional opinion as to how that case will be decided.

Id. The Academy changed its mind again and submitted the following: "While a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense, under no circumstances may a mediator offer a personal or professional opinion on how the pending matter would be decided." *Id.* at 3.

> 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. 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. 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.[106]

Florida's overarching proposal is a place to start. Mediation[107] must be defined "in light of what is to be accomplished."[108] However, considering the morphing of ADR into mediation and the proliferation of types of mediation, any general state ethical codes must be inclusive. If states fear that the inclusiveness of a comprehensive code will legitimize activities that they find inconsistent with the goals of a particular type of mediation, they should write specific codes and regulations to provide for discrete types of mediation. Explained below are some suggestions for specific code of conduct provisions and process regulations.

V. SPECIFIC CODE OF CONDUCT SUGGESTIONS FOR DISCRETE TYPES OF MEDIATION

A. *Circuit Civil Mediation*

In circuit civil mediation, where parties are usually represented by attorneys who choose the mediator, cases are of substantial value and may consist of myriad issues. Circuit civil mediation participants, more than any others, may find the evaluative/facilitative mediation debate irrelevant. Their goal is to settle the case. Lawyers want other lawyers as mediators and they want that lawyer to be not just any lawyer, but a litigator.[109] They also prefer mediators who have "substantive experience in the field of law

106. FLA. RULES FOR COURT-APPOINTED MEDIATORS Rule 10.037 (Proposed Draft 1998).

107. *See, e.g.*, Dorothy J. DellaRae, *Precedents' Message: Conflict in the Mediation Field Is a Challenge to Be Best*, AFM MEDIATION NEWS, Summer 1998, at 1 & 3 (asking if a single ethics code can "simultaneously prohibit the mediator from giving opinions or advice and still set the ethical parameters for giving case evaluations" while prohibit[ing] a mediator from influencing the parties' outcome and yet permitting] the mediator to state what he or she believes the trial outcome may be."

108. Riskin, *supra* note 10, at 12 n.15.

109. *See* Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 390 (1997); *see also* Layn R. Phillips, *Laying Foundation for Successful Mediation: Questions Neutrals and Parties Need to Ask*, 13 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 132 (1995) (assuming that mediators are lawyers and suggesting that details about the mediators's law practice may reveal bias).

related to the case."[110] Furthermore, lawyers want mediators to evaluate and "to give their view of settlement ranges."[111] The code of conduct should provide for any type of mediation as long as all parties agree on the mediation style.

B. *Family Mediation*

Parties, both *pro se* litigants and those represented by attorneys, have different expectations depending in part on the profession of whom they choose to act as their mediator. A mental health professional is often very facilitative; a lawyer may be more evaluative. Participants often choose an accountant because parties want an evaluation of their assets. Therefore, any type of mediation should be allowed in family mediation as long as all parties agree on the mediator and the mediation style. Furthermore, mediators should be allowed to offer a variety of mediation styles that will mesh with their professional backgrounds and the type of mediation required.

C. *County Civil Mediation*

Parties are often not represented by attorneys and the cases do not have a substantial value. Volunteer mediators are frequently used, and the parties and their attorneys are not able to choose their mediator. Therefore, only facilitative mediation should be permitted in County Civil Standards of Professional Conduct. If court-connected programs are available, Professor Robert Moberly believes this decision is best left up to each Program Director.[112]

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110. McAdoo & Welsh, *supra* note 109, at 390.

111. *See id.* In response to directive mediators, the Minnesota ADR Review Board adopted new language in its proposed ethics code sent to the Minnesota Supreme Court: "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." *Id.* at 390 n.71 (quoting *Orders in the Court*, BENCH & B. OF MINN. 38 (Mar. 1997)); *see* Interview with Jack M. Ross, attorney, in Gainesville, Fla. (July 2, 1998). Mr. Ross described a mediator's "silver bullet," which Mr. Ross strongly endorsed. *See id.* The mediator writes on two pieces of paper the mediator's estimate of the amount that will settle the case. *See id.* Each party then writes "yes" or "no" and returns the papers to the mediator. *See id.* If both say yes, a settlement is reached. If one or both says no, the mediation continues; however neither party knows the content of the other party's response. *See id. See also* Jeffrey Krivis, *Taking Mediation Online*, DISP. RESOL. MAG., Summer 1998, at 25 & 27 (describing the neutral evaluation process). In order to facilitate a neutral evaluation, the mediator should ask each disputant if they would permit the mediator to make a neutral recommendation to which each party can confidentially respond. *See id.* If both parties agree with mediator's recommendation, there is a deal. *See id.* If not, the process continues. *See id.*

112. *See* Interview with Professor Robert B. Moberly, Professor of Law and Director of the University of Florida Institute for Dispute Resolution, in Gainesville, Fla. (July 13, 1998). Professor Moberly has written that the two primary dangers of evaluative mediation are "(1) the parties

D. *Agricultural Mediation*

Parties are seldom represented by attorneys and may be unable to pick their mediator.[113] Often the mediators are volunteers from a variety of backgrounds; others are professionals with extensive agricultural knowledge. Program Directors in each state may choose the backgrounds required of mediators. Any type of mediation may be allowed in states where the parties have an opportunity to choose the mediator and can agree on the mediator's style. Otherwise, states should sanction only facilitative mediation.

E. *Process Regulations*

Standards of Professional Conduct may include both over-arching standards and specific standards that will be applied to each discrete type of mediation. In addition, process rules may be needed. These may include:

1. *Identification of mediation.* With so many types of mediation and styles of mediators, the parties and their attorneys should be given the opportunity to decide which type they want to employ. Some parties want mediators to evaluate—whether through testing, giving options, or by the mediator's giving an opinion about the outcome.[114] Others want purely facilitative mediators who empower parties and help them reach agreement.[115] Some believe mediators may provide information but not give advice.[116] Others want subject matter expertise. If the mediator will hear the case and then make a decision, the parties should know they will experience "mediation-arbitration."[117] If the mediator will decide the case after a mini-trial, the parties should know this will be "litigation-mediation." Therefore, the mediator should identify and name the form of

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potential loss of self-determination, and (2) the mediator's potential loss of . . . impartiality." Moberly, *supra* note 5, at 671. I believe parties are most at risk from these two dangers of evaluative mediation in county civil mediation. Therefore, facilitative mediation may be preferred.

113. Florida, where mediation is free, keeps a roster of mediators who are assigned to mediations according to their location. Thus, a participant living in south Florida may not have the services of a mediator living in North Florida.

114. *See* Riskin, *supra* note 9, at 45 & n.118 (stating "[t]here are ways to minimize the effects" of evaluative mediation by "agree[ing] in advance that the mediator will delay preparing an assessment, prediction, or recommendation . . . until after" the parties have exhausted negotiation opportunities).

115. *See supra* notes 23-29 and accompanying text (discussing the scholarly debate surrounding the proper role of mediators).

116. *See supra* note 22.

117. *See supra* notes 17-19 and accompanying text (describing the confusion between arbitration and mediation).

mediation that he or she provides.[118]

2. *Contracting for discrete types of mediation.* There are dozens of permutations of "mediation"; therefore, identification of the process is the important issue. The parties and the mediator should sign a pre-mediation agreement stating the type of mediation they expect.

F. *Professional Regulation*

Regulation of mediation will be problematic. Including all types and styles of mediation may force professional regulatory bodies to proscribe mediation activities. For instance, if lawyer-mediators give legal evaluations, are they practicing law?[119] Aware of possible confusion concerning an attorney's role in matters not traditionally considered practicing law, the American Bar Association House of Delegates promulgated Model Rule 5.7, expressly identifying mediation as an ancillary service.[120] If during a mediation a lawyer/mediator "provides legal advice and analysis to unrepresented parties," it is possible the pro se parties could mistakenly believe" the lawyer/mediator "is acting as their lawyer."[121] Should this occur, Model Rule 5.7 contemplates that the attorney-mediator owes the same duties to these parties as a lawyer owes to their client.[122]

The legal profession should help lawyers develop specific skills for mediation. Otherwise, mediating will be merely "another pretrial procedural hoop in the litigation process."[123] Lawyers should learn how to "be" in a mediation and notice how this differs from their conventional adversarial role. For instance, the point in time when mediation is used in

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118. See Interview with Fran Teutonic, in Orlando, Fla. (June 18, 1998). Ms. Teutonic is a certified Family Law Mediator and always tells potential clients that she provides "facilitative mediation." *See id.* She stated that other mediators she knows are now providing the same information before mediating. *See id.*; *see also* Moore, *supra* note 3, at 382 (anticipating the use of more than one dispute resolution procedure and stating the neutral must advise the parties, explain the consequences, and afford the parties an opportunity to select another neutral for the subsequent procedures).

119. *See* Riskin, *supra* note 9, at 9 n.3 (citing Dean James Alfini's concerns that such advice might prompt bar regulatory bodies to "regulate, control or proscribe" such activity.) The ABA's Standards of Practice for Lawyer Mediators in Family Disputes impose a duty on the mediator "to assume that the mediation participants make decisions based upon sufficient information and knowledge." *Id.* (quoting ABA, STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES, Standard IV (1984)). In the Exxon case, the government believed the mediator may have some responsibility for the fairness of the settlement. Eric R. Max, *Confidentiality in Environmental Mediation*, 2 N.Y.U. ENV'T L.J. 210, 217-22 (1993).

120. *See* Bruce E. Meyerson, *Mediation and the Practice of Law*, 3 DISP. RESOL. MAG. 11, 11 (1996).

121. *Id.*

122. *See id.*

123. *See* Kovach, *supra* note 38, at 581.

a case varies. Conventional wisdom seems to be that mediation "should be used after the completion of pretrial discovery."[124] Perhaps another appropriate time is very early in the case before depositions.[125]

Furthermore, lawyers representing clients in mediation might be wise not to use an advocacy frame of reference and instead to employ a "paradigm shift away from a win-lose dichotomy and toward shared gains."[126] Because the focus of mediation is a win-win solution, lawyers should not use mediation to gain adversarial advantage or to narrow issues for a subsequent trial.[127] This is difficult because lawyers frequently come to mediation with an adversarial mind set.[128] Likewise, the ethical rules that guide lawyers' conduct are litigation focused.[129]

Lawyers should prepare clients for mediation issues such as who speaks first and how to address their remarks. Appealing to a neutral third party may be especially important if the participants have chosen an evaluative rather than facilitative mediator.

Other professional organizations have likewise adopted ethical standards[130] that may be useful. Undoubtedly, this trend will continue as mediation expands and becomes even more diverse.

CONCLUSION

ADR is morphing into "mediation." This is evident from the general use of the term "mediation," its co-option by lawyers, and the proliferation of types of mediation. The mediation community continues to struggle to develop overarching standards of conduct. This "one size fits all" approach to mediation will suffice no longer. Specific standards of conduct for variant types of mediation are needed. Likewise, states, in their standards

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124. Steven Keeva, *Inventing Solutions*, 76 A.B.A. J. 58, 61 (1998).

125. *See id.* at 62. Natasha Lisman suggests that too often lawyer gamesmanship prevents early use of ADR. *See id.*

126. Kovach, *supra* note 36, at 2.

127. *See* Kovach, *supra* note 48, at 581.

128. *See supra* notes 30-36 and accompanying text (describing the adversarial approach lawyers take to mediation).

129. *See id.* Scholars have stated that a majority of lawyers think good faith is necessary; however, it is unclear exactly what constitutes "good faith." Is it attendance at a mediation? If so, must an exchange of information accompany attendance? Other issues include whether lawyer/mediators can use contingent fees or can charge bonus fees for settlement in cases involving large amounts of money, and whether lawyers can employ a specific mediator or service provider routinely. A "reasonable person" may see this as an issue of impartiality even if the mediator informs both parties of the frequency which with the mediator mediates for a given party or institution.

130. *See id.* These include the Society of Professionals in Dispute Resolution, the American Arbitration Association, and the American Bar Association Sections of Litigation and Dispute Resolution, all of which collaborated on the Model Standards of Conduct for Mediators. *See id.*

of conduct, should adopt process regulations that require identification of the type of mediation offered. Finally, professions involved in mediation should provide direction for participants. If these issues are adequately addressed, the changing face of mediation will yield results that participants can understand and anticipate, and not unexpected results that are borne of variant interpretations of a single theme.