

A PLURALISTIC APPROACH TO MEDIATION ETHICS: DELIVERING ON MEDIATION'S DIFFERENT PROMISES

ROBERT A. BARUCH BUSH*

- I. INTRODUCTION
- II. A HYPOTHETICAL DILEMMA: THE CASE OF JOSE, LILLY...AND RAFAELA
 - A. *The Case*
 - B. *The Mediation*
 - C. *The Dilemma*
 - D. *The Nature of an Ethical Dilemma*
- III. MEDIATION MODELS AND MEDIATION CODES
 - A. *The Facilitative (Protective/Directive) Approach*
 - B. *The Transformative (Supportive/Nondirective) Approach*
 - C. *Different Models, Different Aims, Different Skills—Different Ethics?*
- IV. MEDIATION CODES AND MEDIATOR CHOICES
 - A. *The Role of the Mediator*
 - B. *Resolving the Dilemmas of the Jose/Lilly Case Under the Family Code*
 1. *SHOULD THE MEDIATOR STATE EXPLICITLY TO JOSE AND LILLY HIS/HER VIEW REGARDING THE RISKS TO RAFAELA OF THE SLEEPING SCREEN ARRANGEMENT THEY ARE AGREEING TO?*
 2. *SHOULD THE MEDIATOR QUESTION JOSE AND LILLY ABOUT WHAT RISKS MIGHT BE ENTAILED, TO GET THEM TO CONSIDER THOSE RISKS, WITHOUT STATING HER OWN VIEW OR "EXPERT OPINION" EXPLICITLY?*

* Distinguished Professor of Alternative Dispute Resolution, Maurice A. Dean School of Law, Hofstra University. The author thanks Dorothy Della Noce, Peter Miller, John Peter Weldon, Jody Miller, and Sharon Press for their help in thinking through the ideas presented herein. The author also thanks the Deans of the Hofstra Law School for their generous support for the research and writing of this Article.

3. *SHOULD THE MEDIATOR SUGGEST OR DEMAND THAT JOSE AND LILLY GET EXPERT ADVICE ABOUT THEIR SCREEN IDEA BEFORE ADOPTING IT?*
 4. *ULTIMATELY, IF LILLY AND JOSE ARE NOT INTERESTED IN SEEKING EXPERT ADVICE, AND THEY DECIDE TO IGNORE THE EXPERT INFORMATION THE MEDIATOR GIVES THEM ABOUT CHILD WELFARE, SHOULD S/HE ALLOW THEM TO PROCEED WITH THEIR AGREEMENT ON THE SCREEN; OR SHOULD S/HE "VETO" THEIR PROPOSED AGREEMENT AND TERMINATE THE MEDIATION?*
 5. *SUMMARY*
- C. *Resolving the Dilemmas of the Jose/Lilly Case Under the Community Code*
1. *SHOULD THE MEDIATOR STATE EXPLICITLY TO JOSE AND LILLY HIS/HER VIEW REGARDING THE RISKS TO RAFAELA OF THE SLEEPING SCREEN ARRANGEMENT THEY ARE AGREEING TO?*
 2. *EVEN IF THE MEDIATOR REFRAINS FROM DIRECTLY EXPRESSING AN OPINION ABOUT THE SCREEN, SHOULD S/HE AT LEAST QUESTION THE PARTIES ABOUT WHAT RISKS MIGHT BE ENTAILED, TO GET THEM TO CONSIDER THOSE RISKS, WITHOUT STATING HIS/HER VIEWS?*
 3. *EVEN IF S/HE REFRAINS FROM QUESTIONING THE PARTIES ABOUT THE WISDOM OF THEIR SCREEN SOLUTION, SHOULD S/HE SUGGEST OR DEMAND THAT THEY GET EXPERT ADVICE ABOUT THEIR IDEA BEFORE ADOPTING IT?*
 4. *FINALLY, IF THE PARTIES ARE SIMPLY NOT EXPRESSING CONCERNS ABOUT THE RISKS TO RAFAELA ON THEIR OWN (AND WITHOUT DIRECT OR INDIRECT INPUT FROM THE MEDIATOR) AND THEY ARE NOT INTERESTED IN SEEKING EXPERT ADVICE EVEN IF THE MEDIATOR RECOMMENDS DOING SO, SHOULD THE MEDIATOR ALLOW THEM TO PROCEED WITH THEIR SCREEN IDEA AFTER ALL; OR SHOULD S/HE "VETO" THEIR PROPOSED AGREEMENT AND TERMINATE THE MEDIATION?*
 5. *THE CODE'S DEFINITION OF "POWER IMBALANCE"*
 6. *SUMMARY*

- V. *THE META-DILEMMA OF MEDIATION ETHICS AND POSSIBLE SOLUTIONS*
- A. *Unitary Standards*
1. *PROTECTION-BASED CODES*

A PLURALISTIC APPROACH TO MEDIATION ETHICS

- a. *Indiana Court Rules for Alternative Dispute Resolution*
 - b. *NYSdra Standards of Ethics*
 - c. *Ontario Bar Association (CBAO) Model Code of Conduct for Mediators*
 - d. *Virginia Standards of Ethics for Certified Mediators*
 2. *SELF-DETERMINATION-BASED CODES*
 - a. *The Model Standards of Conduct for Mediators*
 - b. *Codes Based on the Model Standards*
 3. *THE PROBLEM WITH UNITARY STANDARDS*
 - B. *Combination Standards*
 1. *THE MODEL STANDARDS*
 2. *NORTH CAROLINA STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS*
 3. *GEORGIA COMMISSION ON DISPUTE RESOLUTION ETHICAL STANDARDS*
 4. *NEBRASKA STANDARDS OF PRACTICE FOR FAMILY MEDIATORS*
 5. *THE PROBLEM WITH COMBINATION STANDARDS*
 - C. *A Third Approach: Pluralistic Standards*
- VI. A PLURALISTIC APPROACH TO MEDIATION ETHICS:
DELIVERING ON MEDIATION'S DIFFERENT PROMISES
- A. *Mediation Ethics Commentary and the Pluralistic Framework*
 - B. *Proposals for Pluralism in Negotiation Ethics*
 - C. *A Pluralistic Approach to Mediator Ethics*

I. INTRODUCTION

Over the last two decades, it has become well accepted that the mediation process does not follow a single, uniform approach. Although that may once have been the case, the mediation field today is composed of practitioners following recognizably different approaches to practice—with different views of the goals, appropriate methods, and underlying assumptions of the practice of mediation.¹ Two widely used and discussed approaches or models of mediation are known as the “facilitative” and “transformative” models.² While some have claimed that talented mediators can (and should) combine the two in serving their clients; others have argued that combining these approaches is practically difficult if not impossible, as well as conceptually incoherent.³ That is, the two models operate on such different foundations, and with such divergent methods, that no mediator can competently “integrate” the two or switch from one to the other as circumstances require. Rather, principled mediators must, and do, choose an approach to practice, either facilitative or transformative, and then offer their clients the very best enactment of that model that their training and experience allows. Alternatively, whether or not they do this consciously and intentionally, the vast majority of mediators gravitate to one or the other of these models in actual practice. In effect, most mediators can fairly be described as following the facilitative or the transformative model—one or the other, but not really a combination of both.⁴

¹ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT*, 99–101 (2d ed. 2005); JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 140 (2001); Grace D’Alo, *Accountability in Special Education Mediation*, 8 HARV. NEG. L. REV. 201, 205 (2003).

² See ALFINI ET AL., *supra* note 1, at 169; ELLEN WALDMAN, *MEDIATION ETHICS: CASES AND COMMENTARIES* 19–25 (2011); Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965, 981–84 (2004). Other recognized models include “evaluative mediation” and “narrative mediation.” See ALFINI ET AL., *supra* note 1; WALDMAN, *supra* note 2. This Article does not address those models.

³ See BUSH & FOLGER, *supra* note 1, at 228–32. See also Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. J. 39, 59–60 (2002).

⁴ Susan Oberman, *Book Review: Mediation Ethics Edited Ellen Waldman*, in *ACRESOLUTION* 24, 24 (Fall 2012). See also Della Noce et al., *supra* note 3. But see, e.g., Michael Williams, *Can’t I Get No Satisfaction? Thoughts on “The Promise of Mediation,”* 15 *MEDIATION Q.* 143 (1997) (arguing that good mediation can and should include both facilitative and transformative practices).

A PLURALISTIC APPROACH TO MEDIATION ETHICS

If this is so, a problem is posed for the regulation of mediators through codes or standards of ethics—one of the major tools of professional regulation. The problem is that any single or unitary code of practice is unlikely to be capable of coherently regulating the conduct of both facilitative and transformative mediators. If a single code attempts to do so, it is likely to fall prey to one or the other of two fatal mistakes: either it will wind up being “exclusive,” adopting provisions that make sense as regulatory principles for only one of the two models of mediation;⁵ or it will end up being overly “inclusive,” adopting provisions of a general and malleable character in order to “reach” both models.⁶ The first error results in favoring one model of practice and delegitimizing the other; the second error results in a code under which almost any practice can be justified, which is thus of little value for either regulation or ethical guidance.

The best solution to this problem in ethical regulation is to recognize the pluralistic character of mediation practice and to respond with a pluralistic approach to ethical regulation.⁷ That is, mediators following different models of practice should be governed by different ethics codes designed to hold them accountable to the principles of their specific mode of practice. In this way mediator ethics regulation would follow a pluralistic approach that requires mediators to “declare” their model of practice, and then be held accountable to standards designed specifically for that model. The benefit of this approach is that mediators will receive clear and coherent guidance in resolving difficult dilemmas faced in practice, and clients will receive services that conform to their expectations and deliver high quality and consistent professional help.

This argument for a pluralistic approach to mediator ethics is explored, in this Article, in the context of a hypothetical case involving a classic dilemma faced by mediators in practice. The specifics of this hypothetical will allow for the examination of how two different codes of ethics, both currently used in the field, would advise a mediator to handle the dilemma presented. That examination will show that neither code alone is sufficient to guide and regulate both facilitative and transformative mediators. After this analysis, the Article examines several other ethical codes to show that this problem is common and then proposes a solution that would address the problem by enacting a pluralistic framework for mediator ethics.

⁵ See *infra* notes 101–36 and accompanying text.

⁶ See *infra* notes 137–75 and accompanying text.

⁷ See *infra* notes 176–217 and accompanying text.

II. A HYPOTHETICAL DILEMMA: THE CASE OF JOSE, LILLY...AND RAFAELA

A. *The Case*

Jose and Lilly, both in their early thirties, had been married for twelve years when the personal, cultural, and religious differences between them became too great to resolve.⁸ They started with a blazing romance and lovely wedding. Lilly was the daughter of “hippie” parents who grew up in the ’60s and raised their daughter with a philosophy of loving, trusting, and sharing with everyone. In fact, Lilly was born in a “commune” where she and her parents shared living space with several other couples and unmarried friends. Lilly’s own path as an adult was a good deal more conventional than her parents’, but she still found traditional social values pretty ridiculous. She would agree to marry Jose in a religious ceremony only because it meant something to his parents, but they agreed that they would not give the Catholic religion of his parents any place in their life together—it was his Latin passion that she loved, not the highly restrictive traditional culture of past generations. On his side, Jose had indeed grown up in a traditional, religious, Catholic Hispanic family, but he rebelled when he went to college. By the time he met Lilly, he considered his background a burden and saw in her the new free outlook on life he really wanted for his own family. (They married in a civil ceremony, since Lilly was not Catholic or even religious at all.)

Their first few years of married life were bliss for both of them. But once their daughter Rafaela was born, and named for Jose’s grandmother whom he remembered fondly, that changed. Jose found himself longing for the traditional rituals of his youth, even the religious ones. Lilly could not understand, and when he wanted to take Rafaela to church, she was stunned—and the arguments began. Eventually, when Rafaela was eleven years old, they agreed to divorce and to share physical custody of Rafaela, which the court approved. About six months after the divorce, Lilly began seeing a new boyfriend. He was from a similar “open-minded” background to Lilly’s, and they agreed they never wanted to get married or be “stuck” in

⁸ A single hypothetical case is used here as the basis for the analysis of the different answers given by different ethics codes to the questions raised by the case. This aim is different than that taken in other writing on mediation ethics, where a variety of cases are used to exemplify different dilemmas. *See, e.g.,* WALDMAN, *supra* note 2. The focus on a single case here corresponds to the aim of the Article—to analyze how a number of different codes would treat the same dilemma. The case is intended to be representative of a particular kind of situation involving a particular kind of dilemma that is central to the mediator’s job. *See infra* notes 9–10, 15–18 and accompanying text.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

mindless traditions. After a few months, she invited him to move into her one-room studio apartment, in which she and Rafaela lived. When Jose found out that eleven-year-old Rafaela was living and sleeping in the same one-room living space with Lilly and her unmarried lover, he was outraged and went to court to demand full custody of Rafaela. The case was referred to mediation.

B. *The Mediation*

In the mediation, all the above was discussed. Then, Jose and Lilly discussed and considered several alternative living arrangements for Rafaela, but none of them were acceptable to both: Lilly said that Jose's full custody would be impractical, given his work schedule, and it would ignore Lilly's and Rafaela's needs to be together. Jose said Lilly should get a larger apartment with a separate bedroom for Rafaela, as the child had in his apartment; but Lilly could not afford it and Jose could not afford to pay for it himself. Jose said Lilly's boyfriend should just sleep elsewhere, but Lilly said he was not moving out, because he was more than a boyfriend, he was her new partner, married or not. It was clear from their statements that behind these positions were Jose and Lilly's different values: From his regained traditional values, Jose saw the unmarried boyfriend's presence in Lilly's home as immoral and a bad influence on Rafaela. From her "open" values, Lilly saw Jose's objections as narrow-minded and foolish—this was the way she herself had grown up, after all, and was life-affirming!

After much discussion, Jose and Lilly moved towards an agreement on a simple option: The boyfriend can stay in the one-room studio apartment when Rafaela is in Lilly's home, as long as Lilly puts up a moveable wooden screen in front of the corner where Rafaela sleeps when the child goes to bed. Both Jose and Lilly are beginning to agree that the moveable screen would be an affordable way to give Rafaela the privacy she needs as an eleven-year-old girl in the same studio apartment as a man, whether that man is her father or someone else.

C. *The Dilemma*

As the agreement about the screen has begun to emerge, the mediator has become very concerned. With knowledge and training in matters of family mental and physical health, s/he is convinced that an arrangement in which an eleven-year-old girl sleeps in the same room with her mother's adult boyfriend (not her father) is inappropriate psychologically, as well as physically risky. In effect, the mediator agrees

with Jose's original objections, though for quite different reasons. However, since the parties are agreeing on this arrangement, the mediator is unsure about what the right thing is for him/her to do, with regard to the emerging agreement about the screen.

Assuming his/her assessment of the risks to the child is correct (according to experts in her field), should s/he state his/her views of those risks explicitly to the parties? Should s/he question them about what risks might be entailed without stating his/her views? Should s/he suggest or demand that they get expert advice about their idea before adopting it? If they are not interested in seeking expert advice, or reject the mediator's advice, should s/he allow them to proceed with their idea; or should s/he "veto" their proposed agreement and terminate the mediation?

Before exploring the answers to these questions, according to two major ethics codes, a broader question: Why do any of these questions signal an ethical dilemma, calling for ethical guidance from some sort of code of ethics?

D. *The Nature of an Ethical Dilemma*

In general form, a dilemma is a situation where a choice is presented between two important values, both of which cannot be supported at once. That is, no matter what specific step is taken, one of the two values will suffer. If there is a way to support both, then the dilemma vanishes. However, there is often no way to do so; rather, no step is possible that supports one value without damaging the other, and in that case there is a true dilemma.⁹ The dilemma presented in the case here can be described as the choice between respecting party self-determination, on the one hand, and protecting (or avoiding risk to) a vulnerable party on the other. In a well-known study, this type of dilemma was reported as one of the most common and difficult that was faced by practicing mediators.¹⁰ This dilemma is faced

⁹ See Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 6-7; see also Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, n.230 (2002).

¹⁰ Bush, *supra* note 9, at 22. That study identified the major types of ethical dilemmas faced by mediators. See *id.*, at 9-10. Commentators on mediation ethics since then have discussed the range of ethical dilemmas that codes should address, and most of those dilemmas were identified in the Bush study. However, while ethics codes do address many of these other dilemmas, those dilemmas do not implicate the very core of the mediator's role, as does the one presented by the Jose/Lilly case. See Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253 (1989). See also *infra* notes 15-18 and accompanying text.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

in some version not only by family mediators but by mediators in almost any case in which a “vulnerable party” (whether or not one of the parties actually present in the session) is put at risk by a choice the parties are making to agree on a solution to their problem—and in many other situations.

However, why is this an *ethical* dilemma for mediators? How does it implicate mediator ethics? This article argues that not only is this an ethical dilemma, it is a core ethical dilemma that goes to the very heart of mediation practice, in both of the primary approaches to mediation followed today. This assertion rests on the conception of professional ethics as a form of “role-morality.” Many dilemmas presenting options of right and wrong, in everyday human interaction, are rooted in general conceptions of moral obligation. However, where one has undertaken an obligation to act in a certain role for the benefit of another—as is typical in professional practice of all kinds—then ethical obligations to the client flow from that role itself.¹¹ This is not an unusual view; on the contrary, it characterizes the views of professional ethics in many fields. Attorneys take on the role of “champion” of the client’s interests, and ethical obligations flow from that role, such as the prohibition against “dual representation”—since it is impossible to champion two adversaries simultaneously. Doctors take on the role of healer, and the ethical obligation to “do no harm” flows from that role, including the prohibition of administering treatments desired or even demanded by the patient that would actually harm him/her. Judges take on the role of “voice of the law,” and the ethical obligation to set aside any personal views and decide only according to the applicable legal rule, flows from that role. Arbitrators take on the role of “wise, experienced expert,” and the central ethical obligation that follows is to make a clear decision and not promote a compromise. In the case of each professional, the role s/he accepts defines the primary ethical obligation s/he owes to the client(s). And it defines which path to choose when a dilemma arises, because the role itself requires placing priority on one value over others that might compete.

In keeping with the concept of professional “role ethics,” it follows that the same concept applies to mediators. However, with mediation the issue is more complex, precisely because of the fact that two models of mediation are being practiced, each of which holds a different conception of the mediator’s role. This author argued long ago that mediators were enacting at least two different role conceptions: one viewing the mediator as facilitator of *fair* agreements—and thus as protector from unfairness—and

¹¹ See OMER SHAPIRA, *MEDIATION ETHICS* 3–8 (1st ed. 2016) (discussing the theory of role ethics).

the other viewing the mediator as supporter of party choice and communication regardless of the fairness of an agreement reached, or indeed whether any is reached at all.¹² Both role conceptions, it was argued, imply ethical duties owed by the mediator to the clients. In many respects the ethical duties are the same under both. For example, obligations of impartiality, confidentiality, and competency are common no matter which role conception is followed.¹³ However, in one critical respect, the two role conceptions point mediators in very different directions. The protective conception implies an obligation to monitor and control against unfair outcomes even if it means limiting party choice; while the supportive conception implies an obligation to privilege party decisionmaking regardless of outcome fairness. Of course, some cases pose no conflict between ensuring fairness and supporting party self-determination. But where ensuring outcome fairness and supporting self-determination cannot both practically be achieved, mediators face a choice—and the choice they make will depend on what role conception they hold. In terms of this article, it will depend on whether they follow the facilitative or transformative model in their practice.¹⁴

It is worth noting that this tension between two views of the mediator's role is deep and longstanding in the literature of the field. Nearly four decades ago, the debate between Professors Susskind and Stulberg over the mediator's "accountability" for the fairness of agreements rested on this difference in conception of the mediator's role—Susskind arguing for protection and Stulberg arguing for supporting self-determination as the higher duty.¹⁵ That debate has continued in force until the present day, and still animates discussion in the field.¹⁶ This lasting controversy reinforces the assertion that the dilemma of whether to protect against unfairness, or support party self-determination, is central to mediation ethics. And it is a dilemma that, unlike others, cannot be resolved by a single governing code applied to all mediators. That is why the Jose/Lilly case is used as the

¹² See Bush, *supra* note 10.

¹³ SHAPIRA, *supra* note 11, at 88–105.

¹⁴ See *infra* notes 22–36 and accompanying text.

¹⁵ See Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

¹⁶ See Bernie Mayer, *What We Talk About When We Talk About Neutrality: A Commentary on the Susskind-Stulberg Debate*, 2011 Edition, 95 MARQ. L. REV. 859 (2011–2012).

A PLURALISTIC APPROACH TO MEDIATION ETHICS

example for the analysis of this Article.¹⁷ The protection versus self-determination dilemma, as reflected in the Jose/Lilly case and many others, is the defining ethical challenge of mediators. That is, it defines and is defined by the role conception on which a mediator's practice is founded. And ethical standards that ignore the foundational difference in role conceptions will inevitably fail to guide all mediators fairly and effectively.¹⁸

III. MEDIATION MODELS AND MEDIATION CODES

The mediation field is not short on ethical codes. On the contrary, codes or standards of conduct have been promulgated for many years by different agencies, including state court systems, professional associations, and even private mediation providers.¹⁹ These codes purport to offer guidance to mediators in situations just like the one faced in the case of Jose and Lilly. At the same time, they can be seen as regulating the behavior of mediators, so that clients like Jose and Lilly receive appropriate professional

¹⁷ Other cases also involve risks to vulnerable parties—whether third parties as here or parties to the mediation itself, and whether in the family conflict context or in others. But this scenario presents a strong version of this dilemma, where the pulls toward each value, and thus the tension between them, is particularly sharp. Note also that this Article focuses on one illustrative case, rather than offering multiple case examples, because the aim is to provide a focus for analyzing the way different ethics standards deal with this particular dilemma, rather than raising multiple ethics questions. *See also supra* note 8.

¹⁸ It should also be noted that the mediator's role conception and ethical obligations—and those of other professionals, as mentioned above—can be seen as having two sources. One is the implied (or explicit) promise made by the professional to clients regarding what will be done for them. Where this is not wholly explicit, it can be implied from the usual expectation held by the client regarding the professional's role and the actions they will take. In the case of mediation, this is somewhat problematic, since in the presence of different models it is not clear what a particular client expects from a particular mediator unless an initial meeting spells that out—a useful practice, as discussed below. *See infra* text accompanying notes 212–14. Another source for role conception, more general in nature, is the natural comparison between the “products” of different professionals. Regarding mediation, the question is what mediators can do for parties in conflict that is unique and different from what other “third party” interveners such as judges and arbitrators can do. As this author discussed in a previous article, arbitrators provide quick, expert resolutions, and judges provide resolutions that protect rights and ensure justice/fairness. Only mediators offer parties the opportunity for self-determination and direct communication. *See Bush, supra* note 10.

¹⁹ *See* Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 388 (2006) (providing a comprehensive review of different mediation ethics codes).

services.²⁰ Whether regarded as guidance for mediators or consumer quality control for clients, ethical codes are an important presence in the field. However, these well-intentioned policy statements often create—rather than resolve—dilemmas for the mediators they are intended to guide and regulate. The reason for this is simple: the codes are drafted without recognition of the pluralistic character of mediation practice today. They effectively cast all mediators in a single mold, whereas in practice the mediators being addressed are not practicing a single monolithic process called mediation.²¹ They are practicing two significantly different processes called facilitative mediation and transformative mediation. At this point, a short summary of these two models is needed to establish that they are indeed different and distinct in both aim and in method.

A. *The Facilitative (Protective/Directive) Approach*

In the facilitative approach, mediation is seen as a process aimed at reaching fair and creative resolutions of specific problems faced by parties in conflict. To achieve that goal, the mediator leads the parties through a sequence of stages: opening the session, setting ground rules, gathering information, defining issues, exploring options, generating movement by forceful persuasion, and achieving agreement.²² While the description of stages in the literature differs from text to text, the commonalities are very clear. What is also clear is the principle that the mediator controls and directs the process at every stage and that effective mediation requires the exercise of such mediator control to keep the process moving toward agreement and to protect against unfairness.²³ From this fundamental principle of mediator

²⁰ See SHAPIRA, *supra* note 11, at ch. 2.

²¹ See Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997); *see infra* text accompanying notes 187–90.

²² This approach is known as “facilitative mediation.” On the view of problem-solving as the goal of facilitative mediation, see Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217, 225–27 (1995); LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 180–86 (2005). On the view that the process involves a series of stages, see ALFINI ET AL., *supra* note 1, at 107–40 (2006); Bush, *supra* note 2, at 969–71 (both offering a good summary of the stages followed in facilitative mediation).

²³ See Bush, *supra* note 2, at 969–71; Stulberg, *supra* note 15 (presenting a good description of the classical view of how the mediator controls the process); *see also* Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 470–74 (D.M. Kolb & Associates, eds.,

A PLURALISTIC APPROACH TO MEDIATION ETHICS

control of the process, specific mediator practices follow, many of which involve limiting or overruling party self-determination in order to ensure a fair or just outcome.

Some of the practices recommended and documented in mediation literature include encouraging or steering the parties, especially through probing and pointed questions, to consider the fairness/justice dimensions of issues being discussed or solutions being proposed;²⁴ advising parties who lack relevant information, regarding legal rights or otherwise, to obtain that information before reaching any agreement (and even providing them with information within the mediator's knowledge);²⁵ openly discussing the importance of (and asking parties to commit to) achieving just outcomes, in mediators' opening statements on the aims of the process;²⁶ and directly suggesting or supporting specific proposals aimed at creating a fair outcome.²⁷ In general, it is a common view that "[w]hen disparities in power or knowledge disable a weaker party from effective bargaining the mediator must intervene to avoid a patently unfair agreement"²⁸ To do so, many recognized mediation experts recommend that the mediator affirmatively

1994) (summarizing what they call the "settlement-oriented" mediator's strategies for controlling the process, based on their close qualitative study of several mediators at work). This practice of mediator process control, despite the importance placed on party self-determination in mediation theory, is often explained with the conventional wisdom that "the parties control the outcome, but the mediator controls the process." *Id.*

²⁴ See, e.g., James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Ruminaton on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 84–85 (2004); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 180–82 (2002).

²⁵ See, e.g., Hyman & Love, *supra* note 24, at 85–86; Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U.L.Q. 47, 92–96 (1996); Waldman, *supra* note 21, at 732–42 (1997).

²⁶ See, e.g., Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87, 91–91 (2004).

²⁷ See, e.g., Waldman, *supra* note 21, at 742–56; Kolb & Kressel, *supra* note 23, at 471–74.

²⁸ Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 521 (1991); see also Nolan-Haley, *supra* note 25; Coben, *supra* note 24, at 83–87.

engage in “power-balancing”—a practice directly aimed at “minimizing the negative effects of unequal power.”²⁹

While there are many other practices used by facilitative mediators aimed at moving the parties toward agreement on the issues that separate them,³⁰ the methods mentioned here illustrate the primacy placed on the

²⁹ The facilitative mediator’s job of power-balancing is recognized as a key part of his or her work by many authoritative sources. For example, Christopher Moore, author of one of the basic and widely used texts on mediation practice, includes the following advice regarding power-balancing: “Mediators can work with both weaker and stronger parties to minimize the negative effects of unequal power” CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 391–93 (3d ed. 2003) (quoting in part James A. Wall Jr., *Mediation: An Analysis Review and Proposed Research*, 25 *J. CONFLICT RESOL.* 157, 164 (1981)). Moore believes that the mediator has substantial tools at his or her disposal that can effectively protect weaker parties from the effects of unequal power in the mediation, and thus prevent unjust outcomes. According to Moore and others, the mediator is expected to use these tools to do just that. John Haynes, another widely recognized authority and one of the founders of divorce mediation, goes even further in his endorsement of power-balancing and his claim that it is effective in preventing unjust outcomes: “Power balancing is important because . . . differential power or resources is likely to result in an unequal distribution When the power balance interferes with the couple’s ability to negotiate a fair agreement, I believe the mediator has a responsibility to correct that imbalance.” John Haynes, *Power Balancing*, in *DIVORCE MEDIATION* 277, 280–81 (J. Folberg & Ann Milne eds., 1988) (quoting in part JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 79 (1975)). Haynes goes on to explain that there are multiple strategies by which the mediator can “correct” the power imbalance, including “controlling the communication” between the parties. . . . [T]he mediator intervenes to take charge of the way the couple communicate and reorganizes it to disempower the overly powerful spouse and empower the powerless spouse.” *Id.* at 289–90. It is very clear that these well-respected mediation experts regard power-balancing as a key responsibility of the facilitative mediator, that they identify practical strategies to discharge this responsibility, and that they believe that the mediator’s power-balancing can effectively protect weaker parties from stronger ones who could otherwise take advantage of their power to gain unjust and unfair agreements.

³⁰ These practices include both *managing the parties’ communication* and *problem-solving*. See Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of the Partnership*, 19 *CLINICAL L. REV.* 429, 436–39 (2012–2013) (summarizing the practices described below in this footnote and citing sources documenting them). Both involve measures that intrude on party self-determination. *Managing communication* goes on throughout a session, to avoid the disorganized and unproductive exchange the parties are likely to have if communication is not structured and controlled. Key practices include: *structuring the session* (the mediator organizes and structures the entire session, including when to move from one stage to the next); *controlling the flow of information* (mediators firmly control the flow of information—they direct turn-taking, prevent party interruptions, and ask “probing questions” to elicit

A PLURALISTIC APPROACH TO MEDIATION ETHICS

mediator's role in protecting against unfairness in the process or outcome. All these practices stem from the view that the facilitative mediator is expected to monitor for and ensure that mediated agreements meet standards of substantive fairness, even if this involves overriding or limiting party self-determination.³¹

B. *The Transformative (Supportive/Nondirective) Approach*

By contrast, the most fundamental principle of the transformative approach is that the mediator's job is "to support and never supplant party deliberation and decision-making," on every matter whether regarding process or outcome.³² Thus, mediators following this approach do not control or direct the process, do not use interventions that intentionally steer the

more information); and *controlling and filtering negative expression* (mediators filter the subjects discussed and modes of expression used and control parties when they get emotional or hostile; they "reframe" party statements into non-antagonistic language; and they limit discussions of the past to keep parties "focused on the future"). The practices of *problem solving* are also central to the mediator's work, with the mediator serving, in effect, as the lead problem solver. Several practices are central: *identifying underlying "needs and interests"* (mediators translate parties' demands into "needs and interests," probing for the interest that underlies a demand, and leading the parties into an integrative or interest-based bargaining process); *devising creative solutions that meet all sides' needs* (mediators act, themselves, as skilled integrative bargainers and identify solutions that will "solve the problem" faced by the parties); and *persuading the parties to accept the solution and reach agreement* (mediators use a variety of techniques for "closing the deal," using persuasion on one or both parties, including "devil's advocacy" and "reality testing").

³¹ According to some knowledgeable observers, a minority of facilitative mediators is gradually moving away from directive practices that prioritize substantive fairness over party self-determination. See Email from Peter Miller to author (Aug. 26, 2018) (on file with author). Miller, who is very active in the practitioner community in New York, reports examples of this move by both mediators and mediation trainers with whom he personally works. He also notes, which is certainly true, that Professor Joseph Stulberg, one of the foremost authorities on facilitative mediation, has long supported the primacy of party self-determination. Indeed, Stulberg's work was one of the main sources for this author's account of self-determination as the guiding value of mediation. See Bush, *supra* note 10; see also *supra* note 15 and accompanying text. Nevertheless, the majority of commentary and research on facilitative mediation supports the account of the text that this approach places highest priority on achieving agreements that are substantively fair.

³² Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation: Theoretical Foundations*, in TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS [hereinafter SOURCEBOOK] 15, 25 (Joseph P. Folger et al., eds., 2010).

discussion, and do not substitute their judgment for the parties' on any matter of process, substance, or communication. In short, the process is not mediator-driven, but *party-driven*. What mediators do, instead of directing the process themselves, is to *support the parties' own process* of presenting their views, thinking about what is being said, and making their own decisions on how to understand the situation, their options, and each other—and ultimately on what, if anything, they want to do about all of these things.

Thus the essential work of the transformative mediator is to *support the parties' choices*, rather than to direct them in any way, and to do so without judging the fairness or justice of the process or outcome the parties choose.³³ This means becoming a participant in, but *not* the controller of, the conversation. The mediator's role is supportive but non-directive participation. The mediator's job is to support party decisionmaking but never supplant it, whether to ensure fairness or for any other reason. Specific practices flow from these principles, which respect and facilitate party self-determination even if doing so may allow risks of unfairness in the process or outcome.

First of all, mediators in this model *let go of control* of the session and its outcome, rather than holding onto it firmly. From the very opening of the session, parties can interrupt each other (and the mediator), change topics, return to subjects discussed earlier, and so forth. The mediator supports this freedom of choice, and refrains from “organizing” the discussion and thereby exercising influence over the process or outcome.³⁴

³³ See Robert A. Bush & Joseph P. Folger, *Transformative Mediation: Core Practices*, in SOURCEBOOK, *supra* note 32, at 31, 31–50 (discussing specific practices that support party deliberation and decisionmaking without controlling it); see also Bush, *supra* note 30, at 439–45 and accompanying notes (providing an expanded account of the practices summarized in the text here). The reason for employing supportive rather than directive practices is that the aim of the process is *party empowerment and interparty recognition*—and thus positive interactional change—rather than resolution or even a just resolution; and interactional change is most likely achieved through mediator support rather than mediator direction. See Robert A. Baruch Bush, *Staying in Orbit or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N.D.L. REV. 705, 747–48 (2008). Although, even considering justice as a goal, it has been persuasively argued that steady support for party choice is itself the best guarantee of justice and fairness. See Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213 (2005).

³⁴ The skill of letting go of process control involves many different specifics; one specific aspect of the skill is to avoid “we” talk by the mediator, which implies the mediator holds the same status as the parties in making choices. Instead, mediators learn to use the “you” form of address to convey respect for the parties' authority over the conversation. See Della Noce et al., *Signposts and Crossroads: A Model for Live Action Mediator Assessment*, 23 OHIO ST. J. DISP. RESOL. 197, 212–15 (2008)

A PLURALISTIC APPROACH TO MEDIATION ETHICS

Meanwhile, the mediator listens attentively but “without an agenda”—i.e., without thinking about how to “use” what is being said, for example, to plan toward a solution or to “balance power.”³⁵

At the same time, the mediator uses a variety of methods to “*amplify*” the parties’ exchange. Such “amplification” places parties in control of their own discourse, rather than controlling it in any way. For example, mediators “reflect” party’s narrative comments *without* changing or filtering their content or tone. Building on the attentive listening s/he did, the mediator “mirrors” each party comment back, staying close to the party’s actual language and being careful not to filter or soften what is said.³⁶ This kind of response allows the speaking party to hear and consider her own thoughts, and thus to define more deliberately *for herself* what she wants to say. Mediators also offer verbal “outlines” of segments of the conversation, listing but not editing or shaping the topics the parties have mentioned and

³⁵ In one training manual, the skill is explained by an analogy to “listening like a cow”:

Pay attention . . . Just be there. Don’t be thinking about a solution, or how you should fix it. Just listen hard and try to be present. It’s very bad business to invite heartfelt speech and then not listen [This] is a theory of attention that depends little on therapeutic skills and formal training: listening like a cow. Those of you who grew up in the country know that cows are good listeners This is a great antidote to the critical listening that goes on . . . where we listen for the mistake, the flaw in the argument. Cows, by contrast, manage at least the appearance of deep, openhearted attention.

INSTITUTE FOR THE STUDY OF CONFLICT TRANSFORMATION, TRANSFORMATIVE MEDIATION: PRINCIPLES AND PRACTICE (2010) (citing MARY ROSE O’REILLY, RADICAL PRESENCE 27–29 (1998)).

³⁶ For concrete examples of the use of reflection and summary in mediations, see Bush & Folger, *supra* note 33, at 39–44 and see generally Robert A. Baruch Bush & Sally G. Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPPERDINE DISP. RES. L.J.67 (2002). For an extended case study illustrating all of the skills discussed here in the text, see BUSH & FOLGER, *supra* note 1, at 131–270. Note the contrast between the practice of reflection as described here, and the practice of “reframing” as used in facilitative mediation, where filtering and softening party language is a central skill. See *supra* note 30.

the differences they expressed on each topic, again in whatever terms the parties choose to use.³⁷ Moreover, in both reflecting and summarizing, mediators embrace rather than suppress the “hot” parts of the conversation.³⁸ Rather than limiting or reframing negative and emotional expression, mediators allow it and then include the negative and the emotional in their reflections and summaries. All these practices allow and help parties to become more effective advocates *for themselves*, expressing their views to each other clearly and forcefully, without the mediator controlling or “power-balancing” their exchange.

Finally, when parties make choices—about what to say, or when and how to say it, or what options to consider or reject—the mediator does not question them in order to influence what is and is not chosen. In fact, the transformative approach largely avoids questioning parties at all (e.g., to probe or influence), instead using questions only to “check-in” when parties show signs of hesitation or uncertainty about some aspect of the discussion. The aim of such questions is, as with the other methods mentioned here, to increase the parties’ opportunity for self-determination and choice—but not to monitor or shape the choices being made, even in order to prevent what might be seen as injustice.

C. *Different Models, Different Aims, Different Skills— Different Ethics?*

It should be clear from the above comparison of methods that the practices of facilitative and transformative mediation are very different. The difference is understandable, considering the very different conceptions the two models hold of the aim of mediation and the role of the mediator in the process. In relation to ethical codes, the last point is the crucial one. As

³⁷ See Bush & Folger, *supra* note 33, at 41–44 (describing and illustrating the practice of summary). In courses on transformative mediation, law students and lawyers usually find summary a more familiar skill, since it involves more of the kind of “issue-spotting” that they are trained and accustomed to do by their legal training.

³⁸ See Della Noce et al., *supra* note 34, at 213–14 (discussing this practice and the rationale for it). Once again, this skill contrasts sharply with the skills taught and practiced in facilitative mediation, as discussed above. Indeed, it has been argued that the implicit “rules” of facilitative mediation—rules that are “applied” by the mediator in controlling the process—require the suppression of expressions of blame as well as negative emotions generally. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555–75 (1991) (describing the use of rules of rationality, prospectivity, and compromise in ways that disadvantage women and minorities).

A PLURALISTIC APPROACH TO MEDIATION ETHICS

discussed above, professional ethics codes begin from the conception of the professional's role in relation to the client(s).³⁹

In mediation, the mediator's role is This sentence cannot be completed easily because in mediation, given the pluralistic nature of practice as described above, the description of the mediator's role is not singular. Rather, the mediator's role can be defined in one or the other of two different ways: In the facilitative model, the mediator's role is "problem-solver" and guarantor of fairness, guiding the parties to a resolution that meets the needs and interests of both/all parties and avoids injustice to anyone.⁴⁰ In the transformative model the mediator's role is "conversation supporter," supporter of the parties' communication and decisionmaking, as they explore issues and options for resolution whose justice they alone judge and define.⁴¹ These two roles point down two different paths, as the above discussion of the key practices of each model illustrates: The facilitative role points and leads the mediator into managing communication, solving problems and guarding against unfairness, all of which include many highly directive practices. The transformative role points and leads the mediator into following and amplifying the parties' conversation, using non-directive but supportive practices that enhance but never supplant the parties' own choices, even if those choices lead to what might seem to others like unjust outcomes.

Does this difference in role conception and practices have ramifications for the adoption of codes of ethics to guide and regulate the conduct of mediators? Indeed it does, and the foundational differences should be and are reflected in such codes. If so, then the codes that reflect these differences will offer very different guidance to mediators in cases like that of Jose and Lilly. The following Part of the Article demonstrates that difference and highlights the difficulty this poses for practicing mediators who may be subject to codes that reflect different views of the mediator's role and point in different directions on questions of ethical practice.

IV. MEDIATION CODES AND MEDIATOR CHOICES

The best way to illustrate the way in which ethics codes point mediators in different directions is to return to the case of Jose and Lilly, and Rafaela, and examine how two different codes of ethics would answer differently the questions facing the mediator in that case. In this examination,

³⁹ See *supra* text accompanying notes 11–21.

⁴⁰ See *supra* text accompanying notes 22–29.

⁴¹ See *supra* text accompanying notes 32–38.

the significance of the different answers given can best be appreciated if the assumption is made that the mediator of the case is subject to *both* of these codes, a very real possibility.

Imagine that the Jose/Lilly case is mediated in one of the many community mediation centers overseen by the New York State Court System's Office of ADR Programs (OADR), by a lawyer who is a member of the American Bar Association's Family Law Section (ABA). Each of these entities has promulgated an ethics code, or "standards of conduct," to guide the conduct of mediators working under its aegis.⁴² If so, a volunteer community mediator who is also a family lawyer—not an unusual situation—is subject to the regulation/guidance of *both* of these codes. The following sections examine the portions of each code that would govern the situation presented in the Jose/Lilly case and direct the mediator how to answer his/her questions. First, however, it is instructive to see how each of these codes defines the role of the mediator, the core element in constructing ethical standards—and how different the definition is in each code.

A. *The Role of the Mediator*

According to the ABA Standards for Family and Divorce Mediation ("Family Code"), "The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants."⁴³ Clearly, the Family Code defines the role of the mediator in a manner consistent with the facilitative model of mediation—to help the parties reach agreements that solve their problems by meeting the needs and interests of all parties and avoiding unfairness. By contrast, the OADR Standards for Community Mediation Centers ("Community Code") states

⁴² See STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS (N.Y. STATE OFFICE OF ALT. DISPUTE RESOLUTION PROGRAM 2009), http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/Standards_of_Conduct.pdf [hereinafter Community Code]; see also MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, 35 FAM. L.Q. 27 (2001), available at <https://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf> [hereinafter Family Code]. The American Bar Association adopted the Family Code in 2001, and the Association of Family and Conciliation Courts adopted the Family Code in 2000.

⁴³ Family Code, *supra* note 42, at Standard I.B.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

that, “The primary purpose [role] of a mediator is to help the parties communicate, negotiate, and/or make decisions.”⁴⁴ This definition is more consistent with the transformative model of mediation—the mediator’s role is to support parties’ communication and decisionmaking per se, and neither problem-solving nor agreement is even mentioned.

Therefore, these two codes, and the standards contained in them, rest on very different foundational definitions of the mediator’s role. From this starting point, it seems likely that a facilitative mediator will find more useful guidance in, and will find it easier to comply with, the Family Code; while a transformative mediator will find more guidance, and more appropriate regulation, in the Community Code. But if this is so, the mediator of the Jose/Lilly case—a lawyer mediator volunteering in a community mediation center—will likely be torn about what to do, *regardless* of whether s/he follows the facilitative or transformative model, because in this case s/he is required to adhere to two codes that point in opposite directions with regard to those models. If the mediator is transformative, his/her practice will almost certainly run counter to the Family Code in important respects; if s/he is facilitative, his/her practice will almost certainly run counter to the Community Code. How then can this mediator find answers to his/her questions, and practice in a manner that meets his/her ethical obligations?

Before trying to answer this difficult question, it is important to deepen the question by looking more closely at the different answers these two codes give to the questions raised by the case of Jose, Lilly and Rafaela. Recall those questions, as posed earlier in the Article:

1. Assuming the mediator’s assessment is correct, regarding the risks to the child of Jose and Lilly’s agreement to have her sleep behind a screen in the adults’ room, should the mediator state his/her views of those risks explicitly to the parties?
2. Should s/he question them about what risks might be entailed, to get them to consider those risks, without stating her views?
3. Should s/he suggest or demand that they get expert advice about their idea before adopting it?
4. If they are not interested in considering the issue or seeking expert advice, or reject the mediator’s direct advice, should s/he allow them to proceed with their idea after all; or should s/he “veto” their proposed agreement and terminate the mediation?

⁴⁴ Community Code, *supra* note 42, at Standard VI cmt. 5.

As stated earlier, the essence of the dilemma underlying these questions is the tension between the value of self-determination and the value of protecting the weak and vulnerable, since any answer to the questions will likely sustain one of these values at the expense of the other.⁴⁵

In examining the provisions of the two codes that might address these questions, bear in mind that ethical codes generally use three terms in addressing mediator conduct, or “do’s and don’ts”—may (not), should (not), and shall (not). These terms are used to indicate conduct that is permissive, advisable, and mandatory. A mediator will consider carefully which of these terms is used in connection with a certain standard of conduct, not only to get proper guidance, but to ensure compliance with ethical requirements.

B. *Resolving the Dilemmas of the Jose/Lilly Case Under the Family Code*

As noted, the Family Code’s view of the mediator’s role seems consistent with the facilitative model of mediation: the mediator is there to facilitate an agreement that solves the problem in a way that meets the parties’ needs and avoids unfairness. The first suggestion of a general answer to the questions—and the underlying tension between the self-determination and protection values—comes in the very definition of the mediator’s role quoted above: the mediator is to help the parties “gain a better understanding of their own needs and interests and the needs and interests of others”—presumably including affected and vulnerable “third parties” not directly involved in the session, like Rafaela in our case.⁴⁶ Moreover the completion of the definitional provision, “and facilitate agreement among the participants” suggests that this agreement should be one that takes all these needs and interests into account and avoids unfairness.⁴⁷

Thus, the implication from the start is that the mediator has an obligation to ensure that the parties do not disregard the interests of affected others, particularly vulnerable others like Rafaela. This view is entirely consistent with the modern view of facilitative mediation, in which the obligation to ensure fairness (between the parties and to outsiders) is encompassed by the aim of problem solving.⁴⁸ Problem solving involves

⁴⁵ See *supra* note 10 and accompanying text.

⁴⁶ Family Code, *supra* note 42, at Standard I.B.

⁴⁷ *Id.*

⁴⁸ See Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 10–15 (2012) (discussing the “best practices” view of facilitative mediation).

A PLURALISTIC APPROACH TO MEDIATION ETHICS

reaching good quality outcomes, and unfair agreements are by definition not good quality outcomes. This refinement of the view of the aim of facilitative mediation has been widely accepted today.⁴⁹ Therefore as noted above, the facilitative mediator's role must be protective in some degree, because parties themselves will not necessarily take each other's interests, or those of third parties, into account. Who will see that they are taken into account? The mediator will do so, as part of his/her foundational role of problem solver searching for fair, good quality outcomes. Having noted this general orientation of the Family Code, consider each of the mediator's questions separately. With each question, recall that the mediator believes that the screen solution is dangerous to Jose and Lilly's child, despite the couple's agreement on this solution.

1. *SHOULD THE MEDIATOR STATE EXPLICITLY TO JOSE AND LILLY HIS/HER VIEW REGARDING THE RISKS TO RAFAELA OF THE SLEEPING SCREEN ARRANGEMENT THEY ARE AGREEING TO?*

An answer to this question is given, or at least implied, by considering several sections of the Family Code. First, Standard I ("shall recognize that mediation is based on the principle of self-determination") states that the process "relies on the ability of participants to make their own voluntary and *informed* decisions."⁵⁰ If the mediator believes that the participants are about to make a decision uninformed by crucial information about risks to their child, this might at least permit, though perhaps not require, him/her to inform them about those risks.

Looking further in the Family Code, Standard VI ("shall structure the process so that . . . decisions [are] based on sufficient information and knowledge") provides that "a mediator *may* provide the participants with information that the mediator is qualified by training or experience to provide. The mediator *shall not* provide therapy or legal advice."⁵¹ In the case at hand, it is given that the mediator has training/experience in child welfare. Therefore this provision would clearly permit the mediator to share her view, as an expert in the field, that the screen arrangement, according to the current state of experts' understanding, would pose risks to Rafaela's

⁴⁹ *See id.*

⁵⁰ Family Code, *supra* note 42, at Standard I.A (emphasis added).

⁵¹ *Id.* at Standard VI.B. (emphasis added).

welfare—provided that s/he presents this view as “information” and not “advice.”⁵² So, to address the language of the question, the mediator may tell the participants of the experts’ view on this type of situation, but the mediator probably should not present it as his/her *personal* view, in order to steer clear of the restriction on advice-giving.

While this provision allows the mediator to explicitly state the risks to Rafaela, it does not recommend or require the mediator to do so. On the other hand, taken together with the definitional provision discussed above, the Family Code could be understood to recommend or require the mediator to share this information because it will “help the participants understand . . . the needs and interests of others”—namely, Rafaela. Therefore, the Family Code at least allows, and may even recommend or require, the mediator to tell Jose and Lilly about the experts’ view that this arrangement would be risky to Rafaela, even though doing so would be an attempt to influence their decision and would thus intrude on their right of self-determination.⁵³

2. *SHOULD THE MEDIATOR QUESTION JOSE AND LILLY ABOUT WHAT RISKS MIGHT BE ENTAILED, TO GET THEM TO CONSIDER THOSE RISKS, WITHOUT STATING HER OWN VIEW OR “EXPERT OPINION” EXPLICITLY?*

This question contemplates a less directive means of getting the mediator’s concern about Rafaela’s welfare into consideration by the parents. It assumes that the mediator is not comfortable presenting the information about risks directly, as expert information (and does not believe that doing so is required), but she is still concerned about the danger posed to Rafaela. Therefore, she thinks it might be appropriate at least to prompt the parties to

⁵² *But see* Bush, *supra* note 9, at 29–30 (reporting that many mediators find this line difficult to define, and that, in fact, any information offered may seem “one-sided,” since it may often weigh in favor of one party’s views rather than the other party’s, running afoul of the obligation to be impartial).

⁵³ On another reading of the Family Code, this might not be disregarding the “principle of self-determination” as set forth in Standard I, because that Standard itself describes self-determination as “rel[ying] on the ability of the participants to make voluntary and *informed* decisions” (emphasis added). The key term here is “informed,” suggesting that where the parties lack critical information—such as the risks to Rafaela here—their ability to make informed decisions is lacking. Therefore, supplying that information, or otherwise bringing it to their attention by steps discussed below, actually supports rather than detracts from their exercise of self-determination. *See, e.g.,* Joseph B. Stulberg, *Must a Mediator Be Neutral? You’d Better Believe It!*, 95 MARQUETTE L. REV. 829, 829 (2012). However, see *infra* text accompanying notes 70–72 for a different view regarding the question of “informed consent.”

A PLURALISTIC APPROACH TO MEDIATION ETHICS

consider that there may be risks involved in their proposed screen arrangement, for example by raising questions as they discuss the proposal. For example, she might ask, “That’s an interesting idea, to use a screen, but do you see any downside to this for Rafaela, or would it be fine for her?” Facilitating a discussion of this question could focus the parents’ attention on Rafaela’s welfare and lead them to reconsider the desirability of this arrangement.

The Family Code’s provisions suggest that taking this step would be ethically permissible, and even desirable. Thus, Standard VIII (“shall . . . assist participants in determining how to promote the best interests of children”) provides that “The mediator *should encourage* the participants to explore the range of options available for separation or post divorce parenting arrangements and their respective costs and benefits.”⁵⁴ The “should” language of the Standard indicates that this kind of mediator encouragement is recommended, not just permissible, and possible risks to Rafaela from the screen arrangement certainly qualify as “costs” of a parenting arrangement. Furthermore, under that Standard, the Family Code further suggests that this exploration may include topics such as “information . . . that can help the participants and their children cope with the consequences of family reorganization,” “development of a parenting plan that covers the children’s physical residence with appropriate levels of detail,” and “the developmental needs of the children.”⁵⁵ Clearly, the question of the screen arrangement for Rafaela clearly relates to all of these topics, and is therefore well within the scope of the Family Code’s recommendation that the mediator encourage exploration of this question with Jose and Lilly, even though doing so intrudes on party self-determination.

3. *SHOULD THE MEDIATOR SUGGEST OR DEMAND THAT JOSE AND LILLY GET EXPERT ADVICE ABOUT THEIR SCREEN IDEA BEFORE ADOPTING IT?*

This next question assumes that, in whatever discussion the mediator encourages regarding the screen proposal, Jose and Lilly still see no significant downside for Rafaela. Since the mediator him/herself is not permitted (under Standard VI)⁵⁶ to give therapeutic or legal advice but remains concerned about the risks to Rafaela, s/he is contemplating the step

⁵⁴ Family Code, *supra* note 42, at Standard VIII.A (emphasis added).

⁵⁵ *Id.*

⁵⁶ *Id.* at Standard VI.B.

of recommending that the parents get advice from a child/family counselor who is an expert—thinking that this counselor will likely advise against the arrangement. Of the questions asked thus far, the answer to this is the clearest. According to Standard VI (“decisions based on sufficient information”), “acquisition and development of information during mediation, so that the participants can make informed decisions . . . *may* be accomplished by encouraging participants to consult appropriate experts.”⁵⁷

In addition, Standard VIII (“promote the best interests of children”) provides that in discussing the “costs and benefits” of parenting arrangements, “Referral to a specialist in child development *may* be appropriate for these purposes.”⁵⁸ The language of the Family Code is permissive here—using the term “*may*” rather than “*should*” or “*shall*.” Thus, the Family Code stops well short of requiring or even recommending such referrals. However, the Family Code’s permissive language indicates that, in taking the step of referring—and encouraging—the parties to consult outside experts in child welfare, the mediator would be on solid ethical ground.

4. *ULTIMATELY, IF LILLY AND JOSE ARE NOT INTERESTED IN SEEKING EXPERT ADVICE, AND THEY DECIDE TO IGNORE THE EXPERT INFORMATION THE MEDIATOR GIVES THEM ABOUT CHILD WELFARE, SHOULD S/HE ALLOW THEM TO PROCEED WITH THEIR AGREEMENT ON THE SCREEN; OR SHOULD S/HE “VETO” THEIR PROPOSED AGREEMENT AND TERMINATE THE MEDIATION?*

Mediation students or trainees often assume that, once it is concluded that the mediator can give the parties “child welfare” information directly, or at least refer them to an expert who will advise them about risks to Rafaela, the dilemma is resolved. But this ignores the very real possibility that the parents will dismiss the mediator’s “expert” information and reject the idea of seeking outside advice. Parents—and other parties to mediation—are often leery of experts, as well as unwilling to bear additional costs. Addressing the dilemma must include the final question of what, if anything, to do if Jose and Lilly reject all the mediator’s efforts to highlight the risk of the screen proposal to Rafaela through the steps discussed previously. This is, in a sense, the toughest question involved in this situation, and mediators often give it short shrift by assuming that the steps discussed previously will “work” to change the parents’ mind. In fact, it is in addressing the toughest

⁵⁷ *Id.* at Standard VI.A (emphasis added).

⁵⁸ *Id.* at Standard VIII.A. (emphasis added).

A PLURALISTIC APPROACH TO MEDIATION ETHICS

questions that an ethical code reveals its underlying orientation. And it is here that the Family Code gives its strongest direction, and the clearest indication of what side of the value choice—protection or party self-determination—it ultimately weighs more heavily.

In Standard XI (“shall suspend or terminate the mediation process . . . for compelling reason”), the Family Code states that “a mediator should consider suspending or terminating the mediation if . . . [the] well-being of a child is threatened [or] the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable.”⁵⁹ Given the mediator’s view of the risks to Rafaela posed here, and the insistence on the parents on going forward despite hearing of those risks through one of the steps discussed earlier, it would be reasonable indeed for the mediator to conclude that Rafaela’s well-being is being threatened and that the agreement about to be made is unconscionable in light of that threat. And in that case, the Family Code states, the mediator is *required* to step in and “pull the plug” on the process (“*shall* suspend or terminate”), despite the parents’ desire to go ahead. Of course, as often suggested when this requirement to terminate is mentioned, the parents can certainly go ahead without the mediator, since they’ve basically achieved an agreement—so what is the point of the mediator’s “vetoing” the agreement at this point?⁶⁰ The answer is that the mediator’s “veto” may still stop them, or give them pause, and at any rate it avoids the mediator’s endorsement of a bad solution.

In effect, this standard is a clear statement from the Family Code that, in terms of ethical obligations, the mediator’s accountability for the agreement’s fairness and quality “trumps” the mediator’s duty to support party self-determination. The Family Code resolves the difficult choice between the values of fairness and self-determination in favor of the outcome fairness/quality value.

5. SUMMARY

Thus, in analyzing the Family Code to find answers to the specific questions that arise for the mediator in this case, it is clear that the Family Code permits, recommends, and ultimately requires the mediator to take steps that privilege protecting Rafaela, as a vulnerable person, over supporting the exercise of self-determination by Jose and Lilly, the actual

⁵⁹ *Id.* at Standard XI.A.1, A.4.

⁶⁰ Joseph P. Folger & Sidney Bernard, *Divorce Mediation: When Mediators Challenge the Divorcing Parties*, 10 *MEDIATION Q.* 5 (1985) (reporting on a survey showing that mediators often “veto” an agreement they believe is unfair or unwise).

parties in the session. The guidance is clear and consistent, giving the mediator a well-defined direction to take in addressing the dilemma presented. It is also clear that this guidance is much more consistent with the facilitative approach to mediation than with the transformative approach. From beginning (Standard I) to end (Standard XI), the Family Code endorses the goal and strategies of a well-trained facilitative mediator—to seek to achieve an agreement that meets the needs of all affected parties and avoids unfairness, by directing and shaping the discussion of the issues toward that end and steering the parties away from unfair outcomes, even at the expense of party self-determination.

C. *Resolving the Dilemmas of the Jose/Lilly Case Under the Community Code*

As noted earlier, the Community Code's view of the mediator's role seems consistent with the transformative model of mediation, in which the mediator's job is to support the parties' communication and decisionmaking, without pressing for an agreement on those issues, or for any other particular outcome, and without judging the fairness of any agreement the parties decide to make. Seemingly reflecting this view, the first suggestion of a general answer to the questions about what to do in the Jose/Lilly case—and the implicit tension between the self-determination and protection values—comes in the Community Code's definition of the mediator's role quoted earlier: "The primary purpose [and role] of a mediator is to help the parties communicate, negotiate, and/or make decisions."⁶¹

The Code's statement is clear: the mediator's fundamental obligation is to support the parties' conversation but without influencing or pressuring them in any specific direction. In fact, the goal of agreement is not even mentioned in this definition nor is the concept of party needs and interests, whether those of the primary parties or those of affected and possibly vulnerable others like Rafaela. Rather, the terms used focus on "communication" and "decisionmaking." This definition of the mediator's role is entirely consistent with the approach of transformative mediation, in which the mediator's primary task is defined as "supporting and never supplanting" party deliberation, communication and decisionmaking. There is no suggestion in the Code's definitional language that the mediator has an obligation to ensure fairness (between the parties and to outsiders), or to act as guarantor of a fair outcome or agreement, or any agreement at all. Rather, the mediator is the facilitator of party communication and decisionmaking, wherever the communication and decisions may lead. Having noted this

⁶¹ See *supra* note 44 and accompanying text.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

general orientation of the Community Code, consider each of the mediator's questions separately, as described earlier.

1. *SHOULD THE MEDIATOR STATE EXPLICITLY TO JOSE AND LILLY HIS/HER VIEW REGARDING THE RISKS TO RAFAELA OF THE SLEEPING SCREEN ARRANGEMENT THEY ARE AGREEING TO?*

Several provisions of the Community Code offer guidance on this question, either directly or indirectly. The clearest guidance is stated in Standard VI (Quality of the Process), which includes several "comments" that offer specific ethical directives to the mediator. Comment 5 states that "a mediator should strive to distinguish between the roles [of the mediator and the professional advising a client and] . . . should therefore refrain from providing professional advice."⁶² The Community Code's language does not make a distinction between information and advice, although other codes do so, but, in any event, the mediator's expression of her view could easily be seen as giving advice.⁶³ The reasonable conclusion would be that the mediator is on more solid ground in withholding his/her view from Jose and Lilly and allowing them to make the decision as they see fit.

This conclusion is strengthened when Standard VI Comment 5 is read in conjunction with other provisions of the Community Code emphasizing the respect mediators must show for party self-determination. Thus Standard I (Self-Determination) states in mandatory language that "a mediator shall conduct a mediation in a manner that supports party self-determination as to both process and outcome . . . [meaning] that parties are free to make voluntary and uncoerced procedural and substantive decisions . . ."⁶⁴ While most ethics codes include respect for self-determination as an ethical requirement, many (including the Family Code) use more general and less emphatic language. Read against the background of a substantial literature documenting (and criticizing) mediator influence on parties as coercive, the Community Code's language here sends a message that the mediator should avoid expressing opinions that might have undue impact on the parties' deliberations.⁶⁵ It certainly is far from the Family Code's explicit

⁶² Community Code, *supra* note 42, at Standard VI cmt. 5.

⁶³ See *supra* note 52 and accompanying text.

⁶⁴ Community Code, *supra* note 42, at Standard I.

⁶⁵ See, e.g., Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: The "Problem" in Court-Oriented Mediation*, 15 GEORGE MASON L. REV. 863 (2008);

permission for the mediator to offer “information that s/he is qualified by training or expertise to provide.”⁶⁶ Again, the Community Code suggests that the mediator is on more solid ground allowing the parties to decide on this solution without stating his/her opinion explicitly to them.

A third provision that supports this conclusion is found in Standard II (Impartiality). Standard II.A requires in mandatory language that “[a] mediator shall . . . avoid conduct that gives the appearance of partiality toward or prejudice against a party . . . in word, action or appearance.”⁶⁷ The emphasis on the *appearance* of partiality makes it clear that the mediator must be very careful about how his/her words may be understood by the parties. In the Jose/Lilly case this is quite relevant, since the mediator’s opinion about the risks to Rafaela actually mirror the opinion originally expressed by Jose. While the mediator’s opinion is based on very different grounds than Jose’s, it might still appear that s/he is “siding” with him against Lilly, giving the appearance of partiality.⁶⁸ Some mediators have suggested that almost any opinion or even information given by a mediator in a contentious situation may be seen by one of the parties as “one-sided,” regardless of the mediator’s motivation.⁶⁹ Again, the ethically sounder response for the mediator in this case would be to refrain from explicitly stating his/her negative view of the screen solution being reached by Jose and Lilly.

A final provision in the Community Code that confirms this conclusion is the language included in Standard I Comment 3 about “informed choice.” Some have argued that, when parties lack important information that might affect their decision about an outcome, this itself undermines party self-determination, so the mediator must take some steps to ensure that the crucial information is not missing.⁷⁰ However, the language

Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEG. L. REV. 1 (2001). Both articles document the frequency of mediators exerting pressure and coercion to reach settlements and criticize this phenomenon.

⁶⁶ Family Code, *supra* note 42, at Standard VI.B.

⁶⁷ Community Code, *supra* note 42, at Standard II.A.

⁶⁸ Note that impartiality (not favoring any one party) is different than neutrality (not having a preference for a certain substantive outcome, for fairness reasons or otherwise). *See* Stulberg, *supra* note 53.

⁶⁹ *See* Bush, *supra* note 9, at 20–30; *see also supra* note 53.

⁷⁰ *See, e.g.,* Stulberg, *supra* note 33. Other commentators also argue that the mediator is obligated to ensure that parties have critical information, without which self-determination is a fiction. *See, e.g.,* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999) (arguing that informed consent is an essential

A PLURALISTIC APPROACH TO MEDIATION ETHICS

of Standard I itself states that “self-determination means that parties are free to make . . . uncoerced decisions . . . including whether to make an informed choice to agree or not agree.”⁷¹ The language here is somewhat ambiguous, but arguably it can be read as supporting a party decision to make a choice despite lacking certain information. This reading is supported by Standard I Comment 3, which states clearly that “A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement”⁷² In other words, the mediator is not responsible for guaranteeing “informed choice,” because parties must be free to decide how much information they need to reach a decision. Party self-determination under the Community Code, in sum, requires the mediator to exercise great restraint from any possible influence on the parties’ decisions, even if s/he thinks they are missing or overlooking important information. That suggests again that the mediator in the Jose/Lilly case is on soundest footing in keeping his/her own counsel regarding the screen solution and its possible risks, because party self-determination is paramount.

2. *EVEN IF THE MEDIATOR REFRAINS FROM DIRECTLY EXPRESSING AN OPINION ABOUT THE SCREEN, SHOULD S/HE AT LEAST QUESTION THE PARTIES ABOUT WHAT RISKS MIGHT BE ENTAILED, TO GET THEM TO CONSIDER THOSE RISKS, WITHOUT STATING HIS/HER VIEWS?*

Although the Community Code discourages or prohibits the mediator from directly expressing his/her concern about the screen solution, s/he might wonder whether it is permissible and desirable to at least signal the concern to the parties by posing questions to them about that solution. As mediation experts have long noted, many mediators are skilled in using questions as an indirect way of making suggestions about possible solutions to a problem.⁷³ Would such a strategy be considered ethical under the Community Code? On initial examination, such questioning would not seem to violate any of the Community Code’s provisions, although there is no

aspect of party self-determination and “[w]ithout it, mediation’s promises of autonomy and self-determination are empty.”) *Id.* at 787–89, 840. *See also* Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281 (2012). *See also infra* note 100 (explaining what may seem to some like an unduly strict interpretation here of the Code’s provisions on this and other points).

⁷¹ Community Code, *supra* note 42, at Standard I.

⁷² *Id.* at Standard I cmt. 3.

⁷³ *See* Kolb & Kressel, *supra* note 23, at 468–70.

provision of the Community Code that explicitly permits, encourages, or requires the mediator (as does the Family Code) to raise the subject of risks to Rafaela with the parties if neither of them has raised that subject. However, a conservative reading of the Community Code's various provisions suggests that questioning the parties in this way might well run afoul of the Community Code's strong orientation toward preserving party self-determination.

To return to the point made above regarding research on mediator practices, questioning party proposals is a well-recognized method of influencing parties toward or away from a solution preferred by the mediator. As researcher Deborah Kolb puts it, for many mediators,

[Q]uestions become suggestions in the guise of a query . . . [using the mediators'] expertise as the touchstone of their efforts at persuasion and influence. These mediators . . . acknowledge that they make judgments about what is a good and bad agreement and try to influence the parties in the direction of the good⁷⁴

Against this background, a mediator who asks questions about the risks to Rafaela of the screen solution, when the parties have not raised such questions themselves, runs his/her own risk of violating Standard I's command to ensure that "parties are free to make voluntary and uncoerced . . . substantive decisions" ⁷⁵ Certainly, if the mediator's conduct were challenged, s/he would have to admit that the very purpose of his/her questions was to influence the parties away from the screen solution, and such conduct would clearly violate Standard I's strong injunction to support party self-determination.

One provision of the Code does seem to support the mediator's raising questions on his/her own initiative. That is Standard II Comment 2, on the necessity of maintaining impartiality "even while raising questions regarding the reality, fairness, equity, durability and feasibility of proposed options for resolution."⁷⁶ This provision seems to contemplate the mediator raising questions on her own for the parties to consider. However, the implicit endorsement of mediator questions here seems somewhat anomalous when read against the Community Code's insistence elsewhere that the mediator avoid any action that could influence and limit party self-

⁷⁴ *Id.*

⁷⁵ Community Code, *supra* note 42, at Standard I.

⁷⁶ *Id.* at Standard II cmt. 2.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

determination. Moreover, immediately following Comment 2, Comment 3 reaffirms that “The mediator’s commitment is to remain impartial towards the parties *and their choices* in the process”⁷⁷ That is, the mediator must not show (or appear to show) partiality either to parties *or* to their choices—like the choice of the screen solution.⁷⁸ Where the questions asked by the mediator have the effect of disfavoring a choice the parties are making, as they would in the case here, it seems that the Community Code would disallow as “partial” the very questions it seems to permit. Note also that Comment 2’s primary focus is on maintaining impartiality, not on permitting mediator questions, which are mentioned only as examples of how impartiality may be compromised. Therefore, read conservatively, Comment 3 seems to trump Comment 2 and to indicate that mediator questions are potential ethical landmines to be avoided.⁷⁹

In sum, the provisions of the Community Code taken together direct the mediator to refrain from asking questions about risk “on her own motion,” where the parties have not introduced the subject themselves. The sounder approach would be for the mediator to listen carefully for any indication in their own comments that either Jose or Lilly has concerns about the risks of the screen and then to reflect those comments for the parties. That would support the discussion of risks to Rafaela at the parties’ *own* initiative, preserving rather than diluting self-determination. And that would be the practice of a well-trained transformative mediator. But if the parties raised no question about risks themselves, the mediator should seemingly not raise the issue him/herself by asking questions, for doing so could violate the mediator’s duty to fully support, and not undermine, party self-determination.

⁷⁷ *Id.* at Standard II cmt. 3 (emphasis added).

⁷⁸ See *supra* note 68 on the distinction between impartiality and neutrality. Here the Community Code seems to be demanding neutrality, but the language is not clear.

⁷⁹ Alternatively, these two comments may simply give inconsistent directions, which is a common flaw in ethics codes. See WALDMAN, *supra* note 2. Standard principles of interpretation suggest that, where there is inconsistency, the overall principle of the code should determine which of two provisions to give greater effect—and if so, the principle of self-determination would limit the seeming permission to raise questions in Comment 2.

3. *EVEN IF S/HE REFRAINS FROM QUESTIONING THE PARTIES ABOUT THE WISDOM OF THEIR SCREEN SOLUTION, SHOULD S/HE SUGGEST OR DEMAND THAT THEY GET EXPERT ADVICE ABOUT THEIR IDEA BEFORE ADOPTING IT?*

This question assumes that, in whatever discussion occurs between them regarding the screen proposal, Jose and Lilly see no significant downside for Rafaela. As discussed above, the mediator him/herself is not permitted to provide information or advice, nor to ask questions in order to provoke party consideration of risks to the child in their discussion. Nevertheless, s/he remains concerned about the risks to Rafaela of the screen solution, so s/he is contemplating another action: recommending that Jose and Lilly get outside advice from a child/family counselor who is an expert—thinking that this counselor will likely advise against the arrangement. The answer to this is clear under the Community Code, and it is close to the Family Code’s answer.

Thus, even in Standard I with its seemingly absolute injunction to support party choice and self-determination, Comment 3 qualifies its statement that the mediator cannot ensure informed choice by adding that “the mediator *can* make the parties aware that they may consult other professionals to help them make informed choices”⁸⁰ In addition, in Standard VI, after defining the mediator’s role solely as “help[ing] the parties communicate, negotiate and/or make decisions” and recommending that “a mediator should . . . refrain from providing professional advice,”⁸¹ Comment 5 then adds that “where appropriate, a mediator *should* recommend that parties seek outside professional advice”⁸² Thus the Code first *permits* the mediator to suggest obtaining outside advice with the “can” language and then *recommends* such action with the “should” formulation. Taking the two together, there seems to be little question that the mediator is not only permitted but encouraged to make the recommendation that s/he is contemplating here.

There is some inconsistency in the Community Code’s endorsement of mediators’ recommending outside expert advice, for the recommendation itself may suggest to the parties that their own choices are flawed in some way. Like raising questions without directly expressing an opinion, recommending consultation with outside experts would seem to be a signal that the mediator disapproves of the choice the parties are making.

⁸⁰ Community Code, *supra* note 42, at Standard I cmt. 3 (emphasis added).

⁸¹ *Id.* at Standard VI cmt.5.

⁸² *Id.* at Standard VI cmt. 5 (emphasis added).

A PLURALISTIC APPROACH TO MEDIATION ETHICS

Nevertheless the Community Code certainly views this step as acceptable ethically.

However, taking the further step mentioned in Question 3, and *demanding* that the parties seek outside advice, is not supported by the language of the Community Code. There is no “shall” language used in connection with this step, and if the mediator were to insist that the parties get an outside expert opinion, doing so would almost certainly violate the general injunction of Standard I to support the parties’ “free[dom] to make voluntary and uncoerced . . . substantive decisions.”⁸³ And if the mediator him/herself feels that making this recommendation is unduly burdensome on the parties’ self-determination, the Community Code does not *require* that this be done—in contrast with the Family Code’s mandate that “a family mediator *shall* structure the . . . process so that participants make decisions based on sufficient information and knowledge”⁸⁴ and that “a family mediator *shall* assist participants in determining how to promote the best interests of the child.”⁸⁵ So the Community Code encourages, but does not require, the mediator to recommend seeking advice from experts outside the process. Finally, if the parties decline to follow the mediator’s recommendation to seek outside advice, the Community Code does not authorize the mediator to insist that they do so, because this would intrude on their self-determination. This last point sets up discussion of the mediator’s fourth and most serious question.

4. *FINALLY, IF THE PARTIES ARE SIMPLY NOT EXPRESSING CONCERNS ABOUT THE RISKS TO RAFAELA ON THEIR OWN (AND WITHOUT DIRECT OR INDIRECT INPUT FROM THE . . . MEDIATOR) AND THEY ARE NOT INTERESTED IN SEEKING EXPERT ADVICE EVEN IF THE MEDIATOR RECOMMENDS DOING SO, SHOULD THE MEDIATOR ALLOW THEM TO PROCEED WITH THEIR SCREEN IDEA AFTER ALL; OR SHOULD S/HE “VETO” THEIR PROPOSED AGREEMENT AND TERMINATE THE MEDIATION?*

Having answered Question 3 affirmatively, mediators or trainees often assume that the dilemma is resolved—the mediator cannot express his/her opinion, or even pose suggestive questions, but s/he can refer the

⁸³ *Id.* at Standard I.

⁸⁴ Family Code, *supra* note 42, Standard VI (emphasis added).

⁸⁵ *Id.* at Standard VIII (emphasis added).

parties to an outside expert who will hopefully “straighten them out.” But this ignores the very real possibility that Jose and Lilly will simply reject the idea of seeking outside advice. Parents—and other parties to mediation—are often leery of experts, as well as unwilling to bear additional costs, so addressing the dilemma must include the final question of what, if anything, to do, if Jose and Lilly reject the recommendation for getting outside advice and just resolve to go ahead with the screen proposal without any concern for its risks to Rafaela. As with a mediator working under the Family Code, this is the toughest question involved in this situation under the Community Code, since it assumes that the mediator still feels Rafaela is at risk but believes that Jose and Lilly are either oblivious to that risk or underestimating it. In fact, it is in addressing the toughest questions that an ethical code reveals its underlying orientation. And it is here that the Community Code, like the Family Code on the same question, gives the clearest indication of what side of the value choice it ultimately weighs more heavily.

It first appears that the Community Code does contemplate the mediator’s terminating the mediation session in certain circumstances, despite Standard I’s strong mandate to support the parties’ freedom to make their own choices. The “termination” language indeed appears in Standard I itself, in Comment 4, and it also appears prominently in Standard VI, which states clearly that “a mediator shall terminate the mediation . . . or take other appropriate steps if she or he believes that participant conduct . . . jeopardizes sustaining a quality mediation process.”⁸⁶ However, upon closer examination it seems that the situation presented in the Jose/Lilly case does not present the kind of circumstances the Community Code sees as justifying overriding party choice and terminating a mediation.

In the several provisions of the Community Code recommending or requiring termination of the session by the mediator, different reasons are given to justify that extreme step. In Standard VI Comment 8, the Community Code recommends (but does not require) termination by the mediator if a party is incapable of understanding and participating in the mediation process.⁸⁷ The Community Code does not elaborate, but its language suggests its concern for the circumstance where a party has diminished capacity either because of a mental impairment or because of substance abuse. The Jose/Lilly cases does not present this circumstance, so Comment 8 does not apply. Comment 10 of the same Standard recommends

⁸⁶ Community Code, *supra* note 42, at Standard VI.B.

⁸⁷ *Id.* at Standard VI cmt. 8.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

termination “if the mediation is being used to further illegal conduct” and is also inapplicable to the Jose/Lilly case.⁸⁸

Beyond these two provisions, there are several others in which termination is recommended or even required, and they all make reference to the same justification—“power imbalances” between the parties. Standard I Comment 4 recommends that “Where a power imbalance exists between the parties . . . the mediator should . . . terminate the mediation”⁸⁹ Standard VI Comment 11 observes that “a mediator has an ongoing obligation to be sensitive to power imbalances between the parties” and recommends that if such imbalances jeopardize sustaining a quality mediation process, “the mediator should terminate the process.”⁹⁰ This kind of concern for power imbalances is very common in mediation literature, although it is usually found in discussions of facilitative, not transformative, mediation.⁹¹ Therefore, it is somewhat surprising to see it in Community Code, which overall reflects a transformative orientation. However, even by the common definition of power imbalances—one party possessing more resources, information, or bargaining power than the other—this kind of circumstance is not presented in the Jose/Lilly case. As between Jose and Lilly themselves, no such differential appears to exist, and the Community Code does not address the impact on a vulnerable third party such as Rafaela.

Therefore, none of the Community Code’s provisions that recommend termination apply in the circumstances of the Jose/Lilly case. Rather, in this situation where two relatively co-equal parties are making what the mediator believes is a bad decision, even one that affects a child, the mediator’s concern for the child’s welfare cannot override the obligation to support the parties’ self-determined choices about the solution.⁹² Regarding the mediator’s fourth question, then, the answer is that nothing in the Community Code permits, recommends or requires the mediator to terminate this session if Jose and Lilly have agreed on the screen solution for Rafaela’s sleeping arrangement. The mediator must accept their decision without comment. The result could not be more different from that under the Family Code.

⁸⁸ *Id.* at Standard VI cmt. 10.

⁸⁹ *Id.* at Standard I cmt. 4.

⁹⁰ *Id.* at Standard VI cmt. 11.

⁹¹ See *supra* note 29 and accompanying text.

⁹² The same would be true, presumably, if the mediator was concerned that the “bad decision” affected one of the parties themselves, where they were of relatively equal power, or if the vulnerable party were an older person, etc. See Bush, *supra* note 9, at 25–28.

5. THE CODE'S DEFINITION OF "POWER IMBALANCE"

Apart from the answer to the mediator's last question, it is important to note that the Code's commitment to supporting party self-determination is even stronger than discussed thus far because of its unusually narrow definition of "power imbalances." As noted, the common definition of a power imbalance is a significant differential in bargaining power, etc.⁹³ However, the Community Code, including the footnotes and comments to the Standards, uses a much narrower definition and uses it consistently throughout the document. Thus, Standard I Comment 4 refers to "a power imbalance [that] exists between the parties such that one or both parties cannot exercise self-determination."⁹⁴ Then Footnote 7 to that Comment explains that the indicators of such a power imbalance are "where one party *threatens, intimidates, or otherwise coerces* the other party into . . . reaching a desired result . . . [.]"⁹⁵ Similarly, in Standard VI Comment 11, referring to power imbalances that jeopardize a quality process and justify termination, Footnote 15 clarifies the definition of power imbalance in identical language.⁹⁶ In short, the Community Code's definition of power imbalances is far narrower than the conventional definition, and essentially means the presence of threatening and intimidating behavior directed by one party at the other.

This narrow definition is confirmed further by the "Committee Notes" by the Mediator Ethics Advisory Committee that are appended to the Standards themselves. The Note to Standard I Comment 4, cited above as recommending termination where a power balance exists, states:

The Committee recognizes that power imbalances are an inherent part of mediation between any two parties . . . [and] since the issue of power concerns the fundamental principle of self-determination the mediator should be sensitive to any significant challenge to a party's ability to freely and willingly make decisions⁹⁷

However, the Note then continues, using the same language cited above from Comment 4 itself,

⁹³ See *supra* note 29 and accompanying text.

⁹⁴ Community Code, *supra* note 42, at Standard I cmt. 4.

⁹⁵ *Id.* at Standard I cmt. 4 n.7 (emphasis added).

⁹⁶ *Id.* at Standard VI cmt. 11 n.15.

⁹⁷ *Id.* at Committee Notes, note to Standard I cmt. 4.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

Such circumstances include where one party is *threatening, intimidating or otherwise manipulating* the other party through either words or actions. In those cases the mediator should . . . terminate the mediation.⁹⁸

In other words, the meaning of the term “power imbalance” in the Community Code, according to its drafters, is not a differential in bargaining power alone, but the actual exercise of intimidation by one party against the other. This is a far narrower definition than the conventional one referring to differential bargaining power. The Note to Standard VI Comment 11 uses identical language in explaining when the principle of self-determination is to be overridden. It seems likely that the Community Code’s concern about “power imbalances” refers primarily, though only implicitly, to cases involving domestic violence or abuse, where intimidation, threat and manipulation are often present, even if not openly revealed.⁹⁹

In short, the Community Code’s commitment to party self-determination prevails and negates the mediator’s authority to terminate a session, even where there *is* a power imbalance in the conventional sense—a power *differential*—unless the stronger party is using that differential to threaten, intimidate, or coerce the other. This is clearly not the situation in the Jose/Lilly case, but this full examination of the Community Code’s provisions is meant to demonstrate the great weight the Community Code assigns to the value of party self-determination.

6. SUMMARY

Thus, in analyzing the Community Code to find answers to the specific questions that arise for the mediator in this case, it is clear that the Code neither requires, recommends, or even permits the mediator to take steps that would override or even influence, directly or indirectly, Jose and Lilly’s decision about the screen, other than recommending that they seek an outside expert’s view—and if they are not interested in doing so, the mediator must accept their decision. All this, even though the mediator sincerely believes that the screen solution puts Rafaela’s welfare at risk. Nevertheless, the mediator must privilege supporting the exercise of self-

⁹⁸ *Id.* (emphasis added).

⁹⁹ See *generally* LUNDY BANCROFT, UNDERSTANDING THE BATTERER IN CUSTODY AND VISITATION DISPUTES (1998), <http://www.thelizlibrary.org/~liz/liz/understanding-the-batterer-in-visitation-and-custody-disputes.pdf>.

determination by the parents, Jose and Lilly, over protection of a vulnerable child. The guidance is clear and consistent, giving the mediator a well-defined direction to take in addressing the dilemma presented. It is also clear that this guidance is much more consistent with the transformative approach to mediation than with the facilitative approach. From beginning (Standard I) to end (Standard VI), the Community Code endorses the goal and strategies of a well-trained transformative mediator—to support and never supplant party self-determination, withholding any and all directive impulses and instead following, attending to, and amplifying the parties' conversation in ways that help them regain their own sense of competence and connection in the midst of the conflict conversation, and relying on them to choose the best outcome for themselves and their child.¹⁰⁰

¹⁰⁰ This summary of the guidance given by the Community Code in this case, and its consonance with transformative mediation, may be disturbing or even shocking to some readers, including mediators who follow the facilitative approach in their practice. How can it possibly be ethically acceptable, they might ask, to leave a child at risk without taking any significant steps to prevent that result? And indeed, as noted in the text, there are possible readings of the Community Code's provisions that would permit the mediator somewhat more room to raise questions or take other steps with the aim of influencing the parents away from the screen solution. Why does the analysis in the text take what seems to be a very strict interpretation of the Code's provisions? The answer to these questions is in part rhetorical and in part substantive. Rhetorically, the aim of the strict reading given here is to show that the Community Code can be read as consistently privileging the self-determination value, although doing so may well put fairness and even safety at risk. That is, this is a reasonable reading of the Code and does not stretch the meaning of its provisions, especially when taken together. And this reading shows that a genuinely self-determination-based ethics code is both possible and practical—and that such a code is indeed in actual operation. This supports the argument made in this Article for a pluralistic ethics framework, without which such a code might not be considered viable. Beyond rhetoric, adopting a strict reading of the Code, with its clear direction that the mediator must avoid taking steps that intrude on the parents' self-determination, brings home the real meaning of following a transformative approach to practice. A transformative mediator will *not* be shocked by the Code's strict demands to respect and support the parents' choices; rather, this respect and support will seem completely proper to the mediator—and indeed the best way to achieve the goal of the mediation process. This is so because the goal is *not* to reach an optimal and fair agreement that protects against injustice. The goal is to support *the parties' exercise of their core human capacities for autonomy and understanding*. The underlying premise is that the parties actually have and value those capacities and are extremely distressed that the conflict has temporarily disabled them. With support from the mediator, they can reclaim those core human capacities and make decisions for themselves that are good and proper in their own judgment. In short, the transformative mediator's restrained and supportive approach does not mean that s/he does not *care* about justice or protection; it means that s/he *trusts the parties* to make decisions that are just and protective of

V. THE META-DILEMMA OF MEDIATION ETHICS AND POSSIBLE SOLUTIONS

From the extended analysis of how each of two mediation ethics codes would answer a mediator's questions about the same dilemma—support party self-determination or protect against unfairness or harm to a vulnerable party—it is evident that the codes themselves confront the practicing mediator with a meta-dilemma. That dilemma is faced squarely by the lawyer family mediator practicing in community mediation center: S/he is supposed to follow the guidance of two different codes, but the guidance offered by each is opposite to that offered by the other in critical ways. As a result, whatever course of action s/he takes, if it follows the direction of one code, will almost surely put him/her at risk of violating the other code. What should s/he do? There is no obvious answer to that question.

At a higher level, what of those charged with drafting and implementing these regulatory guides for mediators? If they choose to model their standards on the Family Code, they exclude transformative practitioners from practice in their jurisdiction. While if they model their standards on the Community Code, they put facilitative mediators on notice that their practices will not be accepted by the jurisdiction. The meta-dilemma, in short, is faced both by individual practitioners and by the authorities that promulgate standards to guide their practice. Whatever choice of standards is made, it will disfavor or exclude one group of practitioners, and favor and privilege another group. How can this meta-dilemma be resolved? In fact, there are several different approaches to doing so, and they will be described and considered in this Part of the Article.

A. *Unitary Standards*

The obvious way of resolving the meta-dilemma is simply to choose one of the competing underlying values—protection versus self-determination—as the supreme value and adopt a code that privileges that value. That would mean adopting either a code similar to the Family Code, on the one hand, or one similar to the Community Code, on the other. Each

themselves, each other, and other affected parties. This is not just theory; these principles are embedded in the actual work of the transformative mediator, and they explain and justify his/her ready acceptance of the ethical guidance given by a code like the Community Code, even when it is read strictly as in this Article. *See* BUSH & FOLGER, *supra* note 1, at ch. 1 & 7 and sources cited there (fully explaining and justifying these and other elements of a transformative mediator's outlook).

of those codes, as analyzed above, consistently privileges one of the two values, and thus takes a unitary approach. The effect of doing so, as noted above, is to put one group of mediators on notice that they must either change their mode of practice, or risk being in violation of the ethics code that regulates them. Policymakers are certainly entitled to follow such an approach. However, at a stage when mediation practice has arguably not crystallized into a single mold but is still developing, the unitary solution may be unduly restrictive to that development. Nevertheless, until recently it appears to have been the most prevalent solution. The Family (ABA) and Community (New York State) Codes analyzed above are both examples of the unitary approach, but there are numerous others—some favoring protection and the facilitative approach, and some favoring self-determination and the transformative approach. Consider the following examples.

1. *PROTECTION-BASED CODES*

Codes that favor the protection value would resolve the questions of the Jose/Lilly case in a similar fashion to the Family Code discussed above, as an analysis of the provisions of each code suggests. Note that most of these codes include a provision endorsing self-determination as “a core principle” of mediation. Nevertheless, the codes’ provisions contemplate overriding that principle when it conflicts with the concern for avoiding unfairness.

a. *Indiana Court Rules for Alternative Dispute Resolution*¹⁰¹

The Indiana Court Rules for ADR (“Indiana Rules”) incorporate ethics rules for multiple ADR processes, including mediation. Regarding mediation in particular, the Indiana Rules are notable in *not mentioning* anywhere the term “self-determination,” which is cited as a core principle in almost all mediation ethics codes. The Indiana Rules do contain a few provisions bearing on party self-determination, such as: “A neutral [mediator] shall not coerce any party,”¹⁰² and “[a] neutral [mediator] shall not make any substantive decision for any party.”¹⁰³ However, the Indiana

¹⁰¹ RULES FOR ALTERNATIVE DISPUTE RESOLUTION (IND. RULES OF COURT 2019), https://www.in.gov/judiciary/rules/adr/#_Toc470860707.

¹⁰² *Id.* at r. 7.5(A).

¹⁰³ *Id.* at r. 7.5(C).

A PLURALISTIC APPROACH TO MEDIATION ETHICS

Rules otherwise stress protective obligations of the mediator. Some provisions make the mediator responsible for the fairness of the process: “A neutral [mediator] shall promote mutual respect among the participants throughout the process”,¹⁰⁴ and “The mediator shall . . . in child related matters, ensure that the parties consider fully the best interests of the children and that the parties understand the consequences of any decision they reach concerning the children . . . [.]”¹⁰⁵ Other provisions go further and make the mediator responsible for preventing unfair outcomes: “The mediator shall terminate or decline mediation whenever the mediator believes that: the mediation process would harm or prejudice one or more of the parties or the children; [or] the ability or willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely; . . . or mediation is inappropriate for other reasons.”¹⁰⁶ Finally, the Indiana Rules require that “A neutral [mediator] shall withdraw whenever a proposed resolution is unconscionable.”¹⁰⁷ Taken together, these provisions make it clear that these ethics Indiana Rules exemplify a unitary code based on the value of protection against unfairness, even at the expense of self-determination.

b. *NYSDRA Standards of Ethics*¹⁰⁸

Another code that takes a unitary approach and favors the facilitative approach is the original code adopted by the New York State Dispute Resolution Association (“NYSDRA Code”) (still in effect as of 2005 but since replaced by the Model Standards discussed below). The NYSDRA Code explicitly refers to itself as a code for facilitative mediators: “Facilitative mediation is a process chosen by disputing parties, in which an impartial third party provides an opportunity for constructive deliberation, problem solving, and decision making by the parties. Based on the principles of self-determination, fairness and privacy, the mediator facilitates communication in a way that makes it possible for each party to gain greater clarity of perspectives, preferences, issues, goals, and options; from which

¹⁰⁴ *Id.* at r. 7.4(F).

¹⁰⁵ *Id.* at r. 2.7(A)(2).

¹⁰⁶ *Id.* at r. 2.7(D)(1).

¹⁰⁷ *Id.* at r. 7.5(B).

¹⁰⁸ NEW YORK STATE DISPUTE RESOLUTION ASSOCIATION, *MEDIATOR STANDARDS OF PRACTICE* (2005) (on file with author) (since superseded by adoption of Model Standards).

the parties can find and implement mutually acceptable terms of resolution.”¹⁰⁹ The language identifies the fundamental principles as “self-determination *and* fairness,” without clearly indicating which is to take precedence if they conflict. However, this question is resolved by later provisions. Standard F instructs mediators that they “shall respect [the parties’ right of self-determination] and act in ways to encourage parties that they are free to decide for themselves without outside compulsion . . . and should not act in any way that will compromise the parties’ rights to self-determination.”¹¹⁰ But Standard I.3 states that “the mediator should structure the sessions in a way that will allow participants to make decisions about the dispute based on as much information as possible,”¹¹¹ assigning the mediator responsibility for ensuring parties have adequate information, a protective provision. In Standard E.1, mediators are told they are also responsible for the fairness of the process and should therefore “provide all parties with a balanced opportunity for full expression of their needs, interests, issues, perceptions, common grounds and options for mutually acceptable resolutions.”¹¹² This provision is linked to one requiring mediators to become educated about domestic violence and abuse, suggesting that the “full expression” standard is aimed at protecting against unfairness in such situations as well as otherwise.

Finally, the clearest indication that the NYSDRA Code views protection against unfairness as primary is found in Standard D, on “Suspension or Termination.”¹¹³ This Standard says that a mediator *shall* suspend or terminate the session when “one or more of the participants is not participating in good faith or is abusing the mediation process,” or “one party has substantially more resources and/or bargaining power and the other party does not seem to fully comprehend the process, issues, or options, or is acting under fear or coercion,” or “the mediator believes that a participant is unable or unwilling to participate effectively in the mediation process”¹¹⁴—all of which are provisions aimed at protecting against unfairness in process or outcome, even though they all limit party self-determination in some measure. Thus, the NYSDRA Code also presents a unitary ethical framework that places protection against unfairness foremost in its guidance to mediators.

¹⁰⁹ *Id.* at Standard A.

¹¹⁰ *Id.* at Standard F.

¹¹¹ *Id.* at Standard I.3.

¹¹² *Id.* at Standard E.1.

¹¹³ *Id.* at Standard D.

¹¹⁴ *Id.*

A PLURALISTIC APPROACH TO MEDIATION ETHICS

c. *Ontario Bar Association (CBAO) Model Code of Conduct for Mediators*¹¹⁵

The Ontario Bar Association (CBAO) Model Code of Conduct for Mediators (“CBAO Code”) contains provisions having the clear effect of placing priority on protection over party self-determination. The CBAO Code governs Ontario mediators working under the Mandatory Mediation Program in Ottawa, Toronto, and Windsor. The CBAO Code begins with a section mandating mediator respect for party self-determination, but it is followed by other sections mandating considerable mediator decisionmaking power over questions of both process and potential outcome, for the sake of ensuring fairness.

Standard II states that “the mediator’s role . . . is to assist and encourage parties to a dispute: to communicate and negotiate in good faith with each other; to identify and convey their interests to one another; to assess risks; to consider possible settlement options; and to resolve voluntarily their dispute.”¹¹⁶ A subsequent standard requires the mediator: “ensure that they conduct a process which provides parties with the opportunity to participate in the mediation and which encourages respect among the parties,”¹¹⁷ in effect making the mediator the guarantor of a fair process. Beyond this concern for process fairness, the CBAO Code authorizes the mediator to suspend the mediation “if in their opinion: the process is likely to prejudice one or more of the parties; one or more of the parties is using the process inappropriately; one or more of the parties is delaying the process to the detriment of another party or parties; the mediation process is detrimental to one or more of the parties or the mediator; it appears that a party is not acting in good faith; or there are other reasons that are or appear to be counterproductive to the process.”¹¹⁸ Finally, the CBAO Code requires mediators to “terminate mediation if the[se] conditions are not rectified.”¹¹⁹ This standard reinforces the mediator’s role as protector from unfairness not only of process but outcome as well. In sum,

¹¹⁵ MODEL CODE OF CONDUCT (ONT. MINISTRY OF ATTORNEY GEN. 2018), <https://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/codeofconduct.php>.

¹¹⁶ *Id.* at Standard II.

¹¹⁷ *Id.* at Standard VII.2.

¹¹⁸ *Id.* at Standard XI.3.

¹¹⁹ *Id.* at Standard XI.4.

under the CBAO Code the mediator has a clear obligation to ensure fairness, without regard to party self-determination.

d. *Virginia Standards of Ethics for Certified Mediators*¹²⁰

The Virginia Standards of Ethics for Certified Mediators (“Virginia Standards”), while including the usual provision endorsing party self-determination, give clear priority to protection against unfairness. Like most of the protection-based codes, the Virginia Standards state that “[m]ediation is based on the principle of self-determination by the parties.”¹²¹ At the same time, the Virginia Standards permit the mediator several typical directive interventions regarding substantive issues (“The mediator may provide information and raise issues The mediator may suggest and explore options for the parties to consider”¹²²) and regarding the process itself (“The mediator shall promote a balanced process and shall encourage the participants to participate in the mediation in a collaborative, non-adversarial manner.”¹²³).

These provisions are followed by others that are more clearly oriented toward rights protection: “The mediator *shall* encourage the parties to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a party.”¹²⁴ The mandatory language indicates the importance placed on protecting against unfairness. Still more emphasis on protection is evident in the Standard addressing agreements reached by the parties:

Prior to the parties entering into a mediated agreement, the mediator shall encourage the parties to consider the meaning and ramifications of the agreement and the interests of any third parties. The mediator shall encourage review of any agreement by

¹²⁰ STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS (Sup. Ct. Va. 2011), <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/standards.html> [hereinafter Va. Rules].

¹²¹ *Id.* at Standard E.1.

¹²² *Id.* at Standard E.2.

¹²³ *Id.* at Standard E.4.

¹²⁴ *Id.* at Standard F.1 (emphasis added).

A PLURALISTIC APPROACH TO MEDIATION ETHICS

independent legal counsel for each of the parties prior to the mediated agreement being signed by the parties. If the mediator has concerns about the possible consequences of a proposed agreement or that any party does not fully understand the terms of the agreement or its consequences, the mediator may raise these concerns with the parties and may withdraw from the mediation.¹²⁵

Finally, the Virginia Standards include strong protective language regarding the mediator's obligation to terminate the process to avoid unfairness: "The mediator shall terminate the mediation when, in the mediator's judgment, the integrity of the process has been compromised. (For example, by inability or unwillingness of a party to participate effectively; gross inequality of bargaining power or ability; and unfairness resulting from nondisclosure, where there is a legal duty to disclose, or fraud, by a participant.)"¹²⁶ Overall, the Virginia Standards place a clear priority on avoiding unfairness, permitting and obligating the mediator to take steps to do so even if they undermine or override party self-determination.

2. SELF-DETERMINATION-BASED CODES

Codes that favor the self-determination value would resolve the questions of the Jose/Lilly case in a similar fashion to the Community Code discussed above, as an analysis of the provisions of each code suggests. In these codes, the endorsement of self-determination as a principle does not stand alone but is followed up by specific provisions that enact that principle.

a. *The Model Standards of Conduct for Mediators*¹²⁷

The Model Standards of Conduct for Mediators ("Model Standards") are a well-known and influential set of model ethical standards, jointly drafted and adopted in 2005 by three major organizations: the

¹²⁵ *Id.* at Standard I.1–3.

¹²⁶ *Id.* at Standard K.4.

¹²⁷ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, (AM. BAR ASS'N ET AL., 2005), https://www.mediate.com/articles/model_standards_of_conflict.cfm [hereinafter Model Standards].

American Bar Association, the American Arbitration Association and the Association for Conflict Resolution. While they themselves have no binding authority, they have served as the basis for authoritative codes in many jurisdictions—including the Community Code analyzed earlier, which was based in large part on the Model Standards.

The Model Standards define mediation as “a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.”¹²⁸ This puts party decisionmaking at the core of the process. The Model Standards continue with a strong statement regarding the mediator’s obligation to support party self-determination:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.¹²⁹

This provision requires mediator support for self-determination not only on outcome but on all process matters as well.

The Model Standards then clarify that “a mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions,”¹³⁰ thus removing from the mediator the duty to protect against uninformed party decisionmaking. The Model Standards do recommend—but do not require—that “where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.”¹³¹ Thus, while there is some recognition of the fairness concern, decisions on information are ultimately left to the parties.

Finally, Standard VI, regarding the duty to ensure a “quality

¹²⁸ *Id.* at Preamble.

¹²⁹ *Id.* at Standard I.A.

¹³⁰ *Id.* Standard I.A.2.

¹³¹ *Id.* at Standard I.A.2.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

process,” imposes a duty to postpone or terminate the process only for limited reasons: “[I]f a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation,”¹³² “if a mediator is made aware of domestic abuse or violence among the parties,”¹³³ or “if a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these [Model] Standards.”¹³⁴ The last of these three seems to be a catch-all provision, but it is noteworthy that no specific mention is made of a situation of “power imbalance” between the parties, nor is there any reference to terminating due to an “unconscionable agreement” or other substantive unfairness in the outcome. Indeed, the Model Standards’ formulation of the duty to terminate puts stricter limits on the mediator than the Community Code analyzed above, which does refer to “power imbalances” as a ground for termination, although from the Community Code’s definition of such imbalances, it seems likely, as discussed earlier, that this applies only in cases like domestic violence.¹³⁵ Still, the Model Standards are more precise in this regard, and provide no explicit protection against “power imbalances.”

In sum, the Model Standards seem to present a strong example of a unitary code that privileges party self-determination over protection. However, there are several provisions of the Model Standards that suggest a dual focus on both values, as discussed in the following Section.

b. Codes Based on the Model Standards

As mentioned above, the Model Standards themselves carry no binding authority. However, they have been adopted in binding form by several jurisdictions.¹³⁶ For example, the Community Code analyzed above in Part II of this Article was based largely on the Model Standards, although there are some differences as discussed below. Also, NYSDRA adopted the Model Standards in full as its revised codes of ethics. In doing so, it moved from its original unitary

¹³² *Id.* at Standard VI.A.10.

¹³³ *Id.* at Standard VI.B.

¹³⁴ *Id.* at Standard VI.C.

¹³⁵ See *supra* notes 93–95 and accompanying text.

¹³⁶ See Exon, *supra* note 19, for a comprehensive discussion of ethics codes in different jurisdictions, noting which ones are based on the Model Standards.

protection-based ethics standards (discussed above) to largely self-determination-based standards—quite a significant shift for practitioners and regulators alike, and a testimony to the influence of the Model Standards.

3. *THE PROBLEM WITH UNITARY STANDARDS*

Whether based on the protection value or the self-determination value, unitary codes face the same problem. They do not accommodate practitioners of both facilitative and transformative mediation. Protection-based codes require conduct that transformative mediators are trained to avoid and prohibit conduct that they are trained to enact. Self-determination-based codes would require conduct that facilitative mediators are trained to avoid and prohibit conduct they are trained to enact. In unitary code jurisdictions, one group of mediators is effectively excluded from practice, because their basic methods are branded as unethical by the codes that regulate mediators in that jurisdiction. One response to this meta-dilemma is to construct codes intended to include both models of practice, as discussed in the next Section.

B. *Combination Standards*

Some ethics standards, to avoid the exclusion problem just mentioned, are drafted to include and accommodate both models of mediation. At least, that is the apparent reason underlying the content of these codes.

1. *THE MODEL STANDARDS*

As noted above, the Model Standards are largely focused on party-self-determination and generally prioritize this value above protection. However, there are a few places where provisions in the Model Standards seem more protection-based. For example, the Standards state, “A mediator may provide information that the mediator is qualified by training or experience to provide.”¹³⁷ This provision, often found in protective codes,¹³⁸ explicitly permits the mediator to use information that may be intended to influence party decisionmaking, or may have the effect of doing so.

¹³⁷ Model Standards, *supra* note 127, at Standard VI.A.5.

¹³⁸ See *supra* notes 52–53 and accompanying text.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

Further, the Model Standards include the provision that “[a] mediator shall conduct a mediation in accordance with these [Model] Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, *procedural fairness*, party competency and *mutual respect among all participants*.”¹³⁹ This mandatory provision seemingly obligates the mediator to monitor whether the process that unfolds in the session is “fair” and “mutually respectful.” The mediator is thus obliged to be the guarantor of fairness and respect, which may require him/her to control or manage the parties’ conversation in a way that limits party choices about how to address one another. This is a provision typically found in protection-based codes,¹⁴⁰ and one more consonant with the facilitative mediation model in which the mediator is expected to manage and “balance” the conversation.

These provisions in the Model Standards are not found in the Community Code, analyzed earlier. The Community Code does not directly refer to or permit mediator information-giving, nor does it place on the mediator an obligation to guarantee fairness and mutual respect in the parties’ conversation. In this sense, the Model Standards appear, to some extent at least, to prioritize *both* self-determination *and* protection, which this Article characterizes as a “combination” code. And, in this sense, the Community Code presents a better example of a unitary self-determination-based code—perhaps the best example of such a code, even though it is based in part on the Model Standards. This is why it was chosen in this Article for the analysis presented earlier.

Despite the provisions discussed here, which might suggest that the Model Standards are a “combination” code, the Model Standards are very largely focused on the mediator’s duty to preserve and support party self-determination, which is why this code was included in the previous Section. However, the potential internal conflict inherent in a combination code makes it important to note that it is less than fully unitary in its orientation. Other codes present a similar picture, while still others are more clearly trying to include both values in their provisions.

¹³⁹ Model Standards, *supra* note 127, at Standard VI.A (emphasis added).

¹⁴⁰ See *supra* text accompanying notes 101–14.

2. NORTH CAROLINA STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS¹⁴¹

The North Carolina Standards of Professional Conduct for Mediators (“N.C. Standards”) are a kind of mirror image of the Model Standards, in terms of presenting a combination code. That is, most of the N.C. Standards’ provisions are oriented toward protection and avoiding unfairness, but the code also includes some provisions clearly directed at supporting party self-determination. Below are several examples of its protection-oriented provisions.

As in other protection-based codes, the N.C. Standards permit a mediator to “raise questions for the participants to consider regarding their perceptions of the dispute as well as the acceptability of proposed options for settlement and their impact on third parties.”¹⁴² However, the N.C. Standards go further and permit mediators to “suggest for consideration options for settlement in addition to those conceived of by the parties themselves.”¹⁴³ In both provisions, the N.C. Standards permit mediator actions that may undermine self-determination and influence party decisionmaking, whether for fairness or other reasons.

The N.C. Standards go still further and permit “the mediator’s expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.”¹⁴⁴ The N.C. Standards also state that “a mediator shall inform the parties of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process.”¹⁴⁵ Again, these provisions seem designed to avoid the “negative impact” of poor party decisionmaking, meanwhile undermining self-determination in order to ensure fair and “quality” outcomes.

Finally, the N.C. Standards include provisions similar to those of other protection-based codes that make the mediator a guarantor of the fairness of both process and outcome, such as the following: “A mediator shall make reasonable efforts to ensure a balanced discussion and to

¹⁴¹ REVISED STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS (SUP. CT. N.C. 2014), <https://www.nccourts.gov/assets/documents/publications/StandardsConduct.pdf?e2dD2UQUqwN6Ypo3wEFy3CtHORzZzp8r>.

¹⁴² *Id.* at r. V.B.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at r. V.C.

¹⁴⁵ *Id.* at r. IV.D.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.”¹⁴⁶ Moreover,

If a mediator believes that the statements or actions of any participant, including those of a lawyer who the mediator believes is engaging in or has engaged in professional misconduct, jeopardize or will jeopardize the integrity of the mediation process, the mediator shall attempt to persuade the participant to cease his/her behavior and take remedial action. If the mediator is unsuccessful in this effort, s/he shall take appropriate steps including, but not limited to, postponing, withdrawing from or terminating the mediation.¹⁴⁷

All of the foregoing provisions indicate prioritization of the value of avoiding unfairness or bad quality outcomes. However, the N.C. Standards also include a few provisions that seem oriented instead to supporting self-determination. Among these: “A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.”¹⁴⁸ This is a stronger statement than many codes offer, making respect for party-self-determination mandatory, and giving some concrete definition to what this duty entails.

Further, the N.C. Standards state that “if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.”¹⁴⁹ Thus the parties are free to reject the mediator's suggestion of consulting outside experts, and the mediator must accept their decision.

¹⁴⁶ *Id.* at r. VIII.A.

¹⁴⁷ *Id.* at r. VIII.B.

¹⁴⁸ *Id.* at r. V.

¹⁴⁹ *Id.* at r. V.D.

Finally, the N.C. Standards require that “a mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.”¹⁵⁰ Again, the N.C. Standards insist on the mediator refraining from statements that could influence party decisionmaking, particularly when this influence is intentional.

These several provisions inject a measure of priority for self-determination into a code largely oriented toward protection against unfairness. This is why the N.C. Standards can be called a combination code, and it suggests the problem inherent in such codes: The provisions favoring protection often conflict with those favoring self-determination, casting the mediator into new dilemmas instead of guiding him/her through them.¹⁵¹

3. *GEORGIA COMMISSION ON DISPUTE RESOLUTION ETHICAL STANDARDS*¹⁵²

The Georgia Commission on Dispute Resolution Ethical Standards (“Georgia Standards”) are a very clear example of a code that tries to take both values—protection and self-determination—into account. The Georgia Standards begin with an introduction that provides one of the strongest statements of the self-determination value found in any code yet joins it to the protection value:

[E]thical standards for mediators can be most easily understood in the context of the . . . fundamental promises that the mediator makes to the parties in explaining the process: 1) the mediator will protect the self determination of the parties . . . Besides maintaining fidelity to these principles, a mediator acts as guardian of the overall fairness of the process.¹⁵³

¹⁵⁰ *Id.* at r. V.C.

¹⁵¹ See WALDMAN, *supra* note 2, at 9–14.

¹⁵² ETHICAL STANDARDS FOR NEUTRALS (GA. COMM’N ON DISPUTE RES. 2013), app. C, ch. 1, <http://godr.org/content/mediator-ethics-information>.

¹⁵³ *Id.* at Introduction.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

Clearly, the Georgia Standards value both self-determination and protection. The commentary to this statement stresses the commitment to self-determination:

*Commentary: The Georgia Commission on Dispute Resolution accepts the proposition that self-determination of the parties is the most critical principle underlying the mediation process. Control of the outcome by the parties is the source of the power of the mediation process. Further, it is the characteristic which may lead to an outcome superior to an adjudicated outcome. Self-determination is a difficult goal in our society in which people seem often unwilling to assume responsibility for their own lives, anxious for someone else to make the decisions for them. Mediation is antithetical to this attitude.*¹⁵⁴

In a further part of the Georgia Standards on self-determination, the same effort to include both self-determination and protection as ethical values is evident:

Self-determination includes the ability to bargain for oneself alone or with the assistance of an attorney. Although the mediator has a duty to make every effort to address a power imbalance, this may be impossible. At some point the balance of power may be so skewed that the mediation should be terminated

Recommendation: . . . If one party is simply unable to bargain as effectively as another, it is probably inappropriate to deny those parties the benefits of the mediation process because of that factor. If the imbalance occurs because of disparity in the ability of the parties' attorneys, the principle of self-

¹⁵⁴ *Id.* at Standard I (Commentary).

*determination, in this case in relation to the selection of an attorney, again prevails.*¹⁵⁵

Once again, the very same standard instructs the mediator to uphold both protection and self-determination. Still further the Georgia Standards address advice-giving, and in this provision self-determination seems paramount:

It is improper for lawyer/mediator, therapist/mediator, or mediator who has any professional expertise in another area to offer professional advice to a party. If the mediator feels that a party is acting without sufficient information, the mediator should raise the possibility of the party's consulting an expert to supply that information

*Recommendation: The line between information and advice can be very difficult to find. However, failure to honor the maxim that a mediator never offers professional advice can lead to an invasion of the parties' right to self-determination and a real or perceived breach of neutrality.*¹⁵⁶

Beyond these provisions stressing both values, the Georgia Standards emphasize directly the mediator's obligation to ensure the fairness of both process and outcome, but even here the Standards include reference to self-determination:

The mediator is the guardian of fairness of the process. In that context, the mediator must assure that the conference is characterized by overall fairness and must protect the integrity of the process. A mediator should not be a party to an agreement which is illegal or impossible to execute. The mediator should alert parties to the effect of the agreement upon third parties who are not part of the mediation A mediator may refuse to draft or sign an agreement which seems fundamentally unfair to one party. . . .¹⁵⁷

This standard includes the following recommendation:

¹⁵⁵ *Id.* at Standard I.B.

¹⁵⁶ *Id.* at Standard I.E.

¹⁵⁷ *Id.* at Standard IV.A.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

*“Recommendation: The mediator’s tension may result from his or her concern that the agreement is not the best possible agreement. On the other end of the continuum the mediator feels that the agreement is unconscionable. This is an area in which the mediator’s sense of fairness may collide with the fundamental principle of self-determination of the parties. On the other end of the continuum, the mediator may feel that the agreement is unfair in that one party is not fully informed. In other words, the process by which agreement was reached was unfair because one party was not bargaining from a position of knowledge. An underlying question is whose yardstick should be used in measuring fairness If . . . the mediator is convinced that the agreement is so unfair that he or she cannot participate, the mediator should withdraw without drafting the agreement Parties should be informed that they are, of course, free to enter into any agreement that they wish notwithstanding the withdrawal of the mediator.”*¹⁵⁸

This lengthy provision strongly stresses the obligation to protect against unfairness but still includes the competing value of self-determination. Together with the provisions cited above, it is a clear example of a “combination code,” and it suggests the difficulty mediators face in trying to adhere to the inherently conflicting directions of such a code.

4. *NEBRASKA STANDARDS OF PRACTICE FOR FAMILY MEDIATORS*¹⁵⁹

¹⁵⁸ *Id.*

¹⁵⁹ NEBRASKA STANDARDS OF PRACTICE AND ETHICS FOR FAMILY MEDIATORS, (SUP. CT. NEB. 2008), https://supremecourt.nebraska.gov/sites/default/files/Programs/mediation/ne_standards_and_ethics_for_family_mediators.pdf [hereinafter Nebraska Standards].

The Nebraska Standards of Practice for Family Mediators (“Nebraska Family Standards”) are notable for the extent to which they borrow from both kinds of unitary codes—protection-based and self-determination-based. The effect is a more truly combination code, but it is also to create more confusion for mediators about what they should do in situations like the one in the Jose/Lilly case.

The Nebraska Family Standards begin with “General Principles,” which state that the mediator “assists the participants without coercion or the appearance of coercion to define and clarify issues and interests, reduce obstacles to communication, explore possible solutions, and where desired, reach a mutually satisfactory agreement. Party self-determination is a core value of mediation, in which the decision-making authority rests with the participants themselves.”¹⁶⁰ This introduction then explains:

In mediation, decision-making authority rests with the disputing parties. [The mediator’s] role may include, but is not limited to, assisting the parties to identify issues, help the parties in conflict to talk to and listen to each other, facilitate communication, focus on each other’s needs and interests, maximize the exploration of alternatives or options, and to support the parties to voluntarily achieve resolution of the problem.¹⁶¹

The Nebraska Family Standards thus begin with a clear emphasis on self-determination.

Following this introduction, the first standard addresses the core element of self-determination, and it does so in terms taken almost verbatim from the Model Standards:

A family mediator shall conduct a mediation based on the principle of party self-determination. Self-Determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at all stages of mediation, including mediator

¹⁶⁰ *Id.* at general princ. B.

¹⁶¹ *Id.* at general princ. C.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

selection, process design, the nature of their participation in the process, and outcomes.¹⁶²

This language is the broadest used by any code, including not only outcome but process decisions throughout the mediation session. It would seem to limit mediator intrusion on party decisionmaking of any kind. The Nebraska Family Standards then add that “a mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.”¹⁶³ Again, this language is the clearest used by any code to stress that the parties are also free to decide how much information they need, and the mediator is not the guarantor of “informed choice.” Standard I concludes by requiring the mediator to “inform the participants that they may withdraw from family mediation, after attendance at any legally required sessions, at any time and are not required to reach an agreement in mediation.”¹⁶⁴ All in all, this standard, borrowed from self-determination-based codes,¹⁶⁵ sends a strong message of the primacy of party self-determination. However, that seemingly clear message is soon diluted, if not contradicted, by a number of other provisions with a clearly protective character.

Thus, despite Standard I’s strong command to mediators to support party self-determination, Standard VI requires that “[a] family mediator shall structure the mediation process so that the participants make decisions based on self-determination [and] will support the participants’ efforts to gain sufficient information and knowledge”¹⁶⁶ In furtherance of that requirement, “The family mediator shall support the participants’ efforts to fully and accurately disclose, acquire and develop information during mediation so that the participants can make informed decisions.”¹⁶⁷ Furthermore, “a mediator may provide the participants with information that the mediator is qualified by training or experience to provide.”¹⁶⁸ Finally, though not a requirement, “The mediator should inform the participants that any agreement should be reviewed by an attorney before it is finalized.”¹⁶⁹ Thus, having guaranteed parties no interference by the mediator in their

¹⁶² *Id.* at Standard I.A.

¹⁶³ *Id.* at Standard I.C.

¹⁶⁴ *Id.* at Standard I.F.

¹⁶⁵ See *supra* text accompanying notes 127, 135.

¹⁶⁶ Nebraska Standards, *supra* note 159, at Standard VI.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at Standard VI.B.

¹⁶⁹ *Id.* at Standard VI.D.

decisionmaking in Standard I, the Nebraska Family Standards permit and require in Standard VI considerable interference to ensure “adequate information and knowledge,” a clearly protection-based provision.

Not surprisingly, since this is a code for family mediators, the Nebraska Family Standards continue to introduce protective provisions related to the “best interests of the child.” Standard VIII requires the mediator to “support each party to consider the needs of each child and how to promote the child’s best interests.”¹⁷⁰ This includes “encourag[ing] the parties to seek expert advice in the area of child development to facilitate a parenting plan that is appropriate to the child [which] should take into account the child’s health, emotional wellbeing, care and safety while promoting stability and continuity to the greatest extent possible.”¹⁷¹ In addition, the “mediator should assist the parties in anticipating areas of potential conflict as the parties create a parenting plan [and] the mediator should encourage the parties to develop a plan to revise the plan as the needs of the child change.”¹⁷² In short, the Nebraska Family Standards require and recommend a good deal of advice-giving by the mediator, at least regarding what the parties should consider, if not the specific decisions they should make. This departs quite a bit from the principle of full freedom of party choice on all matters of outcome and process. It is noteworthy, in this regard, that Standard II of the Nebraska Family Code requires mediators to have training that includes the subjects of family law, family systems, child development, and other material that suggests the use of this information by the mediator to help—that is, to influence—the parents in making decisions, about the child and otherwise.¹⁷³

Finally, the Nebraska Family Standards adopt almost verbatim, as grounds for terminating a mediation, the factors listed in the ABA Family Code, analyzed earlier in this Article,¹⁷⁴ including, among other circumstances: “the safety of a participant or well-being of a child is threatened; the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable; or a participant is using the mediation process to gain an unfair advantage.”¹⁷⁵ The power, if not the requirement, for a mediator to terminate a session for these reasons is clearly based on a concern for avoiding unfairness or even danger to a vulnerable party—as discussed earlier in the analysis of the Family Code.

¹⁷⁰ *Id.* at Standard VIII.

¹⁷¹ *Id.* at Standard VIII.A.

¹⁷² *Id.* at Standard VIII.C.

¹⁷³ *Id.* at Standard II.B.

¹⁷⁴ See *supra* text accompanying notes 43–60.

¹⁷⁵ Nebraska Standards, *supra* note 159, at Standard XI.A.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

In sum, the Nebraska Family Standards, far from offering clear guidance to mediators, are almost bound to create confusion, by prioritizing both party self-determination and protection against unfairness, despite the fact that these two will almost certainly conflict in many cases, like that of Jose and Lilly.

5. *THE PROBLEMS OF COMBINATION STANDARDS*

From the foregoing discussion and analysis, it is clear that combination standards, while they may try to avoid the exclusivity of unitary standards, create significant problems themselves. If the purpose of these combination codes is to accommodate practitioners of both models, they don't really accomplish this. The slight "room" given for directive protection by the Model Standards, for example, is not enough to permit many facilitative practices. And the opposite is true for the N.C. Standards—the slight room for supporting self-determination given by this code is not enough to accommodate many transformative practices. Moreover, as demonstrated by the Nebraska Family Standards and the other combination codes analyzed above, practitioners of either approach are sure to be confused by the contradictory provisions contained in a "combination code" that calls for both protection *and* self-determination, when the two "priorities" are likely to conflict in many situations. Indeed, unitary standards at least have the virtue of clarity and consistency of purpose. Combination standards, seemingly designed to support more diversity of practice, wind up confusing practitioners of either approach.

C. A Third Approach: Pluralistic Standards

The foregoing sections—as well as the earlier analysis of the Community and Family Codes themselves—illustrate the limitations and problems of both unitary codes (of either kind) and combination codes. They are either too narrow or too broad, either exclusionary or self-contradictory. However, there is a third approach to ethics regulation for the mediation field, which could address the diversity of practice in the field more effectively than either unitary or combination standards. That approach is to recognize that mediation practice today is pluralistic, and therefore ethics standards should also be pluralistic.¹⁷⁶ That is, there are distinct and different models of practice being used by

¹⁷⁶ See Waldman, *supra* note 21, at 765–68.

mediators today—the most common of which are facilitative and transformative. Each of these models prioritizes a different value—reaching good solutions that avoid unfairness or supporting party self-determination. The role of the mediator, as discussed earlier, is different in each model. Therefore, the ethical obligations that flow from this role should be recognized as being different in each model. No one single set of ethical standards is feasible or appropriate for a diverse and pluralistic profession. Rather, different ethical standards should exist for each of the distinct models of practice, allowing mediators of each approach to practice, but also holding mediators of each approach to practice ethically within their model. This is the solution explored in the final Part of this Article.

VI. A PLURALISTIC APPROACH TO MEDIATION ETHICS: DELIVERING ON MEDIATION'S DIFFERENT PROMISES

In a general sense, ethical practice means delivering on the promises that the professional makes to his/her client. The contract between mediator and client, whether explicit or implied by the role the mediator offers to play, defines what the client has a right to expect of the mediator. Ethical standards try to ensure that the mediator fulfills those expectations, delivers on those promises. However, as shown earlier in Part III of this Article, the promises made are different depending on whether the mediator follows the facilitative or the transformative approach to practice. It follows that, in order to ensure that mediators' promises are fulfilled in practice, ethical standards should also be different for mediators following the two different approaches. Therefore, rather than adopting a single set of ethical standards, whether "unitary" or "combination" as described above, each jurisdiction should have in place *two sets of ethical standards*, one applicable to facilitative mediators and one applicable to transformative mediators. This framework would permit mediators of both approaches to practice within the jurisdiction, while providing for each approach a clear and coherent set of guiding and controlling standards of practice. All mediators would be asked to declare to their clients, either as a general statement about their practice or at the beginning of a case, which approach to practice they follow. Their service to their clients will then be subject to those standards, and deviation from the chosen standards would be grounds for complaint.

Interestingly, one of the ethics codes analyzed in Part III actually begins to suggest something of this sort, but without establishing the

A PLURALISTIC APPROACH TO MEDIATION ETHICS

different standards to make it workable. The Virginia Standards¹⁷⁷ require mediators to

[D]escribe the mediation process to the participants. The description of the process shall include an explanation of the role of the mediator. The mediator shall also generally describe his or her style and approach to mediation. The parties must be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and mediator must include in the Agreement to Mediate a general statement regarding the mediator's style and approach to mediation to which the parties have agreed.¹⁷⁸

The assumption of this provision is that mediators may in fact follow different approaches to practice, and that ethical practice requires that they disclose their approach to the parties at the outset of the case. This requirement might be the basis for pluralistic standards keyed to the major approaches to practice. However, the Virginia Standards are a unitary, protection-based code, and it does not follow up and provide alternative standards for facilitative and transformative mediators. Nor has any other jurisdiction as of yet adopted a pluralistic approach. Indeed, this approach has also received only minor attention in the mediation ethics literature.

A. Mediation Ethics Commentary and the Pluralistic Framework

Despite plentiful commentary on mediation ethics over many years, the idea of a pluralistic framework for ethical standards has rarely been suggested. Instead, the literature has almost always assumed that there can and should be only one set of standards regulating all mediators, and the focus has generally been on what those standards should be—whether by explaining and justifying some existing set of standards, criticizing and suggesting modifications to existing standards, or proposing an entirely new set of standards. In any event, the almost universal assumption is that the standards, however modified or improved, should be singular and apply to all mediators.

¹⁷⁷ See *supra* note 120 and accompanying text.

¹⁷⁸ Va. Rules *supra* note 120, at Standard D.1.

One eminent scholar-practitioner who has helped to explain the Model Standards, analyzed earlier in this Article, is Professor Joseph Stulberg. Beyond his role in authoring the Reporter's Notes that elaborate on the content and rationale of those Standards, Stulberg has written numerous articles addressing how questions of substantive justice should be considered in mediation ethics—an issue that the Model Standards do not directly address.¹⁷⁹ Stulberg's view on this subject, which seems consistent with the Model Standards, is that justice in mediation is assured by certain core elements of the process itself, so that the mediator need bear no responsibility to monitor and assure the justice of the outcome.¹⁸⁰ At the heart of those core elements, for Stulberg, is party self-determination or autonomy—understood as an essential and not merely instrumental value. For Stulberg, “[A] person's capacity to engage in the process of making such decisions, and to have her choices respected, is essential to her being; one cannot be a person without making such decisions and assuming responsibility for their outcome.”¹⁸¹ Whatever one's view of Stulberg's argument that meeting fundamental conditions of procedure is the best guarantee of substantive justice, and that one core condition is party autonomy, the Model Standards is clearly a code that adopts these views—that is, it is a unitary, self-determination-based code. Subscribing to that code, Stulberg sees no need for ethical provisions encouraging or requiring mediators to engage in directive problem-solving practices in order to guarantee justice, and therefore he sees no need for multiple codes or pluralistic standards to accommodate practitioners of a protective, problem-solving approach. As long as those mediators respect party self-determination as required by the Model Standards, they are on solid ethical ground and need no separate ethical guidance.

While Stulberg in effect explains and justifies the Model Standards (and the views of those who drafted them), another scholar of mediation ethics has launched an effort to critique the Model Standards and offer an alternative code that he believes would improve on them. Professor Omer Shapira has argued that the Model Standards are both over general and oversimplified, conflating different dilemmas and ethical imperatives that should be dealt with separately, inadequately defining other dilemmas, and

¹⁷⁹ See Stulberg, *supra* note 33; Stulberg, *supra* note 53.

¹⁸⁰ Mediation is “a procedure suitably viewed as one of pure procedural justice. That leads to the conclusion that party-acceptability of outcomes is, and should be, the defining feature of justice in mediation. Standards independent of the process are not needed.” Stulberg, *supra* note 33, at 245.

¹⁸¹ *Id.* at 230.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

omitting still others altogether.¹⁸² At the same time he argues that, despite the existence of multiple models of practice there are core elements common to all the models, and based on these common elements a single code of ethics can be formulated and applied to all forms of mediation practice.¹⁸³ Shapira's critique of the Model Standards, his argument for a common base for all mediation "styles," and his own proposal for a revised code, are the product of serious deliberation, analysis and drafting.¹⁸⁴ As with Stulberg's view of fairness, one may differ with Shapira's common-elements theory.¹⁸⁵ Nevertheless, it is clear that he believes his Proposed Model Code can properly guide ethical practice for mediators of all current models, and thus like Stulberg he does not address the idea of a pluralistic framework for mediator ethics.

¹⁸² Omer Shapira, *A Critical Assessment of The Model Standards of Conduct for Mediators (2005): Call for Reform*, 100 MARQUETTE L. REV. 81 (2016).

¹⁸³ See SHAPIRA, *supra* note 11, at ch. 3.

¹⁸⁴ See *id.* at ch. 3, app. I (proposed model code of conduct for mediators).

¹⁸⁵ In this author's view, there are strengths and limitations to Shapira's argument. His theoretical base of professional role-ethics as the proper framework for articulating mediation ethics is a sound one, and one which underlies much of the work done on transformative mediation by this author and others. See Bush, *supra* note 10. There is also validity to his argument that there are common elements to the different models of mediation. However, his further step of arguing that these common elements are a sufficient basis for a common code of ethics is problematic. Shapira's common elements are indeed features of the mediation process in all models, but Shapira does not include as core elements either the goal envisioned for or the value underlying the process in the different models. It is there that the models differ greatly, and goals and values are certainly core elements that reflect and shape the mediator's role conception in each model, and therefore also the ethics that flow from this role conception. These differences are the main reason that a single code of ethics cannot encompass all the different models of practice, as this Article argues. A related problematic element in Shapira's argument relates to the question of prioritizing the different values that may conflict and pose dilemmas for mediators. Shapira's view, like Waldman's, is that no a priori ordering of these values is possible, and therefore a "relativist" approach must be taken that calls on mediators to balance important values—like self-determination and justice—according to the situation and the mediator's own judgment. If so, as argued below regarding Waldman's work, then codes of ethics offer no more than statements of the conflicting values that mediators should be aware of, and ethics becomes a matter of personal judgment. See *infra* note 96 and accompanying text. The alternative view, which underlies the argument of this Article, is that there are indeed default value priorities in each mediation model—self-determination in the transformative model, and outcome quality/justice in the facilitative model—and that ethics codes can and should be based on these value priorities, and thus give clear answers on what to do when important values conflict.

In sum, in the terms of this Article, Stulberg is satisfied by a well-drafted unitary self-determination-based code, and Shapira would be satisfied by a well-drafted combination code. But neither sees the need for a pluralistic framework with two sets of ethics standards, each applicable to one model of mediation. These two scholars are joined by others, some of whom focus on explaining current standards and some on suggesting modifications or alternatives.¹⁸⁶ Very few acknowledge or take seriously the idea that the diversity of practice in the field calls for and requires diverse ethical standards.

One exception to this is found in work done by Professor Ellen Waldman. In her early work, Waldman first of all acknowledged that there are different models of practice, distinguished by the way in which the process involves norms—allowing parties to generate their own, educating parties about extrinsic norms that might guide party choices, or advocating the use of social norms to decide matters.¹⁸⁷ While Waldman’s models differed from the two main models discussed in this Article, her discussion of the ethics challenges posed by multiple models paralleled the argument offered in this Article. Thus, she agreed that,

[Most] codes contemplate one set of principles to be applied in a uniform manner to all mediation. Unfortunately, each mediation model places a different weight and emphasis on the values of fairness, disputant autonomy, social justice, and self-determination. Predictably, the tensions, both within and among the ethical guidelines, occur at the points where the ethical vectors in the [different] mediation models begin to diverge.¹⁸⁸

Waldman also recognized that, despite these value differences, code drafters insist on creating a single code applicable to all mediators, which simply cannot work: “The effort to construct a code suitable for all manners of mediation fails because it does not recognize the divergent, and often competing, dictates which issue from each model. Mediation is not a ‘one-size-fits all’ process; it cannot be guided by a ‘one-size-fits all’ code.”¹⁸⁹ Therefore, she argued that,

¹⁸⁶ Ronit Zamir, *The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic*, 11 PEPPERDINE DISP. RES. J. 467 (2011); See, e.g., Exon, *supra* note 19.

¹⁸⁷ Waldman, *supra* note 21.

¹⁸⁸ *Id.* at 765.

¹⁸⁹ *Id.* at 768.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

Replacing our existing theoretical lens with a multi-tiered prism would allow for the construction of internally consistent codes, tailored to fit each of the mediation models. The codes could straightforwardly acknowledge that mediators cannot pay absolute deference to party autonomy while ensuring that mediated agreements reflect societal norms and value judgments. Rather, the codes could specify that mediators are to give greater weight to disputant autonomy in the norm-generating model than in the norm-educating or norm-advocating processes. Conversely, fairness concerns and the safeguarding of third party interests should loom larger in the mediator's consciousness when she is employing more norm-based procedures. If both mediator and disputants are in agreement regarding the particular mediative approach to be used, it is unlikely that either value-fairness or autonomy will be unduly compromised.¹⁹⁰

In sum, Waldman's argument in 1997 shared many of the elements of the argument made in this Article and reached a similar conclusion about the need for a pluralistic framework of ethics standards.

However, for whatever reasons, in her more recent work, including a major book on mediation ethics, Waldman seems to have given up on this pluralistic vision, and on authoritative regulation generally, arguing in essence that mediator ethics cannot be effectively regulated by ethics codes, whether single-value or combination, but rather must be guided by individual mediators balancing competing values in particular situations using what she calls "intuitionist ethics."¹⁹¹ Codes of whatever orientation can be useful in framing value choices and conflicts, but they cannot be relied upon to answer

¹⁹⁰ *Id.*

¹⁹¹ WALDMAN, *supra* note 2, at 15–16. The problem of this approach is that there is no clear standard by which to assess mediators' conduct and hold them accountable: whatever a mediator does can be justified by his/her own personal sense of ethics. Stulberg describes and criticizes a similar problem. See Joseph B. Stulberg, *Facilitative versus Evaluative Mediator Orientations: Piercing the Grid Lock*, 24 FLA. ST. U.L. REV. 985, 991–92 (1996–1997). See *infra* note 211 and accompanying text.

ethical questions clearly. Instead, mediators can only be asked to have a clear awareness of the competing values, and then weigh those values deliberately and make choices based on their personal sense of the right path in a specific situation.

In the end, Waldman winds up putting less faith in ethics codes than either Stulberg or Shapira, both of whom believe that a well-crafted code can indeed be a sound basis for mediator ethics. Nevertheless, none of these scholars, nor any others of similar stature, seriously consider the possibility of a pluralistic framework of mediator ethics, as advocated in this Article. However, precedent for the pluralistic solution can be found in a different but related field—negotiation ethics.

B. *Proposals for Pluralism in Negotiation Ethics*

For some time, the literature on negotiation has recognized, like the mediation literature, that there are different models of practice being followed by practitioners today. Although again the definitions differ, most commentators recognize at least two primary models: traditional, adversary negotiation aimed at gaining the lion's share of whatever pie is at stake; and problem-solving negotiation, aimed at generating a "win-win" solution that expands the pie and meets all side's needs and interests.¹⁹² These two models have both been treated extensively in the literature on negotiation skills and practice, for lawyers and otherwise. More recently, however, attention has been given to the implications of a two-model negotiation process for ethical regulation and standards. In this context, the idea of a pluralistic framework has actually emerged and generated discussion by serious negotiation scholars.

One of the most prolific writers on the negotiation process, Professor Carrie Menkel-Meadow, has done major work to develop the theory and practice of problem-solving negotiation as an alternative to the traditional adversarial model, in both legal negotiation and otherwise.¹⁹³ In her work on lawyers' ethics in particular she has argued that "the Model Rules of Professional Conduct [are] still based on an adversarial conception of the advocate's role [that] is not responsive to the needs, duties, and responsibilities of one seeking to be a 'non-adversarial' problem-solver," and that "a different orientation to the client and to the 'adversary' may be essential in the kind of creative option generation and problem-solving"

¹⁹² See, e.g., RISKIN ET AL., *supra* note 22, at 178–86 (2005).

¹⁹³ See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

A PLURALISTIC APPROACH TO MEDIATION ETHICS

involved in non-adversarial lawyering.¹⁹⁴ That orientation would require modification of the existing ethical standards that regulate lawyers' behavior in negotiation, and Menkel-Meadow suggests several principles that could bring the diversity she advocates to ethics standards.¹⁹⁵ However, she ultimately doubts that the organized bar will adopt these revisions to its essentially adversarial ethics code, and most of her work on ethics focuses on lawyers who play roles other than the traditional one of negotiator for clients.¹⁹⁶

By contrast, two other legal negotiation scholars have made extensive arguments regarding how the Model Code of Professional Responsibility, the authoritative code regulating lawyers' behavior in negotiation for clients,¹⁹⁷ can and must be revised to accommodate the non-adversarial, problem-solving approach to negotiation, in an essentially pluralistic ethics system. Both of these scholars propose frameworks that would take a pluralistic approach to lawyers' ethics, although each proposal is quite different from the other.

Professor Robert Bordone observes that the negotiation process is used by lawyers in two very different contexts, and argues that it is and should be conducted differently in each context.¹⁹⁸ In one context, negotiation is actually part of the litigation process, and in that context the traditional adversarial approach to negotiation is appropriate and indeed required to serve the client's interests, and the existing Model Rules serve well. However, Bordone argues, lawyers regularly negotiate for clients to resolve conflicts out of court, make deals, or act otherwise to solve clients'

¹⁹⁴ 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, 409–10, 428 (1997).

¹⁹⁵ See Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 167–68 (1999–2000).

¹⁹⁶ Carrie J. Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 40 (1996) ("I am skeptical that ethics rules changes can really reform the adversary system. Adversarialism is so powerful a heuristic and organizing framework for our culture, that, much like a great whale, it seems to swallow up any effort to modify or transform it."); see also Menkel-Meadow, *supra* note 9 (discussing roles for lawyers outside traditional client representation).

¹⁹⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY (AM. BAR. ASS'N 2018), https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/mod_code_prof_resp.authcheckdam.pdf.

¹⁹⁸ Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. DISP. RESOL. 1, 14–15 (2005).

problems, and in all of these non-litigation contexts the lesson of decades of negotiation research is that the problem-solving approach is far more appropriate and effective than the adversarial approach, regardless of the specifics of the situation involved.¹⁹⁹

Therefore, he proposes the adoption of a second code of professional conduct specifically applicable to lawyers serving as negotiators in these non-litigation-related contexts. That code would require such lawyers to negotiate as problem-solvers, using what Bordone believes has been proven to be the superior approach to the process.²⁰⁰ Adversarial negotiation behaviors would be unethical under this lawyer-negotiator code, even though they might be perfectly acceptable in litigation-related negotiation. In effect, Bordone would limit each negotiation approach to what he argues is its appropriate context. Bordone's pluralistic framework does not envision the use of *both* adversarial and problem-solving negotiation as valid alternatives everywhere, whether inside or beyond the litigation context. Rather his ethical pluralism is strictly context-based. In one context, ethics rules would permit adversarial methods—as the current Model Rules do—and in the other context an entirely new code would permit only problem-solving practices. Bordone has not proposed a draft of this new code, but its outlines are implied by the principles of the problem-solving negotiation model, as well as in other work on collaborative problem-solving.²⁰¹

A significantly different approach is taken by a third negotiation scholar. Professor Scott Peppet argues for what he calls a “contractarian” form of ethical pluralism for lawyer negotiators.²⁰² By this he means a system in which lawyer negotiators (and their clients) could agree to be bound by either of two sets of ethics rules, one directed to the adversarial approach and the other to the problem-solving approach.²⁰³ This commitment could be made generally – with the lawyer committing to and advertising his/her approach to all prospective clients – or it could be made on a case by case basis, again with notice to clients. Based on the commitment made, the

¹⁹⁹ *Id.* at 15–19.

²⁰⁰ *Id.* at 29–32.

²⁰¹ *See id.* at 15–20; Menkel-Meadow, *supra* note 9; Menkel-Meadow, *supra* note 193.

²⁰² Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 475 (2005).

²⁰³ *Id.* at 514–25. Peppet contrasts this approach specifically with what he calls the approach of regulatory uniformity, which assumes that all lawyers should be subject to a single unitary ethics code. *Id.* at 518–19. In doing so, he explicitly states that his proposal is “structured around a different foundational assumption: pluralism.” *Id.*

A PLURALISTIC APPROACH TO MEDIATION ETHICS

lawyer's practices would be judged by different ethics rules, adversarial or collaborative. The choice of approach, and rules, would be available to lawyers regardless of the "context" of their negotiation practice—related or unrelated to litigation. Thus, Peppet envisions a truly pluralistic ethical framework for lawyer negotiators, authorizing lawyers to choose between the two different models in any context and any case, and then be subject to the ethics rules they chose.

Moreover, Peppet goes beyond this general idea and begins to suggest what the alternative ethics rules could actually be.²⁰⁴ In doing this, he does not draft an entirely new "collaborative" code but builds on the existing Model Rules. For each of several of the Model Rules that would serve as defaults, he proposes alternative collaborative language or add-ons that the lawyer could opt for by formal declaration. Thus, Peppet uses as an example Rule 4.1 of the Model Rules, regarding "Truthfulness in Statements to Others." This Rule, together with the official comments on it, is often offered as a prime example of the adversarial ethics of lawyer negotiation, allowing a whole range of nondisclosure, puffing and bluffing.²⁰⁵ Peppet's proposal would join the current adversarial rule to a new collaborative alternative, and allow lawyers either to retain the current version or to opt-in and be subject to a different and more collaborative rule (shown by italics), as follows:

(1) [Rule 4.1(1) would contain the existing Rule 4.1:]

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

[then add the following [optional collaborative rules]:]

²⁰⁴ *Id.* at 522–25.

²⁰⁵ See RISKIN ET AL., *supra* note 22, at 253–71.

- (2) *A lawyer may opt for a more collaborative engagement with third persons by so designating, by reference to this Rule provision, in a written agreement signed by all clients and attorneys involved in a matter, so long as all parties to the agreement provide informed consent. Lawyers practicing pursuant to this provision agree to:*
- (a) *be truthful in all respects regarding the matter for which this section has been invoked;*
 - (b) *disclose all material information needed to allow the third person in question to make an informed decision regarding the matter;*
 - (c) *negotiate in good faith, i.e., among other things, abstaining from causing unreasonable delay and from imposing avoidable hardships on another party for the purpose of securing a negotiation advantage.*
- (3) *A lawyer may further opt for a more collaborative engagement with third persons by so designating, by reference to this Rule provision, in a written agreement signed by all clients and attorneys involved in a matter, so long as all parties to the agreement provide informed consent. Lawyers practicing pursuant to this provision agree to:*
- (a) *refuse to assist in the negotiation of any settlement or agreement that works substantial injustice upon another party....*

[also add to Rule 7.4 (Communication of Fields of Practice and Specialization)]

- (e) *A lawyer or law firm may, in advertisements or communications, designate him- or herself or the firm as*

A PLURALISTIC APPROACH TO MEDIATION ETHICS

a "Collaborative" or "Problem-Solving" lawyer or firm so long as that lawyer or firm primarily practices subject to the provisions of Rule 4.1(2) or 4.1(3).²⁰⁶

Peppet's pluralistic framework would not only allow lawyer negotiators to choose collaborative rather than adversarial ethics rules, it would allow the choice of two different levels of collaborative practice. It would also allow lawyers to switch from one mode to another during a case, if the lawyer decided that it was appropriate, and the client agreed. And it would allow lawyers to advertise their chosen mode of practice to clients and to other lawyers.

Peppet's proposal, and his justifications for it, show that where there are two different and viable models being used to engage in a certain professional practice, a pluralistic framework of professional ethics is both possible and desirable.²⁰⁷ Thus, although this insight has not yet been adopted by the mediation field, there is good precedent for it in the related field of negotiation. This Article argues that the time has come to employ the pluralistic approach to *mediator* ethics.

C. *A Pluralistic Approach to Mediator Ethics*

The argument of this Article is that it is time to recognize the need for a pluralistic framework for mediator ethics, as the only way to both support and hold accountable mediators following either of the major approaches to practice. Professor Peppet's proposal for negotiation ethics rules demonstrates one way to enact a pluralistic framework (though he has not shown how it could be applied throughout the lawyers' Model Rules). However, the path to doing so in mediation ethics is actually much easier, given the existing environment of multiple ethics standards. As demonstrated by the earlier analysis of representative mediation ethics codes, the mediation field has already put in place standards that are appropriate for both models of practice currently being used. There are unitary self-determination-based standards like the Community Code, the Model Standards on which it is

²⁰⁶ See Peppet, *supra* note 202, at 523–24.

²⁰⁷ *Id.* at 514–19 (discussing the primary critiques of the Model Rules—i.e., they permit non-accountability and partisan professionalism, and demand regulatory uniformity—and showing that the pluralism proposal avoids or overcomes all of the critiques).

partly based, or other state codes based in turn on the Model Standards.²⁰⁸ On the other hand, there are unitary protection-based-standards, like the ABA Family Code or the Virginia Code.²⁰⁹ Even the codes described above as “combination codes” are usually oriented heavily toward either protection or self-determination, and could be rendered unitary with slight editing.²¹⁰

In short, with ample existing material to choose from, little drafting would be required. A pluralistic ethics framework could be established relatively easily in any jurisdiction by simply approving one code of each type—protection- or self-determination-based—and requiring mediators to declare which code they commit to practicing under, either generally or in each specific case, as Peppet suggests negotiators could do. That declaration would establish the ethics code applicable to that mediator (in that or all cases), and both mediators and clients would know what is expected and demanded of the mediator and what conduct gives grounds for complaint.

As discussed earlier in this Article, establishing a good framework for mediator ethics has proven a tough “problem” for the field to solve. Adopting unitary codes based on either core value—protection or self-determination—makes it difficult and risky for mediators whose practice model is based on the other core value. Adopting combination codes confronts mediators with the insoluble problem of satisfying both values even when they are in conflict, which will often be the case. Nor does it seem wise to regard all ethics standards as merely suggestions and thus delegate to every individual mediator the task of resolving ethical dilemmas according to their personal sense of right and wrong, or their ethical intuition—a “solution” that would mean no consistent ethical regulation at all.²¹¹

²⁰⁸ See *supra* notes 61–100, 127–36 and accompanying text.

²⁰⁹ See *supra* notes 46–60 & 101–20 and accompanying text.

²¹⁰ Some examples of editing of codes that would render them more clearly unitary (of one kind or the other): For example, in the Model Standards, to make them more clearly unitary and self-determination-based, remove Standard VI.A, which includes “safety” and “mutual respect”—neither of which is included in the Community Code. And remove Standard VI.A.4 (“mediator should promote honesty and candor”) and edit Standard VI.A.5 (“mediator may provide information if qualified by training and experience”). Note also these differences are what make the Community Code a better choice for a unitary self-determination-based code in a pluralistic system. There are also possible edits in protection-based codes that would make them more unitary and not combination.

²¹¹ See *supra* notes 185 & 191 and accompanying text. This would, in this author’s view, be the worst solution, because it would provide no consistent standard by which to hold mediators accountable, whatever their model of practice. See Stulberg, *supra* note 191, at 991–92 (making a similar point that if “facilitative and evaluative” mediators are held to a single standard, then there is really no standard at all and “anything goes”).

A PLURALISTIC APPROACH TO MEDIATION ETHICS

By contrast to all of these unsatisfactory solutions, adopting a pluralistic framework for mediator ethics is both a feasible and a desirable approach. It would avoid the exclusion of practitioners of either model of mediation. It would offer practitioners of each model clear and coherent guidance on how to resolve the major dilemmas they are likely to face in practice—and especially the dilemma they will find most challenging whenever it arises, the choice between protecting against injustice or supporting self-determination. An ethical system that does not provide clear guidance, especially on that dilemma, does an injustice to both mediators and their clients, and the system in place until now has allowed that situation to prevail. With agreement now widespread on the options for mediator practice and the values underlying those options, it should be possible for the field to stand up and meet the challenge of establishing clear, consistent ethics rules by adopting a pluralistic approach to mediation ethics in every jurisdiction where mediation is practiced.

To return in closing to the case that launched this inquiry, the case of Jose, Lilly and Rafaela, and the ethical questions raised by the parents' choice to resolve their disagreement by using a screen to provide privacy for Rafaela:²¹² How would this case be treated under the kind of pluralistic ethics regime suggested here? In that regime, it can be assumed that two codes of ethics would exist, corresponding to the two models of practice and their underlying values, protection and self-determination. Assume those were the two codes analyzed earlier, in Part IV of this Article—the New York State Community Code and the ABA Family Code (although the latter would be expanded to include protections not only for children but for vulnerable parties of other kinds, such as the elderly, the disabled, etc.).²¹³ With both codes and both models of practice available, one further element would need to be present for the pluralistic framework to work: an ethical requirement on *all* mediators to inform clients of the approach to mediation that they follow *and* the other approach to mediation that could be provided by a different mediator. This disclosure requirement could be satisfied by a written statement included in both ethical codes, with a requirement that it be read and explained to all clients before they engage a mediator's services. The statement should describe the key elements of each approach to mediation, the key differences between them, and the advantages and disadvantages of each—all in plain language. This type of "process option disclosure" is more and more under consideration as an ethical requirement for lawyers advising

²¹² See *supra* text accompanying note 8.

²¹³ See *supra* notes 89–91 and accompanying text.

clients on dispute resolution options prior to undertaking a representation.²¹⁴ If the mediator explaining the options were a facilitative mediator, then Jose and Lilly could choose either to go ahead with that mediator or ask to be referred to a colleague who follows the transformative approach—and vice versa if they'd begun with a transformative mediator.²¹⁵

This introductory step should satisfy Jose and Lilly that they've found a mediator who uses the approach they want—either taking a supportive role that follows and supports (but does not limit or direct) their communication and decision-making wherever it leads, or taking a protective role that guides and directs them toward a solution that meets both sides' (and Rafaela's) needs and is fair and just. When the mediation then proceeds, using the model chosen by the couple, their mediator is both guided by and accountable to a code of ethics suited to his/her model of practice. And that code, whether it is the Community Code or the Family Code, will provide clear and coherent answers to the questions the mediator faces as Jose and Lilly discuss and begin to agree on using the screen to afford Rafaela privacy. Those answers have been identified and explained in the analyses presented in Part IV of this Article, and they should ensure that the mediator knows what to do in order to provide the parties the kind of assistance that they themselves have decided they want.

Ultimately, this is the test of a successful ethics regime: It ensures that clients receive the service that they believe they want and need, and that the mediator has promised to provide.²¹⁶ A pluralistic ethics system is the best guarantee that individual mediators will deliver on their promises to specific clients. At a larger level, it is also the best guarantee that the mediation field as a whole will deliver on the different promises it has made to parties in conflict by permitting and supporting, but also by holding accountable, mediators following diverse models of practice based on different underlying values. Both of those models have value, and both respond to different needs and preferences of parties in conflict.²¹⁷ A diverse world of mediation practice is needed to fulfill the different promises the

²¹⁴ See, e.g., RULES OF PROFESSIONAL CONDUCT r. 2.1 (COLO. BAR ASS'N 2018); Donald

A. Burkhardt & Frederic K. Conover, II, *The Ethical Duty to Consider Alternatives to Litigation*, 19 COLO. LAW 249, 249 (1990). See also Menkel-Meadow, *supra* note 194 (suggesting such process disclosure counselling as one of her principles for nonadversarial lawyering).

²¹⁵ The objection is often made by facilitative mediators that transformative mediators do not inform clients of the facilitative alternative. However, the same is true in reverse. A disclosure statement would cure this problem for all mediators and clients.

²¹⁶ See *supra* note 18 and accompanying text.

²¹⁷ See BUSH & FOLGER, *supra* note 1, at ch. 7.

A PLURALISTIC APPROACH TO MEDIATION ETHICS

field holds for disputing parties and for society as a whole. For that diversity to exist and flourish, ethical standards must be clear, coherent—and pluralistic. The argument of this Article is that such a pluralistic approach to mediation ethics is within the field's grasp, and that it should be discussed and adopted, the sooner the better for mediators, parties, the mediation field, and society as a whole.

