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The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator

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THE ETHICS OF MEDIATION EVALUATION: SOME TROUBLESOME QUESTIONS AND TENTATIVE PROPOSALS, FROM AN EVALUATIVE LAWYER MEDIATOR

JAMES H. STARK*

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I am relatively new to mediation practice, having spent most of my professional life training neophyte litigators in law school clinical programs. As a longtime litigator, I have been surprised by recent discussions in the literature regarding the propriety of case evaluation in the mediation of legal disputes.¹ I have been mystified that a

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1. Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation Is an Oxymoron*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31 (1996); James Alfini & Gerald Clay,

number of mediation ethics codes have taken such a strong stand against evaluation.² Like many lawyer mediators, I think that case evaluation, performed competently,³ has a useful place in certain forms of mediation practice. And, given the fact that evaluative

Should Lawyer-Mediators Be Prohibited from Providing Legal Advice or Evaluations?, DISP. RESOL. MAG., Spring 1994, at 8; Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, app. at 54 (proposing ethical standard that would prohibit the mediator from providing legal information or advice, even in response to litigant questions and even if the mediator is qualified by training and experience to do so).

2. The STANDARDS OF CONDUCT FOR MEDIATORS (American Arbitration Association, Society of Professionals in Dispute Resolution, and American Bar Association Section on Dispute Resolution, 1994) [hereinafter, JOINT STANDARDS] state, for example:

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that the parties seek outside professional advice, or consider resolving the dispute through arbitration, counselling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

Commentary at VI. Although this language was apparently the product of much dissension and was intended as a compromise to discourage, rather than prohibit, mediator evaluation, it has been read more broadly. Compare Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 9 n.3 (1996) (discussing the dissension and ultimate compromise) with Kovach & Love, *supra* note 1, at 31 ("these [JOINT STANDARDS] say that the principle of self-determination is central to the mediation process and prohibit a mediator from providing professional advice.")

In addition to the JOINT STANDARDS, the ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (1984) and mediator codes in Colorado and Texas either limit or prohibit legal advice by a mediator. See Riskin, *supra*, at 9 n.3. For a more general survey of state code provisions, see Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, app. at 101-02 (1996) (listing sample ethics codes from Arizona, Colorado, Florida, Hawaii, Indiana, Nebraska, and Oklahoma).

3. Because the subject of this symposium is *Lawyers' Duties and Responsibilities in Dispute Resolution*, I do not address in this essay the difficult competency and unauthorized practice of law questions that may be raised when nonlawyer mediators provide legal information and advice to disputants. I agree with the sense of Carrie Menkel-Meadow's symposium remarks that efforts to create transdisciplinary standards for lawyer and nonlawyer mediators are problematic. See generally Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997). I also think it an open secret that nonlawyer mediators employed by small claims and other low level courts around the country often provide legal information and advice—often competent, sometimes not—to parties in court-ordered mediations. The focus of this essay is on legal information and advice-giving by lawyer mediators.

mediation is not only prevalent,⁴ but seems quite likely here to stay,⁵ the more relevant questions would seem to be not *whether* it is proper to evaluate, but under what circumstances, and how.⁶

Nonetheless, there are aspects of evaluative mediation practice that trouble me and one particular pattern of behavior (frequently observed but seldom discussed) that raises very difficult and important questions about how mediators do evaluate and should evaluate. By exposing this pattern of behavior, I hope that I can get to the heart of what makes evaluative mediation controversial.

So here is what I propose to do: first, (like any good law professor) I will give you a hypothetical setting and problem to help concretize the issues I want to discuss; second, I will briefly review the arguments that have been advanced for and against evaluation in mediation—demonstrating, I hope, why evaluation is appropriate and necessary, at least with certain disputants, in certain disputes, in certain contexts; third, I will return to my hypothetical setting and present an imagined conversation, in caucus, between three mediators and a disputant; fourth, I will analyze the conversation, examining the ethical “propriety” or “impropriety” of various mediator questions and statements and identifying points beyond which, I believe, many or most evaluative mediators would not go; and finally, I will scrutinize and criticize these stopping points and use the hypothetical transcript as a vehicle to suggest, quite tentatively, several new standards of ethics for mediator evaluation.

In a nutshell, I believe that the most difficult ethical issues posed by mediation evaluation are caused by the tendency of evaluative

4. See, e.g., Riskin, *supra* note 2, at 23–25; Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 111 (1995) [hereinafter *Standards Symposium*] (Professor Leonard Riskin commenting that evaluative mediation is “a form of mediation that is being practiced everyday and perhaps is the most common form of mediation in this country”); James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 485 (1996) (stating that “[c]ourt-annexed and lawyer-controlled mediations tend to be highly evaluative”).

5. As Dean Feerick somewhat ruefully acknowledged in his conference remarks, “The market is for evaluation. Parties want evaluation [in the mediation of all types of cases].” Remarks of Dean John Feerick at the *South Texas Law Review’s* Symposium entitled, “The Lawyer’s Duties and Responsibilities in Dispute Resolution,” held at South Texas College of Law on Oct. 25, 1996; see also Kovach & Love, *supra* note 1, at 31 (stating that “many practicing mediators have an evaluative orientation”). These assessments certainly accord with my own experience, and if they are true, one must wonder about the wisdom of enacting ethical standards so discordant with prevailing practice.

6. For a particularly sophisticated treatment of the subject, see Marjorie Corman Aaron, *Evaluation in Mediation*, in DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 267–305 (1996) (discussing a multitude of factors to consider before providing an evaluation and suggesting a variety of methods for doing it).

mediators to give the parties "stunted" legal advice: advice about the weaknesses of their cases but (sometimes) not the strengths; advice about the "four corners" of the parties' complaint and answer, but not about how each party could strengthen his or her legal position; advice designed to bring the parties closer together, not push them further apart. This sort of incomplete and potentially misleading advice-giving is understandable given mediators' desire to reduce tension and conflict, avoid the appearance of bias, and promote settlement. But it undermines what I take to be the principal purpose of evaluation in mediation: promoting the parties' self-determination through informed consent. If a mediator decides to evaluate, I argue that he or she ought to be required to provide the parties with information sufficient for them to make reasonably informed decisions about their rights and responsibilities. But even this modest proposal is problematic, as will be seen.

I. THE SETTING

Law students Able and Baker are co-mediating a small claims landlord-tenant dispute in state housing court under faculty supervision as part of a law school mediation clinic. In the case that is being mediated, both parties are appearing *pro se*; neither realistically can afford an attorney, especially given the relatively small dollar amount in controversy. If the case cannot successfully be mediated, it will be tried before a magistrate later the same day.

The tenant has sued the landlord for \$450, the portion of her \$900 security deposit that was not returned to her when she vacated her apartment six months ago. The landlord deducted the \$450 to replace the bathroom tile. He alleges that the tenant ruined the tile by allowing her six year-old daughter continually to splash around in the tub and by not regularly using the shower curtain. This resulted, he says, in frequent water overflow.

There is little doubt that the landlord replaced the tile; he has the receipts to prove it. The tenant claims, however, that the tile was in poor shape when she moved into the apartment a year earlier, that the bathtub was not properly caulked (a claim that the landlord hotly denies), and that additional damage, if any, is "ordinary wear and tear," for which, under the relevant statute, she is not legally responsible. Other than the landlord's receipt for the tile work, neither disputant has any documentary evidence, corroborating witnesses, or photographs to support his or her claim.

The security deposit statute also specifies that landlords must return vacating tenants their security deposits, less any claimed damages, within thirty days of receiving written notice of a new forwarding address from the tenant. Failure to do so subjects the landlord to a claim for "double damages." This means that the security deposit is doubled and any damages owed the landlord are subtracted from that amount. Double damage claims, when properly pleaded, are strictly enforced by the court. When potential double damage claims are apparent from the facts alleged in the complaint but are not properly pleaded, magistrates will seldom award them.

In this case, the landlord mailed the tenant a check thirty-four days after the tenant vacated the apartment. Both parties agree that the tenant gave the landlord a slip of paper with her new address the day she moved out. But the tenant has not made a claim for double damages, and neither party appears to know about this provision of the statute.

The landlord, single and in his early thirties, is an underemployed handyman. He has been a landlord for only twenty months, and is unsophisticated about his legal rights and responsibilities. The building he acquired is a seventy-year-old, three family house in a working class section of town. He lives in the top unit and rents out the first and second floor units. The income from these rental units is very important to him.

The tenant is a single mother, in her late twenties, who works as a bank teller. She had lived in the apartment, on a month-to-month tenancy, for thirteen months before moving out. The tenant seems well educated, ambitious, and upwardly mobile, but has not had an easy life. She's paying more for her new apartment than she was paying for her old one. She is very rights-conscious and appears determined not to give up anything to which she is entitled under law.

With the assistance of their supervisor, law students Able and Baker have spent almost an hour in joint session with the parties, encouraging them to tell their stories, asking questions, engaging in active listening, clarifying and summarizing. Through her questions, mediator Able has succeeded in exposing a relational issue in the dispute: It appears that the tenant moved out, without warning and in a huff, because she felt that the landlord was "sexually harassing" her. For his part, the landlord admits being attracted to the tenant and acknowledges that he asked her out to dinner or a movie two or three times. But he strongly denies that anything he did amounts to "harassment." His feelings appear to be hurt, not only by the tenant's re-

jection of his romantic overtures, but also by her failure to give any notice of her intention to vacate. Unfortunately, exploration of these issues has not produced a basis for compromise. If anything, it has exacerbated tensions; both parties feel strongly that they are in the right.

The student mediators have tried to do some gentle negotiation, tentatively exploring other possible bases for settlement. Mediator Baker has appealed to efficiency concerns, twice repeating that there isn't much money in controversy and that it may be several more hours before the case can be heard. Mediator Able has appealed to the parties' own ideas of fairness, asking whether there is some basis, other than law, on which they can resolve their dispute. Unfortunately, neither of these interventions has had much effect. At the conclusion of the joint session, the landlord has agreed to refund \$100 to the tenant, just to get the case over with. The tenant refuses to accept anything less than the full \$450. The mediators and their supervisor huddle, and decide to caucus with the parties. "We'd like to begin with you," they tell the tenant.

II. TO EVALUATE OR NOT TO EVALUATE

When they caucus with the tenant (and subsequently with the landlord), should law students Able and Baker assist the parties in assessing the strengths and weaknesses of their cases? As Margaret Shaw has helped us understand, "evaluation" is not one behavior, but a continuum of behaviors, ranging from asking parties questions about case strengths and weaknesses, to providing information, to giving procedural and substantive advice, to making predictions of possible or probable court outcomes, to suggesting possible bases for resolving a dispute.⁷

Let us posit that Able and Baker are competent to engage in these kinds of behaviors. We'll assume that they are third-year law students, above average in ability, familiar with basic rules of evidence and procedure. They have received training in the technical, but fairly

7. In her *Evaluation Continuum*, Shaw identifies the following less directive to more directive activities that mediators commonly perform: Questioning parties about their case and elements of proof; asking a party to respond the other side's arguments; engaging in "risk analysis"; providing opinions about various elements of each party's case; stating opinions about the strengths and weaknesses of a party's entire case; providing opinions about the range in which a case is likely to settle; providing opinions about how a court is likely to decide the case; and proposing a settlement. Margaret L. Shaw, *Evaluation Continuum*, Prepared for Meeting of CPR Ethics Commission, May 6-7, 1996. (Copy on file with author).

narrow and readily mastered law of small claims housing. They have familiarized themselves with a detailed legal manual (the same manual that magistrates use in adjudicating cases) that explains the applicable statutory provisions and collects the relevant precedents. In a pinch, they can consult with their clinical supervisor, an experienced attorney mediator who has handled these kinds of cases for a number of years.

With this as a background, let's review ten arguments that have been made against mediator evaluation, and the counter-arguments. For ease of reference, the arguments are presented in the form of a "Top Ten" list, beginning with some of the broadest arguments that have been advanced against evaluation, and proceeding to more narrow ones.

Reasons Not to Evaluate (and the Counter-Arguments)

1. *Argument:* Mediation is an alternative to litigation and a regime of legal rules that as often as not are restricting, irrational and/or unsuited to the needs of the parties. Mediation can, and should, exist without law.⁸

Counter-Argument: Most people with legal disputes want and expect that legal rules will be treated as relevant to, if not determinative of, their dispute.⁹ The alternative is a radical, lawless, and ultimately self-destructive view of the mediation process.¹⁰

2. *Argument:* The highest goal of mediation is party autonomy and self-determination. Evaluative interventions by the mediator diminish the decision-making responsibility of the parties and thereby undermine self-determination.¹¹

8. For a useful review and critique of the anti-law bias sometimes found in the mediation literature, see Ellen Waldman, *The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion*, 1 VA. J. SOC. POL'Y & L. 87, 96-101 (1993).

9. See, e.g., Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 333-36 (1984) (arguing that because most Americans wish to understand their legal positions, lawyer mediators can provide a valuable service to unrepresented parties by explaining their legal rights). See also Nolan-Haley, *supra* note 2, at 64 (relating that for "[p]arties who choose to bring their conflicts into the public domain of the court . . . law may be an important, if not predominant, value."). In an earlier article, I have publicly sided with this position. See Stark, *supra* note 4, at 486-88.

10. See, e.g., Waldman, *supra* note 8, *passim* (characterizing the anti-law stance of certain mediation practitioners and scholars as "anarchic" and arguing that the inclusion of legal norms in mediation helps address the concerns of feminist and liberal critics of mediation about mediator bias and the provision of second-class justice to disadvantaged and less powerful disputants).

11. Kovach & Love, *supra* note 1, at 31; see also Symposium comments of Dean John Feerick ("Self-determination is the most basic principle of mediation. Facilitation follows from that. . . . Evaluation weakens the facilitative process.").

Counter-Argument: Legal evaluation affirmatively facilitates the goal of party self-determination. Indeed, meaningful self-determination is not possible without adequate legal information.¹²

3. *Argument:* Evaluation undermines the facilitative nature of mediation by overemphasizing law to the exclusion of the disputants' own values, ownership of the process, creative problem-solving, etc. Evaluation encourages argumentation and confrontation, rather than collaboration and compromise.¹³

Counter-Argument: Evaluation can be used in support of facilitation by helping disputants assess their legal "bargaining chips" and enabling them to trade these off against other, nonlegal values.¹⁴ In addition, sharing knowledge of the law can often assist the parties in "expanding the pie," improving the potential for integrative solutions.¹⁵

4. *Argument:* Evaluation undermines mediator neutrality, because it will appear to the parties that the evaluative mediator is committed to a particular substantive outcome, dictated by law.¹⁶

Counter-Argument: Providing information and advice is not the same thing as being committed to a particular outcome, and a competent evaluator can readily make this distinction clear.¹⁷

12. See, e.g., Nolan-Haley, *supra* note 2, at 65-66 (explaining that authentic self-determination can only be exercised when parties understand both their legal and nonlegal interests); *Standards Symposium*, *supra* note 4, at 108 (comments of Professor Don Weckstein).

13. Kovach & Love, *supra* note 1, at 31.

14. See, e.g., Nolan-Haley, *supra* note 2, at 65-66 (explaining that only by understanding both legal and nonlegal interests can parties make informed trade-offs among these varying interests); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (arguing that in legal negotiations, the law provides "bargaining chips" which the parties can claim or forego). See also Riskin, *supra* note 2, at 37 (describing how Gary Friedman, a well known divorce mediator and author with a "facilitative-broad" style, routinely predicts judicial outcomes "in order to free the parties from the potentially narrowing effects of the law").

15. Waldman, *supra* note 8, at 107-08 (noting that mediators see their role as resource expanders and demonstrating how, for example, legal advice about the tax ramifications of divorce can help the parties expand the "marital pie.")

16. Kovach & Love, *supra* note 1, at 31. I am here using Josh Stulberg's definition of neutrality: A mediator is neutral if he or she has no personal preference that the dispute be resolved one way rather than another, and if he or she helps the parties develop settlement terms that they find acceptable, even if the mediator finds those terms objectionable. JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* 8, 37 (1987).

17. See Riskin, *supra* note 2, at 37; Aaron, *supra* note 6, at 269 n.3 (stating that expression of belief that one side is more likely than another to win at trial does not compromise neutrality, so long as mediator has no stake in the outcome and no greater investment in one side than another).

5. *Argument*: Evaluation undermines the appearance of mediator impartiality, because each item of information the mediator provides, by definition, favors one disputant at the expense of another.¹⁸

Counter-Argument: In most legal disputes, there will be strengths and weaknesses to each party's position. The evaluative mediator can enhance both parties' knowledge of the strengths and weaknesses of their claims, without necessarily appearing to be a proponent for one side over the other.¹⁹

6. *Argument*: It is better that each party in a dispute obtain an evaluation of the legal merits of his or her claim by an independent legal representative, rather than relying on the legal advice of a mediator.²⁰

Counter-Argument: For many poor and middle income persons with legal disputes in this country, the ideal of independent legal representation is a cruel illusion. Even where parties can afford independent legal representation, rules that prohibit mediator evaluation and require consultation with separate counsel add unnecessary expense and delay to the dispute resolution process.²¹

7. *Argument*: Mediators cannot personally ensure that each party makes fully informed decisions.²²

Counter-Argument: Decisions can never be "fully informed," in the sense of being made on the basis of perfect or complete knowledge. The fact that the mediators may not have full knowledge of the case and may not be able to ensure complete parity of legal knowl-

18. Kovach & Love, *supra* note 1, at 31 (stating that in evaluative mediation, a mediator sides with one party in pronouncing "winners and losers."); Alfani & Clay, *supra* note 1, at 8 (stating any evaluation works to the advantage of one party and the detriment of the other). By "impartiality," I mean "treat[ing] all parties in comparable ways, both procedurally and substantively." STULBERG, *supra* note 16, at 37.

19. See, e.g., John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996) (stating that parties do not lose trust in mediators or consider them biased because they provide a neutral assessment of their litigation risks). But see Aaron, *supra* note 6, at 279-83 (asserting that evaluation poses risk of appearance of mediator alliance with the "winning" side).

20. See, e.g., Kovach & Love, *supra* note 1, at 31; JOINT STANDARDS, *supra* note 2. Many mediator ethics codes, even if they stop short of prohibiting mediator evaluation, counsel mediators to recommend that parties obtain independent legal advice. See generally Nolan-Haley, *supra* note 2, at 92-93.

21. See, e.g., Waldman, *supra* note 8, at 134-41 (surveying overwhelming lack of access of divorce litigants in a number of jurisdictions to private counsel and characterizing the "two-tiered model" of "outside attorney as safeguard" as a myth for many litigants); Nolan-Haley, *supra* note 2, at 82 (arguing that "[the] 'independent counsel' rule is a woefully inadequate response to the problem of unrepresented parties in court mediation").

22. JOINT STANDARDS, *supra* note 2, at I ("A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement").

edge as between the parties are hardly justifications for providing the parties no relevant information at all.²³

8. *Argument:* Legal evaluation in mediation constitutes the practice of law, giving rise to special duties and obligations.²⁴ Few ethical standards now exist for mediator evaluation, and therefore there are accountability problems when mediators provide incompetent advice.

Counter-Argument: Legal evaluation in mediation may implicate the practice of law, but does not constitute it. In any event, standards for legal evaluation in mediation could be enacted and the accountability problem resolved.²⁵

9. *Argument:* Most present-day mediators are not lawyers. Recognition of a legal evaluation role for mediators will lead to domination by lawyer mediators, driving out of the market many qualified nonlawyer mediators.²⁶

Counter-Argument: This is an argument about turf, not ethics. In point of fact, lawyer mediators often do have special knowledge and expertise that disputants wish to utilize.²⁷

23. The doctrine of informed consent, in both the doctor-patient and the attorney-client relationships, requires that individuals be provided information reasonably necessary to make informed decisions. The test generally is what a reasonable person would consider material and therefore wish to know. Compare, e.g., CHARLES W. LIDZ ET AL., INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY 14 (1984), with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 & cmt. (1983) ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued").

24. Kovach & Love, *supra* note 1, at 31; Alfini & Clay, *supra* note 1, at 8 (explaining that the mediator who evaluates may lack relevant facts or be misinformed about law, and may thus provide litigants erroneous information and advice); see also Letter from Jacqueline M. Nolan-Haley to James H. Stark (April 9, 1997) (on file with the author) (arguing that lawyer mediators often may not know the relevant law well enough to give competent legal advice). On mediation as the practice of law, see, e.g., Menkel-Meadow, *supra* note 3, at 419-24 (arguing that when mediators give legal information they are, in effect, practicing law without a representational relationship).

25. See, e.g., Sandra E. Purnell, *The Attorney as Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986 (1985) (asserting that mediators who provide legal information are not practicing law because the parties do not reasonably believe that the mediator is their representative); Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO HIGH COST LITIG. 74, 75 (1996). On the accountability problem, see, e.g., Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1990). On the question of competency to evaluate, I think that the arguments are overbroad. The fact that mediators may sometimes lack the legal knowledge to give competent legal advice is not to me a sufficient reason to prohibit all mediator evaluation, as is sometimes argued.

26. Alfini & Clay, *supra* note 1, at 8; Symposium Comments of Dean John D. Feerick (defining and regulating mediation so as to make it a "lawyers' preserve" would be a terrible setback).

27. Riskin, *supra* note 9, at 333-36.

10. *Argument*: It is desirable clearly to distinguish mediation, which should be purely facilitative, from other forms of alternative dispute resolution ("ADR"), such as early neutral evaluation. Giving these processes separate labels will avoid confusion in the marketplace, enabling attorneys and disputants to know exactly what to expect from each process.²⁸

Counter-Argument: A full array of ADR options is not available to litigants in every jurisdiction in every kind of case.²⁹ Even if it were, permitting mediators the flexibility to use both facilitative and evaluative techniques as appropriate is more efficient and less costly for litigants.

Presenting the arguments in this kind of point-counterpoint format underscores (perhaps overemphasizes) the polarized—and, to my mind, somewhat unhelpful—nature of the debate. More or less evaluation will be more or less productive and appropriate depending on a complex variety of disputant, dispute, forum, and mediator characteristics.³⁰ Still, if I must choose one pole or the other, I choose evaluation, at least in contexts like the one I have described.

Re-examine this context. The mediation is being conducted deeply "in the shadow of law,"³¹ with a magistrate ready, just a few rooms away, to hear the case and apply "black letter" principles to it if the case does not settle. The parties have terminated their relationship, and appeals to that relationship, to efficiency concerns, and to subjective notions of fairness have failed to produce agreement. Neither party has realistic access to a lawyer. A separate system of early neutral evaluation is not available to the parties. The mediators are competent to evaluate. If either or both of the parties desire an evaluation (that remains to be seen), it seems a somewhat cramped vision of "self-determination" to conclude that they may not have one.³²

28. Kovach & Love, *supra* note 1, at 32.

29. See, e.g., Hon. Gladys Kessler & Linda J. Finkelstein, *The Evolution of A Multi-Door Courthouse*, 37 CATH. U. L. REV. 577, 585 (1988) (stating that the "multi-door courthouse" concept is still in its infancy).

30. See generally Aaron *supra* note 6, at 271-72 (stating that the appropriateness of evaluation depends, *inter alia*, on the obstacles to settlement, the expectations and desires of the litigants, and psychological factors such as the parties' degree of commitment to their respective positions).

31. See generally Mnookin & Kornhauser, *supra* note 14.

32. See JOINT STANDARDS, *supra* note 2, at I; ("Self-determination is the fundamental principle of mediation."); Feerick, *supra* note 5, at 458 ("Self-determination is the most fundamental principle of mediation.").

So let's return to the mediation room and examine what such an evaluation might look like, and the difficult questions that are, in fact, presented.

III. SCENES FROM AN EVALUATIVE CAUCUS

Able ("M1"): "So, how are you doing with all this?"

Tenant ("T"): "I can't believe [Landlord] would lie like he's doing! It doesn't seem like we're getting anywhere. Maybe we should just go see the magistrate and have him decide the case."

Baker ("M2"): "If you'd like to do that, that's of course your choice. We *have* been at this for some time."

T: "What do you guys think of my case? What will happen if I go to the magistrate? I have a good case, don't I?"

M2: "Well, you know, we're not representing you in this case, and we're not acting as judges either. Our role is to help you and your ex-landlord resolve this dispute in a way that satisfies both your interests and your own sense of fairness."

T: "My own sense of fairness tells me not to take anything less than \$450! God knows, I need the money. I know that [Landlord] is flat out lying about the caulking and the condition of the tile when I moved in. But I don't want to wait around here all day."

M2: "Tell us something about your money situation, if you would."

[Tenant talks at some length about her personal finances, which are tight. Conversation then peters out.]

M1: "So, returning to your lawsuit, how do you see your chances of prevailing on your claim for the \$450?"

T: "I *think* I have a good case. . . . I don't know. That's why I'm asking you."

M1: "Well, on the issue of the tile damage, one point in your favor is that [Landlord] has the burden of persuasion."

T: "What does that mean exactly?"

- M1: "It means that if the magistrate can't make up his mind whom to believe, he must decide the issue in your favor."
- T: "Uh huh." [*long pause*]
- M2: "Look. In this case you and [Landlord] fundamentally disagree about the condition of the tile before you moved in, whose actions caused it to deteriorate, and how much it deteriorated. Neither you nor [Landlord] has any supporting witnesses or before and after photographs. What the burden of persuasion means is that if the magistrate cannot decide whose version to believe, he must decide in your favor."
- T: "Great! Then I won't accept anything less than the full \$450."
- M1: "Wait a second! Do you really feel that you have no risk here? Do you think you have no possibility of losing?"
- T: "Well, I don't know. I thought that's what you were saying. What are you saying?"
- M2: "You have considerable risk here. The case is a swearing contest. The fact that your case involves a question of 'reasonable wear and tear' only increases its uncertainty. That concept is pretty vague and amorphous, and different magistrates, we're told, have different conceptions of what constitutes 'reasonable wear and tear.'"
- T: "Uh huh." [*pause*]
- M1: "Look. One way trial lawyers help their clients evaluate cases for settlement is by helping them think about their chances of success on the merits and what they're likely to recover if they do win. So for a client with, say, a forty percent chance of winning a \$10,000 claim, a reasonable settlement position might be derived by multiplying \$10,000 by the forty percent, to yield a settlement figure of \$4,000."
- M2: "But there are other factors to consider, as well, such as what your economic needs are, and how you feel about the pros and cons of going to trial."

[Discussion ensues of the tenant's anger and desire for vindication versus her need to pick up her daughter after school and not wait around all day for trial.]

- M2: "So based on all this, do you want to reconsider what to settle for?"
- T: "I don't know. I'm really confused. What do you think?"
- M1: *[Pause]* "Well, of course you've got to be comfortable with any offer you make, but I would think that if you could settle this claim for somewhere between fifty and sixty percent of its value, that would be a pretty fair resolution of the case, given how much the risk there is for both of you, and given the fact that the landlord does have the burden of proof. Maybe a figure in the ballpark of \$250? What do you think?"
- T: "I'm not sure. Before I answer, is there anything else I should consider in making a decision?"
[Supervisor [S], intervening after a small pause in which the students look at each other, apparently unsure how to proceed.]
- S: "Well, it hasn't come up so far, but there are other aspects of this case I think you should know about before deciding if you want to make an offer, and if so, what offer to make."
- T: "Yes?"
- S: "Well, first there is a very small chance that you might be awarded double damages in this case."
- T: "What do you mean?"
[Supervisor explains in some detail the law of double damages.]
- T: "But I didn't claim double damages in my complaint."
- S: "That's true. But magistrates do have the power to order double damages on their own motion. It rarely happens, but sometimes it does. *[Pause]* If I had to guess, I'd say you have maybe a ten percent chance of being awarded double damages."
- T: "Hmm. Now you've really got my attention. Let me ask you this: Could I revise my complaint now, to ask for double damages?"

[M1 and M2 look at each other, uncomfortably. S glances over at them, raises his eyebrows, and continues.]

- S: "If you wanted to, you could withdraw your complaint and, for a new filing fee of \$30, start all over again. These kind of withdrawals are permitted as a matter of right. It might take another 6–8 weeks, though."
- T: "Really?! You mean if I wanted to start all over, for a \$30 fee, I could increase the value of my claim from (does math in her head) \$450 to \$1350?"
- S: "That's right."
- T: "Wow!" [*Long pause, while the tenant contemplates her options.*]
- S: "There's another thing I wanted to discuss with you. When we were talking before about your relationship issues with [Landlord], it sounded as if you thought that his actions were really threatening."
- T: "That's right. He made it seem like the continuation of my tenancy depended on my going to bed with him." [*Tenant describes some details of this.*]
- S: "Uh huh. Well, I wanted you to know that sexual harassment in the landlord-tenant relationship is unlawful in this state. It's a form of sex discrimination. If you wanted to, you could file a separate complaint with the State Human Rights Commission."
- T: "Really?"
- S: "Really. I don't know whether you'd win the case or not, but it certainly sounds like you have a plausible claim. Win or lose, the *threat* of filing a separate civil rights complaint might well enhance your leverage in this action. Of course, it could work the other way too, and just get [Landlord's] back up!"
- T: "Well, this is *really* interesting. You've all given me a lot to think about. You've been most helpful."

S: "Our pleasure."

[Scene fades]

IV. ANALYSIS OF A CAUCUS

The above described caucus is a reimagining of a number of cases I have observed or participated in. I imagine that all of my readers will find something to criticize in the transcript. My goal here is to try to understand the lines that mediators draw between "proper" and "improper" evaluation.

I want to begin by examining two distinctions that are sometimes drawn—the distinction between providing "information" and "advice," and the distinction between "making statements" and "asking questions"—that do not seem to me useful in understanding the ethics of mediation evaluation. In these sections I will focus on the conduct of the student mediators.

Then, I will try to identify the essential differences between representational and mediation advice, and analyze the decision of the supervisor to advise the tenant of her right to file a sexual harassment claim.

Finally, I want to confront what I think is the most controversial question presented by the transcript—the supervisor's decision to advise the tenant of her double damages claim—and explain how it illustrates the most difficult ethical question that mediators face in providing evaluation and advice to disputants.

A. *The (Mostly) False Dichotomy Between "Information" and "Advice"*

A number of commentators and codes of ethics have taken the position that it is appropriate for mediators to provide legal "information" but not to give legal "advice."³³ For lawyer mediators, of course,

33. See, e.g., Nolan-Haley, *supra* note 2, at 95 (arguing that mediators should refrain from utilizing legal knowledge to analyze issues and predict probable court outcomes); Purnell, *supra* note 25, at 1015 (advocating that guidelines for attorney mediators should be developed allowing legal information but prohibiting legal advice); Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 714 (1994) (stating that the "pertinent distinction the mediator must make here is between giving legal information and giving legal advice."); AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES, at IV (adopted by the House of Delegates of the American Bar Association in August, 1984) [hereinafter FAMILY DISPUTE STANDARDS] ("The mediator may define the legal issues, but shall not direct the decision of the mediation participants based upon the mediator's interpretation of the law as applied as applied to the facts of the

this distinction serves little useful purpose; it is lawyers' professional stock-in-trade to give legal advice. But even for nonlawyer mediators, wishing to avoid the specter of unauthorized practice of law,³⁴ the distinction is not a helpful one,³⁵ as the manuscript helps demonstrate.

Law student Able (M1) begins her evaluation by telling the tenant that "on the issue of tile damage, one point in your favor is that [Landlord] has the burden of persuasion." Because the tenant asks a question about the significance of this statement ["What does that mean exactly?"] and later seems still not to understand it ["long pause"], the student mediators provide incremental embellishments, eventually unpacking for the tenant exactly how the concept of the burden of persuasion applies to the circumstances of her case.

Some would say that it is the application of general legal principles to the facts of the particular case that distinguishes (permissible) information from (impermissible) advice.³⁶ But this distinction quickly breaks down in the hurly-burly of mediation. In the hypothetical transcript, the student mediator's first statement is the most general and informational. Yet it is not plucked out of the air; it is selected by the student mediator precisely because she has some notion that, at the margins, the burden of persuasion might affect the magistrate's evaluation of the case, should the case go to trial. This is

situation."); STANDARDS FOR PRIVATE AND PUBLIC MEDIATORS IN THE STATE OF HAWAII VII (1986) ("A mediator may give information only in those areas where qualified by training or experience and only with the caution that disputants are encouraged to seek independent advice and counsel . . .").

34. Compare, e.g., Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 57, 61 (1996) (arguing that applying legal standards to concrete facts and making predictions constitutes the practice of law, whether or not there is a lawyer-client relationship), with Meyerson, *supra* note 25, at 74 (asserting that to practice law one must have a client).

35. The terms "information" and "advice" are sometimes used synonymously; indeed, a secondary definition of "advice" in my home dictionary is "a communication . . . containing information." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 21 (Unabridged Edition 1979). But "advice" goes beyond "information" in that it may also contain "an opinion or recommendation offered as a guide to action." *Id.*

I do not mean to suggest that mediators never offer pure information, as distinguished from advice, to litigants. They often do so, as, for example, when they explain mediation and its relation to the trial process, define the protections and limits of confidentiality in mediation, or provide basic administrative information about procedures for filing or amending a pleading, bringing a counterclaim, or executing a judgment. See Nolan-Haley, *supra* note 2, at 94-95.

As I hope to show, however, what passes for "information" in mediation is often just inexplicit "advice," and that distinguishing between the two in the midst of a heated, fast-moving mediation is problematic.

36. See, e.g., Menkel-Meadow, *supra* note 34, at 61 (indicating that "[c]ase law attempting to define the practice of law suggests that it entails applying legal principles to concrete facts."); Nolan-Haley, *supra* note 2, at 94-95.

information calculated to instruct (read: advise) the tenant about her legal rights, provided to her by the student mediator so that she can make an informed choice about whether and how to resolve her dispute short of trial. It is *both* advice and information, distinguishable from the other statements in this section of the transcript only in the sense that it is relatively less concrete and explicit.

A similar point can be made about the student mediators' discussion of the tenant's risks if she goes to trial. The mediators proceed from a somewhat general advisory statement ["You have considerable risk here. The case is a swearing contest."], to a description of a possible method by which the tenant can determine the settlement value of her own case. When she seems unable or unwilling to evaluate her own case ["I'm really confused. What do you think?"], the student mediators provide their own opinion and recommend for her consideration a possible settlement figure. Nevertheless, even their first statement has aspects of opinion and recommendation in it. The statement is intended to advise the tenant that her chances of winning the case are little better than her chances of losing, and that therefore it would be rational for her to settle at considerably less than the face value of her claim. The student mediators' advice becomes more specific only because the tenant seems both to need and want more concrete, more explicit assistance.

Some disputants will require more explicit information in order to understand their legal position; others will require less. But if mediator evaluation is proper at all, it is proper, at least in part, because we believe that it is important that disputants exercise informed consent in the resolution of their legal disputes.³⁷ And if the principle of informed consent is important, the ethics of the mediator's intervention cannot sensibly be made to turn on the relative explicitness or lack of explicitness of the mediator's information and advice. So long as mediators are competent to do so, they must be given the flexibility to provide explicit information to disputants who need and want it.

37. See Stark, *supra* note 4, at 487; Nolan-Haley, *supra* note 2, at 91; *Standards Symposium*, *supra* note 4, at 101-02, 108 (Professor Len Riskin commenting to the effect that evaluation can enhance self-determination and Professor Don Weckstein commenting to the effect that without key legal information, the parties cannot engage in informed self-determination); cf. Robert H. Mnookin & Lee Ross, *Introduction* to KENNETH J. ARROW ET AL., *BARRIERS TO CONFLICT RESOLUTION* 11 (Kenneth J. Arrow et al. eds., 1995) (explaining that parties often seek a resolution to their dispute that is proportionate to the weight and legitimacy of their respective claims).

B. "Questions" vs. "Statements"

Commentators who espouse a theory of non-evaluative mediation sometimes argue that it is inappropriate for mediators to make statements to the disputants about the strengths and weaknesses of their cases, but appropriate to ask them questions.³⁸ This distinction appears to rest on the view that directive statements by the mediator about case value will weaken the facilitative process, undermining the parties' self-determination. As a description of different mediator styles and orientations, the distinction has value.³⁹ As an ethical principle, it is problematic, as the transcript helps show.

Student mediator Able begins the evaluation by asking an open-ended question, encouraging the tenant to evaluate her own case. ["So . . . how do you see your chances of prevailing on your claim for the \$450?"]. The tenant responds that she thinks she has "a good case," but seeks further assistance from the mediators [" . . . I'm asking you."] The student mediators then launch into a discussion of the burden of persuasion, the significance of which the tenant completely misunderstands ["Then I won't accept anything less than the full \$450."]. In response to this, mediator Able blurts out two more questions ["Do you really feel that you have no risk here? Do you think you have no possibility of losing?"]. These are questions, to be sure. But they are very statement-like questions, and are so understood by the tenant ["What are you saying?"].

This excerpt illustrates how simple it is for mediators, if they wish, to provide information and evaluation by their indirect hints and questions.⁴⁰ When disputants are armed with legal knowledge and are able dispassionately to evaluate the strengths and weaknesses of their

38. *Standards Symposium*, *supra* note 4, at 108 (Professor Lela Love stating: "Asking questions comports with the mediator's role, but giving or suggesting answers does not."). Dean John D. Feerick also drew this distinction in the question and answer period following his symposium remarks.

39. See generally Riskin, *supra* note 2. In this important new article, Professor Riskin distinguishes different types of mediators, in part, by the extent to which they ask questions or make statements. A mediator with a "facilitative-narrow" orientation, according to Professor Riskin, asks the parties questions regarding the strengths and weakness of their case and helps the parties to develop their own proposals. An "evaluative-narrow" mediator, by contrast, is more likely to assess the strengths and weakness of the parties' cases him or herself, making statements about predicted outcomes. *Id.* at 35. In describing these different orientations, Professor Riskin is writing descriptively, not normatively; he does not suggest that mediator evaluation and prediction are inappropriate or unethical.

40. See, e.g., Bush, *supra* note 1, at 30-31 (asserting that if the parties disagree about the law and the lawyer mediator knows that one party is "wrong," the mediator can say so directly, limit himself to indirect hints, such as by asking questions about the party's source of information, or do nothing at all.)

own claims, there is little need for the mediator to do anything except ask the parties questions and assist them in developing their own proposals. But such instances will be comparatively rare. Disputants frequently come to the mediation table unrepresented or underrepresented. Even when they are well represented, they will likely approach the mediation process with "optimistic overconfidence" about the righteousness of their positions and the strength of their claims.⁴¹ A skilled mediator can dampen that overconfidence by exposing the parties to the reactions of disinterested parties apprised of the essential facts of the case.⁴² Whether this is done primarily by asking questions or by making statements seems less a matter of ethics than style. In many mediation contexts, questioning is little more than evaluation by Socratic dialogue.

I suspect that many of my readers will have no ethical difficulty with any of the student mediators' interventions in the transcript. They illustrate a broad range of evaluation techniques, more or less explicit, more or less directive, but all widely utilized and accepted by evaluative mediators. It is only where the supervising attorney intervenes, introduces the subject of double damages and goes on to advise the tenant of her legal rights regarding sexual harassment that many of you (most of you, perhaps) might conclude that he has crossed a line from permissible "evaluation" to impermissible "partisanship."⁴³ The term "partisanship" is, of course, only a conclusion—an epithet, really—to describe something that makes us uncomfortable. To understand what it means, we must scrutinize the kind of legal advice a representative lawyer gives the client, contrasting it with the legal advice an evaluative mediator is likely to provide to disputants.

C. *Representational vs. Mediation Advice*

The representative lawyer, particularly in litigation, provides legal information and advice designed to help her client, if she wishes it, to maximize her goals and objectives vis-a-vis her adversary. (How can I best vindicate my claims? How can I best defend myself against my opponent's claims? What legal information will help me rebut my

41. Mnookin & Ross, *supra* note 37, at 17-18.

42. *Id.* at 23.

43. In a recent bar association talk, I asked a group of experienced ADR advocates and lawyer mediators whether a mediator should "point out legal rules and procedures by which each party could strengthen its case." Several participants objected on the ground that this would cross a line into inappropriate "partisanship." James H. Stark, *Ethical Dilemmas in Mediation*, Meeting of the Connecticut Bar Association Section on Alternative Dispute Resolution (Nov. 13, 1996).

opponent's arguments and enhance my own?) To be sure, an effective representative lawyer also helps her client balance these legal rights against her other social, psychological, and economic interests. Sometimes, a representative lawyer will work with her client to integrate the client's goals with the goals of adversaries and third parties. But the client's decision to "sacrifice" legal rights should, ideally, always be informed by knowledge of the maximum achievable legal results—knowledge provided by the representative lawyer.

By contrast, the evaluative mediator is not an information maximizer. The mediator's advice to disputants is hedged by two significant constraints. First, the mediator must be concerned about maintaining the appearance of impartiality as between the parties. As Marjorie Corman Aaron has noted, an honest evaluation on the merits that is "too good" for one side risks entrenchment or retrenchment, especially when the mediator's evaluation contradicts a party's own preexisting view of his or her case.⁴⁴ The more one-sided the information—the more it enhances one party's position at the expense of the other—the more potentially explosive it becomes. At some point the mediator may be reluctant to provide it.

But there is another, even more powerful constraint that stunts the advice of evaluative mediators, and it is this: evaluative mediators provide disputants information and advice primarily in order to help them integrate and/or compromise their competing claims. The overwhelming ethos of the mediation profession is to reduce tension, improve communication, bring parties closer together and, if possible, to resolve their disputes.⁴⁵ Collaboration and compromise, not competition, are the watchwords of the mediation movement.⁴⁶ As a conse-

44. Aaron, *supra* note 6, at 281.

45. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 33, 56 and *passim* (1994) (observing critically that most mediators see themselves as problem-solvers, seeking optimal solutions that meet the needs of the parties); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 *LAW & POL'Y* 7, 19–20 (1986) (stating that the job of the "bargaining" mediator is to look for bottom lines, to narrow issues, and to promote exchanges and side-step intractable issues).

Problem-solving mediators also understand that reducing tension and improving communication are important ingredients in creating an atmosphere conducive to settlement. That is why mediation training manuals often emphasize the skill of "productive reframing" to help convert negative messages into more positive, constructive ones. See, e.g., MARK D. BENNETT & MICHELE S.G. HERMANN, *THE ART OF MEDIATION* 87–90 (NITA 1996) (providing useful examples of reframing a "position focus" to an "interest focus," a "judgment focus" to a "problem focus," a "blame focus" to a "need focus," a "past focus" to a "future focus," and an "individual problem focus" to a "shared problem focus.").

46. See, e.g., MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE & DESTRUCTIVE PROCESSES* 352–54, 363–65 (1973) (listing reasons why competitive

quence, mediators are loathe to provide legal information that *widens* the gap between the parties or that raises tensions and stiffens resistance to settlement. Information that instructs by pointing out the risks and weaknesses in each party's position (thereby bringing them closer together) is cheerfully provided by mediators. Information that instructs but exacerbates difference is quite likely to be withheld.

1. *Analyzing the Student Mediators' Advice*

Let's examine these dynamics as they affect the hypothetical transcript, first stepping back to reanalyze the conduct of the student mediators. Even though the student mediators' advice to the tenant about the burden of persuasion (marginally) enhances her position at the expense of the landlord, no evaluative mediator I know would object to it. Change the hypothetical and assume that the mediators' advice to the tenant were that she has only a five or ten percent chance of winning her case. One-sided information? Certainly. Potentially counterproductive? Quite possibly. Inappropriately "partisan," unethical advice? Hardly. It is information the tenant needs in order rationally to assess her claim.⁴⁷

2. *The Supervisor's Advice About Sexual Harassment*

Now let's proceed to the end of the transcript and evaluate the supervisor's advice to the tenant that she may have a sexual harassment claim of which she was previously unaware. I suspect that very few, if any, evaluative mediators would think it proper to provide such advice. Why not? This too is one-sided information, enhancing the tenant's position at the expense of the landlord. This too may poison the mediation climate, making settlement more unlikely. If this advice is different from the students' advice, it is different only in these two respects: First, it is information about an independent cause of action, useful to the tenant in evaluating all her legal options but not directly material to her pending legal claim;⁴⁸ second, the information, tonally, seems designed to promote competition rather than cooperation and compromise [Even "the *threat* of filing a separate civil rights

processes produce destructive conflict and cooperative processes are more likely to lead to productive conflict resolution).

47. See, e.g., Aaron, *supra* note 6, at 281-82 (asserting that giving a highly negative evaluation to a party may well be counterproductive in the sense of reducing the chances of resolving the dispute, but is a positive good if it supports a principled, merits-based approach to settlement).

48. In order to advance the discussion, I assume here that the Housing Court does not have subject-matter jurisdiction over sexual harassment claims arising in the landlord-tenant relationship.

complaint might well enhance your leverage.”]. Any litigant would presumably like to have this information in order to make the most fully informed decision. Yet many mediators would no doubt conclude that this sort of advice is “representational” advice, inconsistent with the mediator’s proper function.

3. *The Double Damages Claim*

Now we’re ready to confront what seems to me the most difficult ethical question in the transcript: Should the supervising attorney have advised the tenant of her ten percent chance of recovering double damages? Would you have done it? I doubt it. The information greatly widens the gap between the parties, predictably leads to the tenant’s follow-up question about revising her complaint and will likely make the landlord very angry if he learns that the advice was given. This is information so one-sided that it endangers public acceptance of the mediation process. Many or most evaluative mediators, I suspect, would not provide it. And yet, unlike the information about sexual harassment, not to provide this information may materially mislead the tenant about the potential value of her pending legal claim.

Now change the scenario and ask yourself: When you caucus with the landlord, might you inform *him* about the tenant’s ten percent chance of recovering double damages? Be honest. Sure you might. This is relevant legal information, designed to apprise the landlord fully of his potential litigation risks. It is information that, in the interests of informed consent, he ought to have. The only difference is that providing this information to the landlord will likely bring the parties closer together, whereas providing the same information to the tenant may well drive the parties further apart.

This case poses especially difficult ethical problems for the evaluative mediator because in a situation of this kind, she appears to face a trilemma.⁴⁹ First, she owes a duty of impartiality to each party, and her concern about the appearance of partisanship may constrain the type of advice she is likely to give. Second, she may feel a professional or programmatic obligation to bring the parties closer together, reduce tension, and, if possible, resolve their dispute—imperatives that also substantially limit her advice-giving. On the other hand, she

49. Cf. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (presenting the trilemma facing criminal defense attorneys in deciding whether or not to present a client’s perjured testimony).

believes she owes a duty of fairness and good faith towards each of the parties in her evaluation; indeed, she evaluates in the first instance, in large part, because she believes in the importance of party empowerment and informed consent. Providing anything less than maximum information is therefore uncomfortable for her, and her ethical conundrum becomes especially acute when less than complete information has the capacity to mislead. As James Boskey has argued, "an agreement is not truly voluntary if it is based on a factual misunderstanding (including a misunderstanding about governing law) that the mediator had an opportunity to correct but did not."⁵⁰

Explaining these constraints on the mediator's advice also helps us understand one of the comments contained in the *Joint Standards*: "A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions."⁵¹ It is not that competent mediators lack the expertise to provide material information to the disputants; it is not that they cannot ensure well informed choices. It is that they may not choose to do so, given their desire both to appear impartial and to bring the parties closer together. It is these constraints that cause some of the most misleading advice given by evaluative mediators. And it is this sort of misleading advice, not advice-giving *per se*, that makes evaluative mediation controversial and sometimes gives it a bad name.

V. TROUBLESOME QUESTIONS, TENTATIVE PROPOSALS

What should be done about the dangers of materially incomplete, misleading, and manipulative advice by evaluative mediators? The dangers are clearly most pronounced in cases like the one I have presented, in which the parties are *pro se*.⁵² Because disputants without counsel are the most susceptible to being misled, some commentators have suggested that mediator evaluation may be inappropriate whenever any of the parties is not represented.⁵³ But parties without

50. James B. Boskey, *The Proper Role of the Mediator: Rational Assessment, Not Pressure*, 1994 NEGOTIATION J. 367, 370.

51. JOINT STANDARDS, *supra* note 2, commentary at I.

52. See generally Craig A. McEwen & Nancy H. Rogers, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995) (arguing that lawyer participation in mandatory court mediation promotes fairness).

53. See, e.g., Feerick, *supra* note 5.

counsel are also, obviously, those most in need of the mediator's information and advice in order to make reasonably informed settlement decisions. Unless we are prepared to conclude that the overall risks of unfair evaluation by mediators outweigh the corresponding benefits, this seems like an extreme remedy.

Some mediation scholars have argued that legal information and advice should never be provided to disputants in private caucus, but only in joint session.⁵⁴ This recommendation has attractions, and may be sensible in many cases, but imposing it as a "rule" ignores the many advantages that can be derived from engaging in private discussions with each litigant concerning his or her needs, fears, and objectives, and the relationship of the legal merits of the case to these nonlegal concerns.⁵⁵ In addition, a standard of conduct mandating joint evaluation is not much of a remedy if the advice the mediator provides to *both* parties is materially misleading.

We could try to mandate that mediators act just like representative lawyers, imposing a duty to provide each party with legal information designed to maximize his or her advantage vis-a-vis the opposing party. However, to impose such a duty would seem to rub hopelessly against the grain of what most mediators conceive of themselves as doing. As Leonard Riskin has written, one of the central advantages of neutral evaluation in mediation is to free the parties from the "adversarial/materialistic perspective" that so dominates the advocate's thinking.⁵⁶ Yet it is precisely the stance of partisanship that causes representative lawyers—advocates—to provide the fullest possible information to their clients. From this perspective, Bar Association proposals that, for example, impose on the evaluative mediator a duty "fully [to] explain[] [to the parties] *all* pertinent [legal] considerations and alternatives" seem to me highminded but unrealistic.⁵⁷

54. See, e.g., *Model Rules for Grievance Mediation in the Coal Industry* (1980), in WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 175 (1988); Maute, *supra* note 25, at 516 (supporting proposed rule providing for legal advice-giving only in the presence of both parties).

55. See Aaron, *supra* note 6, at 285–87 (describing the advantages of evaluation in private caucus as including: reduced party resistance to mediator feedback because of privacy, greater freedom of the mediator to express empathy while delivering "bad news," and increased freedom for the mediator to tailor the way information is communicated, depending on the knowledge base and personality of the individual party. The principal advantage of evaluation in joint session is that it reduces the risk that "tailoring" the message will turn into "manipulating" the message—for example, telling both parties they have a "lousy" case—in order to produce a settlement).

56. Riskin, *supra* note 9, at 335–36.

57. Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Op. 80–23 (1981) (emphasis added), *quoted in* Riskin, *supra* note 9, at 345.

A. *Proposing a Standard*

I do believe, however, that mediators who undertake case evaluation ought to be obliged to provide the parties sufficient information about the law and its application to their case to enable them to make reasonably informed decisions.⁵⁸ Included within this duty should be an obligation to provide all the parties the same information. Included within this duty should be a responsibility to provide the parties information sufficiently complete that it does not materially mislead them about their rights and responsibilities. Included within this duty should be a responsibility to answer the parties' questions forthrightly. Most importantly, included within this duty should be a responsibility to provide information fairly, objectively, and in good faith, without regard for its effect on the prospects for settlement, the climate of the mediation room, or the appearance of mediator partisanship.

As applied to my hypothetical, rejecting a duty to "fully" advise the parties of all relevant considerations while imposing a duty to provide "sufficient" information might well mean that the supervisor would have no responsibility to advise the tenant of her independent claim for sexual harassment, but would have a duty to advise the tenant about her double damages claim and to answer truthfully any questions prompted by that advice.⁵⁹ Since these conclusions will no doubt be controversial, they require some further defense and elaboration.

A similar point could be made about Professor Riskin's own suggestion that neutral lawyers should have a duty to tell the parties "what [they] think[] they would be told by individual lawyers" about the law, but "in a nonadversarial fashion." *Id.* at 336. As I have tried to show, the difference between what evaluative mediators and representative lawyers say about the law to the parties or their clients has to do not only with tone, but with substance.

58. See FAMILY DISPUTE STANDARDS, *supra* note 33, at IV (setting forth a similar recommendation). The proposal is also similar to a standard suggested by Judith Maute, although Professor Maute would require *all* mediators to engage in case evaluation with nonrepresented parties. Maute, *supra* note 25, at 514. As Len Riskin has pointed out in commenting on an earlier draft of my article, the distinction between "full" and "sufficient" information may be difficult for mediators to apply in the heat of mediation. As usual, he is quite right. Nonetheless, a duty to provide the parties with sufficient information in order to make a reasonably informed decision is well grounded in the law of informed consent. See *supra* note 23. At this point in my thinking, I can do no better.

59. As my colleague Jon Bauer has pointed out, this distinction presupposes that the settlement will not include an explicit waiver of all claims arising out of the landlord-tenant relationship. If such a waiver is part of the settlement agreement, the mediator would presumably have a duty to advise the parties of the potential sexual harassment claim as well.

1. Goals in Conflict

I have stated that the mediator in my hypothetical must reconcile three conflicting goals: promoting conflict reduction and settlement, avoiding conduct that favors one side over the other, and fostering party empowerment through informed consent. As Baruch Bush has observed, a common problem in many existing mediator ethics codes is their internal inconsistency: Where the mediator is confronted with a situation in which he must choose between two conflicting ethical values—like fairness and self-determination—she is often told to choose both.⁶⁰ In this instance, however, the mediator's conflict is not a true conflict in ethical values. It is rather a conflict between one ethical value—the principle of party empowerment through informed consent in decision-making—and the desire of the mediator to settle cases or otherwise be effective in his or her mediation. I believe that party empowerment and informed consent trump these other considerations.

Informed Consent vs. Settlement. The mediator who provides double damages information to the tenant no doubt widens the distance between the parties and decreases the chances of settlement. I like efficiency as well as anyone. Helping parties resolve their disputes and assisting in unclogging crowded court dockets are positive goals. But I am unaware of any mediator ethics code that considers them *ethical* goals.⁶¹ Mediators and mediation programs no doubt sometimes judge their success by their settlement rates. Mediators sometimes withhold or manipulate information because it *works* in achieving settlement. But settlements that are achieved by means of withholding information from litigants face the risk of collateral attack if the parties later find out there was additional information they should have had when they settled their case. They lend credence to the concerns of mediation critics that mediation is an unfair, biased process.⁶² In the long term, they undermine the mediation movement. In my view, therefore, the mediator who provides legal information and advice to the parties ought not withhold material legal information reasonably necessary for the parties to understand their rights

60. Bush, *supra* note 1, at 44.

61. See, e.g., JULIA ANN GOLD, UNIVERSITY OF WASHINGTON PROFESSIONAL SKILLS CERTIFICATE TRAINING PROGRAM 27 (1996) (unpublished training materials on file with author) (arguing that "[j]udging a mediator's success by whether or not an agreement is reached is an inaccurate and potentially harmful method of evaluating the work mediators do").

62. See, e.g., BUSH & FOLGER, *supra* note 45, at 24 (summarizing some of these critics' writings).

and responsibilities, even if such information decreases the chances of resolving the dispute.

Informed Consent vs. The Appearance of Bias. Similarly, an evaluative mediator ought to be obliged to provide the parties material legal information and advice even if doing so undermines the *appearance* of his or her impartiality. Mediators have an ethical duty, of course, to *be* impartial.⁶³ However, as Josh Stulberg has written, impartiality means “treat[ing] all parties in the same ways, both procedurally and substantively.”⁶⁴ To my mind, the mediator who provides the parties the same access to legal information and advice—without favoritism or bias, and without regard for the potential effect of the information on the prospects for settlement—is being impartial, in the truest sense of the word. Indeed, it is only where the mediator withholds material information from one party but provides it to the other that the mediator violates his or her oath of impartiality. This is ironic, because, as we have seen, the mediator may well do so to avoid the appearance of partiality toward the party whom the information favors.

The conflict here is thus not between the conflicting values of informed consent and mediator impartiality, but rather between informed consent and the appearance of bias—an appearance which may impair the effectiveness of the mediator.⁶⁵ The authors of the *Joint Standards* have apparently concluded that the appearance of mediator bias—even where there is no bias—undermines litigants’ confidence in the mediation process and that avoiding the appearance of bias therefore takes precedence over the competing value of informed consent.⁶⁶ Because withholding relevant legal information from parties who need it in order to make informed decisions for the sake of “appearances” or party “confidence” in the process seems to me fundamentally wrong, I think they have made an unwise choice.

63. See, e.g., JOINT STANDARDS, *supra* note 2, at III (“The concept of mediator impartiality is central to the mediation process.”)

64. See STULBERG, *supra* note 16, at 37.

65. The mediation evaluation critics do not argue otherwise. See, e.g., *Standards Symposium*, *supra* note 4, at 106 (comments of Lela Love).

66. JOINT STANDARDS, *supra* note 2, commentary at II (“A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.”)

B. Further Complications

I have concluded that a mediator who engages in case evaluation has no duty to provide the parties "full" information, but does have a duty to provide the parties "sufficient" information so that they can make "reasonably informed" decisions, even if the information widens the distance between the parties and reduces the chances of settlement. If readers are with me this far, these conclusions pose a difficult but important subsidiary question: How does the evaluative mediator obtain informed consent from the parties to such a process?

As Marjorie Corman Aaron has written, the question of whether a mediator should evaluate is, in part, a contractual question.⁶⁷ In many contexts, the mediator is privately retained by the parties pursuant to a written or oral agreement which may spell out the scope and nature of the mediator's role.⁶⁸ In such contexts, the mediator will need to explain to the parties the nature and limits of his or her evaluation. But I have also posited that the evaluative mediator engages in evaluation in whole or in part because of a commitment to principles of party empowerment and informed consent. If this is true, then even when working in noncontractual, court-ordered mediations, the evaluative mediator ought to be concerned that the parties understand something about the nature, limits, and potential effects of the mediator's legal advice, and that they consent to an evaluative process.

Thus, if the advice the evaluative mediator provides the litigants is less than "full" advice, surely the mediator who evaluates ought to be required to advise the litigants, in concrete terms, about the limits of that advice. As previously noted, a number of mediation ethics codes counsel or require mediators generally to advise disputants to seek independent counsel.⁶⁹ Mediators who evaluate should also be required to tell disputants how their advice may differ from an advocate's advice, so that—assuming that litigants have the means to do so—they can make an informed judgment about the costs and benefits of separate representation. Finding words to articulate the limits of the mediator's advice as compared to the representative lawyer's—to parties who may have little or no previous experience with mediation, lawyers or courts—is no simple task, but it ought to be attempted if one is seriously committed to the principles of informed consent and party self-determination.

67. See Aaron, *supra* note 6, at 268.

68. *Id.* at 268–69.

69. See *supra* note 20 and accompanying text.

Similarly, if the evaluative mediator is committed to providing all material information to the parties, even if it means—as with the double damages claim—providing new information to one party that she can use to increase the value of her lawsuit, surely the parties ought to be told in advance about such a possibility, so that they can make an informed choice about whether they desire mediator evaluation, mediation without evaluation, or no mediation at all. Litigants entering the mediation room ought to be informed that if the mediator evaluates, the information provided might help them or hurt them, bring them closer together or push them further apart, and that—while legal information and advice usually produces better informed and better decisions—there is also some risk that they will be worse off mediating than by going directly to court. Many litigants, so advised, will no doubt choose court over evaluative mediation. Imposing a duty on court mediators to give such advice would not, I suspect, be popular with judges and other administrators of busy courthouses. Nonetheless, this is a price that we ought to be prepared to pay if the justification for evaluative mediation is party self-determination and informed consent.

VI. CONCLUSION

Where does this leave us? The problems I have tried to address are obviously very difficult. I am not certain that the proposals I suggest are workable. In truth, I am not even confident that I will always have the courage to follow my principles in my own mediations. (I enjoy resolving conflict and settling cases as well as the next person.) But principle does lead me to these (uncomfortable) conclusions.

In cases where the parties want to make reference to legal norms as a partial or exclusive basis for resolving their dispute, it seems appropriate that the mediator should have a duty to take steps to ensure that the parties' decisions are reasonably well informed. If the parties wish the mediator to provide them legal information and advice, and if the mediator is competent to do so, I can conceive of no good reason to prohibit the mediator from engaging in evaluative activity. Nor, as I've tried to demonstrate, is there any good basis for distinguishing, in advance, different modes of evaluative conduct as "appropriate" or "inappropriate"; a wide variety of types of information and advice-giving may be proper, depending on circumstances and party needs.

If the mediator decides to evaluate, however, the mediator's duty must be to try to ensure that the mediation participants make deci-

sions based on information sufficiently complete so that the parties are not materially misled about their rights and responsibilities. This information ought to be provided without regard for its effect on the prospects for settlement or the appearance of mediator partisanship. Before evaluating, the mediator ought to be required to explain in some detail the nature and limitations of mediation evaluation and its possible effects on the litigation process, so that the litigants can make an informed choice about whether they desire the mediator's evaluation.

Stated differently, any standard of conduct that recognizes a role for legal evaluation in mediation ought to make clear that evaluation is useful and proper chiefly because it fosters informed consent and party self-determination, and that these values take precedence over other competing values. As the *Joint Standards* recognize, self-determination is the most fundamental principle of mediation.⁷⁰ Self-determination without knowledge is not deserving of the name.

70. JOINT STANDARDS, *supra* note 2, at I.

