

## Practitioner's Corner

# Remodeling the Model Standards of Conduct for Mediators

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In the early 1990s, representatives from the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution formed a joint committee to draft the *Model Standards of Conduct for Mediators* ("Model Standards"). Although the Model Standards are not binding, they are intended to inform both mediators and potential parties of the principles underlying mediation. In this Article, we analyze the failure of the *Model Standards* to achieve the drafters' stated goals. We argue that this failure stems not so much from the substantive provisions of the *Model Standards* but rather from the drafters' conceptualization of their product.

The *Model Standards* provide only broad guidance with no source for interpretation, no recognition of difficult ethical dilemmas, and no enforcement mechanism. Unfortunately, this structure, along with the variations among mediation practitioners, renders the *Model Standards* uninformative to mediation consumers and unhelpful to mediators. We argue that given the current state of mediation practice, it is important to develop an alternative analysis of mediation ethics. The existing framework of the *Model Standards* might prove useful if the mediation profession develops or centralizes, but it does not address many of the difficult issues presently facing practicing mediators. In this Article, we illustrate several shortcomings of the existing *Model Standards* and encourage individuals and organizations to develop alternative frameworks that better

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fulfill the current needs of the mediation profession. We conclude by offering one model for such a framework.<sup>1</sup>

## I. THE MODEL STANDARDS FAIL TO ACHIEVE THEIR STATED GOALS.

The drafters of the *Model Standards* intended that their product “[1] . . . serve as a guide for the conduct of mediators; [2] . . . inform the mediating parties; and [3] . . . promote public confidence in mediation as a process for resolving disputes.”<sup>2</sup> Although the text reflects an impressive amount of work and careful compromises, the *Model Standards* fail adequately to achieve each of these three purposes.

### A. *The Model Standards Fail to Serve as a Guide for Mediator Conduct.*

Because they are extremely broad, the *Model Standards* provide little practical instruction to mediators. The concepts that the *Model Standards* convey are basic and very similar to the non-controversial material offered in most introductory mediation courses.<sup>3</sup> For example, Standard Two, which addresses mediator impartiality, simply states that “A Mediator Shall Conduct the Mediation in an Impartial Manner.”<sup>4</sup> This mandate provides little practical guidance to a mediator who believes that she<sup>5</sup> faces a tough ethical issue involving impartiality. For example, if she perceives a power imbalance during a mediation (e.g., if one party dominates the discussion due to differences in language skills), most mediators would agree that she should take some action to ensure that the power imbalance does not threaten the ability of the weaker party to assert his own opinions and ideas and to participate fully in the mediation. Yet, certain actions that the mediator might take (e.g., asking the dominant party to listen for a few minutes or directing more questions towards the

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1. We would like to thank and acknowledge David Seibel for his active participation in many of the early discussions from which we developed this model framework.

2. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Preface (Joint Committee of Delegates from American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution 1994) [hereinafter MODEL STANDARDS].

3. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 360–61 (2d ed. 1996) (outlining the content of a typical mediation training program).

4. MODEL STANDARDS Standard II.

5. As an arbitrary convention for addressing gender-based language and as a means of clarifying the use of otherwise vague pronouns, we refer to a mediator as “she” and a mediation party as “he” throughout this Article.

weaker party) may jeopardize the mediator's appearance of impartiality.<sup>6</sup> Unfortunately, Standard Two of the *Model Standards* does not advise mediators as to how to proceed in the face of such difficult power imbalances. Furthermore, the Comments explaining Standard Two provide little additional guidance because they simply state similarly broad, basic ideas (e.g., "A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties.")<sup>7</sup>

It is apparent that the provisions of the *Model Standards* were drafted by consensus. The final draft of the *Model Standards* includes only those principles upon which all of the representatives could agree. As a result, these standards do not address many of the toughest ethical issues within the alternative dispute resolution (ADR) field. For example, although there is considerable debate within the mediation community regarding the role of the law in mediation, the necessary level of mediator training and qualifications, and the criteria for determining when cases are inappropriate for mediation,<sup>8</sup> the *Model Standards* fail to provide useful guidance on any of these issues.

One of the most difficult issues facing mediators today is the introduction of law into the mediation process.<sup>9</sup> While some mediators and mediation programs follow a strict policy of excluding discussions of law from the process,<sup>10</sup> others consistently provide information to the parties regarding their legal rights and obligations.<sup>11</sup> For most mediators, however, questions of when and how to inform ignorant parties of the law present an unusually difficult dilemma. Allowing

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6. See MOORE, *supra* note 3, at 337.

7. MODEL STANDARDS Standard II cmt.

8. See NANCY ROGERS & CRAIG McEWEN, *MEDIATION: LAW, POLICY & PRACTICE* §§ 6:01, 10:01 & 11:02 (2d ed. 1994).

9. See *id.* § 10:01.

10. The Harvard Mediation Program, among others, maintains a strict policy of not permitting its mediators to provide parties with legal information. Although the program's mediators will often encourage parties to consider their alternatives to a mediated settlement (i.e., specifically what they think will happen in court), the mediators do not introduce specific laws into the mediation even if the mediators are aware of laws that are directly relevant to the case. See Harvard Mediation Program, Seminar on Basic Training, February 1996.

11. For example, the Center for Mediation in Law ("CML") in Mill Valley, California, trains its mediators to provide mediation parties with legal information relevant to their dispute. Although CML recognizes the potential dangers of introducing legal information into a mediation, they believe that the techniques they use and their method of introduction minimize the potential risks. See The Center for Mediation in Law, Memorandum No. 6: The Place of Law in Mediation (1983) (unpublished training materials, on file with The Center for Mediation in Law).

parties to make decisions without knowledge of relevant legal information prevents individuals from making fully-informed decisions. On the other hand, any attempt to provide the parties with such information threatens the mediator's neutrality.

The *Model Standards*, unfortunately, include little discussion of the difficult issues surrounding the incorporation of law into mediations. The most relevant portion of the *Model Standards* states,

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 parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, 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.<sup>12</sup>

Because the *Model Standards* discourage mediators from "providing professional advice,"<sup>13</sup> they may deter mediators from informing parties of legal principles that may be relevant to the dispute.<sup>14</sup> The *Model Standards*, however, do not forbid such action; instead, they simply state that if mediators assume an additional "professional role," they must observe the rules of conduct of that profession.<sup>15</sup> This comment regarding additional professional roles is unhelpful for two reasons. First, it does not provide mediators with any guidance

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12. MODEL STANDARDS Standard VI cmt. (emphasis added).

13. *See id.*

14. Note that there is a distinction between a mediator providing professional legal advice and information about the law. While the former involves significant interpretation and judgment, the latter would merely involve providing information regarding basic statutes. Neither attorney-mediators nor non-attorney-mediators may provide parties with legal advice. Attorney-mediators are prohibited from engaging in such action by the legal profession's standards of conduct. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 12 (1983) ("[A] lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other . . .") (hereinafter MODEL RULES); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14, EC 5-15 & DR 5-105 (1980) (hereinafter MODEL CODE). Non-attorney mediators, like all non-attorneys, would likely be prohibited from dispensing legal advice because such actions would probably constitute the unauthorized practice of law. For a brief discussion of the difficult question of what constitutes "the practice of law," see ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 627-37 (3d ed. 1989).

15. *See* MODEL STANDARDS Standard VI cmt.

as to when it might be appropriate to assume this secondary role. Second, while the comment admonishes mediators to act according to the rules and standards of the other profession, it fails to highlight the negative impact that such actions could have on the mediation process.<sup>16</sup> Thus, the *Model Standards* provide little practical guidance to mediators grappling with this problem.

A second example of an important issue skirted by the *Model Standards* is that of proper mediator training and qualifications. Although some states have established minimal training requirements for mediators participating in court-annexed mediation, the issue of training requirements for non-court-annexed mediation, as well as for more complex cases such as divorce or tenant evictions, is a topic of current debate.<sup>17</sup> Although the *Model Standards* touch upon this issue, the guidance they provide is minimal. Standard Four states that "A Mediator Shall Mediate Only When the Mediator Has the *Necessary* Qualifications to Satisfy the *Reasonable* Expectations of the Parties."<sup>18</sup> Unfortunately, the *Model Standards* define neither "Necessary" nor "Reasonable." The comments that elaborate upon this standard state that parties may choose a mediator if they are satisfied with that individual's background and qualifications but acknowledge that training and experience often make a mediator more effective.<sup>19</sup> In addition, the description of the standard also provides that "[i]n court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the *requisite* training and experience."<sup>20</sup> The key word "requisite," however, is also undefined. The drafters' use of broad, vague adjectives such as "necessary," "reasonable," and "requisite" may reflect their inability or unwillingness to resolve the current disagreement over

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16. A mediator may provide the parties with legal information in a way that fully complies with the standards of the legal profession yet still threatens the integrity of the mediation process. It is possible that the mediator's actions, though impeccable through the lens of lawyers' standards of professional conduct, could severely compromise the mediator's neutrality in the eyes of the parties. That is, attorneys' ethical standards may permit a mediator to provide the parties with legal information that greatly favors one party over the other, but the disadvantaged party is likely to perceive the mediator's actions as inappropriately partial.

17. See, e.g., Irene S. Said, *The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality Under the Texas ADR Statute*, 36 S. TEX. L. REV. 579, 626 (1995) (claiming training programs are inadequate to impart standards of conduct for mediators); Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1546 (1994) (suggesting steps to ensure an adequate supply of qualified evaluators).

18. MODEL STANDARDS Standard IV (emphasis added).

19. See *id.*

20. *Id.* (emphasis added).

the proper extent or nature of mediator training.<sup>21</sup> Although there appears to be consensus within the ADR community that mediators should have the "requisite" training, there is no agreement as to what type or amount of training is sufficient. The *Model Standards* take no stand on that question and, therefore, are not particularly helpful to mediators and programs that are currently struggling with the difficult issues surrounding mediator training and qualifications.

Finally, the *Model Standards* fail to provide adequate guidance to mediators in distinguishing cases ill-suited for mediation. Critics argue that mediation may be an inappropriate dispute resolution process when there are power imbalances between the parties.<sup>22</sup> Many mediators maintain that they have the skills and tools to address most of the power imbalances that occur during mediation. There is general consensus, however, that some cases simply are not suitable for the mediation process, regardless of the mediator's skills.<sup>23</sup> For example, mediators are typically wary of working with parties in cases that involve issues of sexual, physical, or mental abuse.<sup>24</sup> In cases involving more subtle power imbalances, however, the ethical norms are less clear. While some mediators will mediate cases involving parties on significantly unequal footing, others contend that such difficult disputes should be left to the court system which, at least theoretically, will better protect the weaker party's rights.<sup>25</sup> The issue of which cases are "unsuitable" for mediation is a difficult

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21. The comments do make two concrete suggestions regarding mediator qualifications: (1) mediators should provide parties with information regarding their training, background, and experience, and (2) parties choosing a mediator should have access to the requirements necessary for mediators to appear on a list of potential intervenors. See *id.* at Standard IV cmt.

22. See, e.g., Scott H. Hughes, *Elizabeth's Story*, 8 GEO. J. LEGAL ETHICS 553, 563 (1995) (arguing that power imbalances between the parties often unfairly impact mediated settlements); Phyllis Gangel-Jacob, *Some Words of Caution About Divorce Mediation*, 23 HOFSTRA L. REV. 825, 834 (1995) (arguing that mediation is inappropriate in cases where spouses have been abused physically, verbally, economically, or through silence and alienation).

23. Grangel-Jacob, *supra* note 22, at 834 ("More or less, all of the proponents of mediation have, after much prodding and admonition, carved out an exception for the battered family. There is general acknowledgment that these folks are not candidates for mediation.")

24. Many states prohibit mediation in cases raising claims of physical or psychological abuse. See, e.g., COLO. REV. STAT. ANN. § 13-22-311 (West 1989 & Supp. 1992) (prohibiting court-referred mediation if a party claims physical abuse and is thereby unwilling to mediate); DEL. CODE ANN. tit. 13, § 711A (Supp. 1994) (prohibiting mediation in cases involving domestic violence, unless victim is represented by counsel and specifically requests mediation).

25. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1558, 1565-67 (1991).

question that has not yet been satisfactorily answered.<sup>26</sup> The *Model Standards*, unfortunately, make no mention of this tough ethical dilemma.

*B. The Model Standards Fail to Inform Parties of the Mediation.*

The second goal of the *Model Standards* is to inform and educate parties about the mediation process.<sup>27</sup> While it is true that the *Model Standards* describe the major characteristics of mediation (e.g., mediator neutrality or self-determination of the parties), the existence of a set of "mediation rules" may have the unwanted effect of misleading parties into believing that a singular "mediation process" exists.

In practice, mediators may serve a number of different functions.<sup>28</sup> Some provide parties with options, legal information, and predictions or evaluation of potential court outcomes; others simply focus on facilitating communication between the parties. Parties generally have a preconceived notion of "mediation" and may not realize the range of services that different mediators provide.<sup>29</sup> Because the *Model Standards* do not distinguish between the various "mediation processes" that exist, they perpetuate this myth of a "singular" mediation process.<sup>30</sup> Instead of helping parties to understand the differences between mediators and the costs and benefits of using different types of mediators, the *Model Standards* imply that all mediators perform essentially the same functions. In reality, mediators provide very distinct services, depending upon the roles they play as third-party intervenors.<sup>31</sup> Ideally, information that parties receive would educate them as to the various services that different mediators provide. With this information, the parties could make an informed decision as to the type of mediator that could best help them resolve their dispute. Instead of alerting parties to the importance of selecting an appropriate mediation process, the *Model Standards* may mislead potential mediation consumers into believing that all mediators provide identical services.

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26. See Hughes, *supra* note 22, at 565.

27. See Preface to MODEL STANDARDS.

28. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 8 (1996) (noting that "a bewildering variety of activities fall within the broad, generally-accepted definition of mediation").

29. See *id.*

30. See MODEL STANDARDS Introductory Note ("The model standards are intended to apply to all types of mediation.").

31. See Riskin, *supra* note 28, at 24-35 (describing common mediator roles and approaches).

C. *The Model Standards Fail to Promote Public Confidence in Mediation.*

The final stated goal of the *Model Standards* is the promotion of public confidence in mediation as a form of dispute resolution.<sup>32</sup> The *Model Standards'* success in this regard is questionable. The main "consumers" of the drafted materials are most likely those scholars and practitioners who are already involved in the dispute resolution field. Because the principles contained in the *Model Standards* are both broad and vague, it is doubtful that these individuals will find any new information regarding mediation that would increase their confidence in the process. The individuals who could benefit most from the drafted *Model Standards* (primarily members of the public at large who have little knowledge of mediation) are highly unlikely to read them. A disputant who is unfamiliar with mediation is much more likely to pick up a reader-friendly pamphlet labeled *What is Mediation? Is It Right For You?* than the *Model Standards*, which appear more formal and somewhat inaccessible. Thus, the *Model Standards* are unlikely to meet the Joint Committee's goal of increasing public confidence in mediation.

II. THE FRAMEWORK CHOSEN FOR THE *MODEL STANDARDS* MADE IT MORE DIFFICULT FOR THE DRAFTERS TO ACHIEVE THEIR STATED PURPOSES.

Although the *Model Standards* highlight important mediation principles, they fail to provide adequate guidance and information to mediators and mediation consumers. While part of the difficulty stems from the awkwardly-drafted compromise positions they enunciate, the *Model Standards* also rely on a framework that does not address the contexts in which modern mediators operate. Despite significant variations between the practices of mediators and attorneys, the *Model Standards* are fashioned after rules governing the ethics of the legal profession.<sup>33</sup> Even if the drafters had crafted each of the substantive provisions differently, the structure of the *Model Standards'* principles, prohibitions, and duties makes it difficult, if not impossible, for the *Model Standards* to achieve the drafters' purposes.

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32. See *Preface* to MODEL STANDARDS.

33. The structure of the *Model Standards* resembles those of the *Model Rules* and the *Model Code*.



A. *The Model Standards Parallel the Structure and the Phraseology of Standards of Conduct Crafted for Lawyers.*

The *Model Standards* identify nine fundamental issues organizing questions of mediator conduct<sup>34</sup> and attach to each of these issues a general statement that describes the basic duty arising from that issue.<sup>35</sup> Typically, these statements are phrased as absolute duties and do not mention the ways in which one duty may affect another. Additionally, the drafters provide narrative statements that clarify each general statement<sup>36</sup> and include statements of principle,<sup>37</sup> definitions,<sup>38</sup> best practices,<sup>39</sup> and specific obligations and duties.<sup>40</sup> Finally, there are one or more "comments" to each of the nine sections or issues. These comments address specific questions raised by the content of the narrative sections and provide illustrations of approved practices.<sup>41</sup>

The structure of the *Model Standards*, which moves from general statements of principle to a discussion of more specific obligations, parallels many of the rules and codes of professional conduct of the legal profession. Each state establishes its own restrictions on the conduct of its attorneys.<sup>42</sup> These rules of conduct typically present lawyers with a set of basic principles that they must uphold and a series of detailed descriptions of the obligations and prohibitions

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34. The nine *Model Standards* are I. Self-determination, II. Impartiality, III. Conflicts of Interest, IV. Competence, V. Confidentiality, VI. Quality of Process, VII. Advertising and Solicitation, VIII. Fees, and IX. Obligations to the Mediation Process. See MODEL STANDARDS.

35. In describing the obligations surrounding the principle of impartiality, the drafters wrote, "Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner." *Id.* Standard II. In many regards, these statements resemble the ABA *Model Code's* Canons, which are simply "axiomatic norms." See MODEL CODE Preliminary Statement.

36. The only exception to this is Standard IX "Obligations to the Mediation Process," for which there is no narrative. See MODEL STANDARDS Standard IX.

37. See, e.g., MODEL STANDARDS Standard II ("The concept of mediator impartiality is central to the mediation process.").

38. See, e.g., MODEL STANDARDS Standard III ("A conflict of interest is a dealing or relationship that might create the impression of possible bias.").

39. See, e.g., MODEL STANDARDS Standard VIII ("The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.").

40. See, e.g., MODEL STANDARDS Standard V ("The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.").

41. See, e.g., MODEL STANDARDS Standard V cmt. ("If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.").

42. See KAUFMAN, *supra* note 14, at 15.

stemming from these principles. The prohibitions and duties are set out as inflexible rules that all attorneys "shall" or "must" observe, regardless of circumstance. Attorneys' rules of conduct are crafted as precisely as possible and are designed to apply in every situation.<sup>43</sup> Similarly, the *Model Standards* are "intended to apply to all types of mediation"<sup>44</sup> and seek to establish a set of particular obligations that mediators must obey in all circumstances.<sup>45</sup> In this regard, they appear to provide the same strict guidance found in the legal profession's standards of conduct. As noted above, however, the provisions of the *Model Standards* are the result of a great deal of compromise, and the only areas in which the drafters crafted provisions with specificity are those in which there is relatively little current debate. As a result, the specific obligations of the *Model Standards* are unlikely to provide mediators with real guidance.

B. *Mediators Operate in Very Different Environments Than Do Attorneys.*

The structure of the *Model Standards* parallels that of many attorneys' standards of conduct, but the contexts in which mediators and attorneys practice differ considerably. While the entry into the legal profession is strictly regulated,<sup>46</sup> mediators do not necessarily need the endorsement of *any* organization or institution in order to practice.<sup>47</sup> In a very real sense, anyone may currently "hang out a

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43. The *Model Rules* provide:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. *The Rules of Professional Conduct prescribe terms for resolving such conflicts.*

MODEL RULES *Preamble: A Lawyer's Responsibilities* (emphasis added); see also MODEL CODE *Preamble* (acknowledging the various roles a lawyer must play as guided by axiomatic norms prescribing standards of professional conduct).

44. MODEL STANDARDS *Introductory Note*.

45. See, e.g., MODEL STANDARDS Standard III (providing, in part, that "[w]ithout the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process").

46. To become a practicing attorney, a person must complete an education in the law and typically pass a state bar examination. If a person fails to receive this certification from the state and nevertheless engages in activity that is considered to be "the practice of law," that person is subject to considerable sanctions. See KAUFMAN, *supra* note 14, at 627.

47. See Kenneth S. Gallant, *Ethical Issues for Lawyer-Mediators*, 38 Aug. ADVOC. (Idaho) 10, 10 (1995).

shingle” and call herself a “mediator.”<sup>48</sup> Many individuals perform mediator functions without identifying their services as such.<sup>49</sup>

In addition to the lack of professional entry standards, mediators, unlike attorneys, are not in regular contact with institutions capable of enforcing standards of conduct. Lawyers are frequently in contact with courts, which can enforce attorneys’ standards of conduct. Additionally, because the practice of law depends on certification from the state, states can enforce the professional standards that bind all lawyers. Mediators, on the other hand, do not necessarily come into contact with courts.<sup>50</sup> Furthermore, there is no consistent certification process for mediators and no single organization to which all mediators belong. The lack of enforcement mechanisms distinguishes the mediation profession from its legal counterpart.

C. *The Differences Between the Worlds of Attorneys and Mediators are Relevant to the Crafting of Appropriate Standards of Conduct.*

The differences between the environments in which mediators and attorneys work impact the effectiveness of standards of conduct. Attorneys are subject to rules and guidelines comprising both broad statements of principle and specific prohibitions and duties. Each of these kinds of regulations of attorney conduct makes sense only when considered in the context of the legal profession. In the legal profession, broad and potentially vague statements of duties can be effective because institutions exist that can interpret these broad statements and provide more specific guidance to practitioners. For example, ABA *Model Rule* 1.9(a) provides that

[a] lawyer who has formerly represented a *client* in a matter shall not thereafter represent another person in the same or a *substantially related matter* in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.<sup>51</sup>

While the definition of “client” and the scope of the phrase “substantially related matter” are central to the meaning of Rule 1.9(a), the

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48. See Paul F. Devine, *Mediator Qualifications: Are Ethical Standards Enough to Protect the Client?* 12 *ST. LOUIS U. PUB. L. REV.* 187, 193–94 (1993).

49. See ROGERS & MCEWEN, *supra* note 8, § 11:01.

50. Although many mediators work in court-annexed programs, a significant number also work in community mediation programs with no formal relationship with the judiciary. See *id.* § 12:09.

51. MODEL RULES Rule 1.9(a) (emphasis added).

*Model Rules* are silent on both issues.<sup>52</sup> Subsequent case law, however, clarifies both terms, making the rule practicable for attorneys.<sup>53</sup> Unlike lawyers, mediators have no institution on which to rely for uniform and binding interpretation of vague statements of principle. As a result, mediators and mediation consumers are unlikely to find significant guidance from such statements.

Similarly, mediators cannot benefit from codified narrow duties and obligations in the same way that attorneys can.<sup>54</sup> An attorney faced with these kinds of restrictions has, at least in theory, a clear idea of what she must or cannot do in the course of her professional work. Crucial to the functioning of codified restrictions is the existence of enforcement mechanisms. Failing to uphold the rules of professional conduct may subject an attorney to sanction from either a court or the Bar. Furthermore, depending on the nature of the breach, a client may pursue a civil lawsuit against the attorney.<sup>55</sup> Mediators, on the other hand, face no consistent or predictable threat of enforcement.<sup>56</sup> As noted above, they do not necessarily have contact with courts or any other organization with the capacity to enforce standards of conduct. Furthermore, the nature of the mediation process makes it difficult for participants, let alone outside observers, to recognize potential violations of standards of conduct. Private enforcement actions for negligence or breach-of-contract provide the only mechanism by which mediators could be held to strict codes of

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52. *See id.*

53. For an examination of the precedents and considerations regarding how and when a person becomes an attorney's "client," see GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.3:106-08 (2d ed. 1994); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1316-17 (7th Cir. 1978); *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1343, 1384 (10th Cir. 1994). For a survey of the significant case law clarifying the bounds of "substantial relatedness" for purposes of attorney disqualification, see HAZARD & HODES, *supra*, § 1.9:104.

54. *See* Linda Stamato, *Easier Said Than Done: Resolving Ethical Dilemmas in Policy and Practice*, 1994 J. DISP. RESOL. 81, 83, 86 (1994) (arguing that mediators can best handle ethical dilemmas through discussion, training, and experience around a structure or process rather than an ethical code).

55. *See* RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* 576-86 (4th ed. 1996) (surveying the role of the legal profession's ethical standards in civil actions against attorneys).

56. *But see* Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 702, 718-719 (1994) (noting that Florida has established a procedural mechanism to enforce standards for court-appointed mediators).

conduct. Because such lawsuits are rare,<sup>57</sup> even a rigid set of restrictions would not alleviate the need for an institutional enforcement mechanism for mediators.

D. *The Model Standards' Failure Stems From Their Structure.*

The *Model Standards'* failure to fulfill their stated purposes stems from the framers' attempt to parallel the ethical rules for attorneys rather than from the content of any specific provision. Similar to the *Model Rules* and *Model Code*, the *Model Standards* present broad statements of principle and a few specific restrictions and duties regarding non-controversial issues. However, mediators practice in an environment very different from that in which attorneys practice, limiting the impact of these kinds of restrictions on mediators. Principles phrased as vague absolutes are unhelpful because mediators and mediation consumers have no obvious source for interpretation. Principles phrased as specific obligations are not reliable because mediators and mediation consumers have no institution to which they can look for enforcement. As a result, the failures of the *Model Standards* stem primarily from the *Model Standards'* framework, rather than from the content of any specific provision.

III. A DIFFERENT FRAMEWORK FOR CONSIDERING QUESTIONS OF APPROPRIATE MEDIATOR CONDUCT MAY HAVE BETTER ACHIEVED THE DRAFTERS' STATED PURPOSES.

The drafters of the *Model Standards* sought to provide guidance to mediators, to educate potential consumers of mediation, and to increase public confidence in mediation as a dispute resolution process. The *Model Standards* fail to accomplish these goals. By framing the standards as absolute duties and prohibitions, the drafters of the *Model Standards* suggest that there are single principles, which, if phrased very carefully, apply to all circumstances and all types of mediators. This suggestion is contrary to the realities that mediators face and does not further the drafters' stated goals.

While each of the principles reflected in the *Model Standards* (e.g., neutrality or self-determination) may appear an absolute necessity to the integrity of the mediation process, real world circumstances often place these principles in tension with one another. In

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57. See ROGERS & MCEWEN, *supra* note 8, § 11:03; Gallant, *supra* note 47, at 10 ("Mediation results in voluntary agreements, infrequently challenged because of ethical failings of the mediator. Thus the demand for clarification and codification of duties by disgruntled consumers is low.").

addition, mediators may reasonably differ over the most appropriate ways to reconcile these tensions. To provide guidance on difficult ethical issues, a set of standards should acknowledge these complexities and offer a process through which mediators and participants can make wise choices.

A. *A Useful Framework Should Recognize and Address the Important Ethical Dilemmas Facing Practicing Mediators.*

Mediators face at least two kinds of difficult decisions. One set of difficult decisions stems from uncertainty about how to best assist the parties in their negotiations, and the second stems from ethical dilemmas facing mediators.<sup>58</sup> In addressing this first kind of difficulty, mediation training courses do not or should not focus solely on abstract issues such as the importance of value creation and fair distribution. Instead, these courses recognize that parties often pose particular challenges, that structural and strategic barriers may impede settlement, and that communication is often difficult and strained. Rather than identifying a single “answer” to these problems, useful training courses provide mediators a variety of tools to identify and overcome barriers facing the disputants.

Mediators need the same kind of guidance in addressing the second set of difficult decisions—those involving ethical dilemmas. Guidance to mediators in resolving ethical dilemmas should avoid the structure adopted by the *Model Standards*. As opposed to the current structure of the *Model Standards*, a more useful model would include a limited number of carefully-defined principles. This model would seek to clarify the scope and nature of each principle, discuss complexities associated with each, and recognize that some circumstances may place two or more of these principles in tension with one another. A more helpful model would also include an analysis of typical ethical dilemmas that mediators face and the impact of mediator actions. This structure would allow mediators to diagnose difficult situations and permit mediators and parties to address the mediator’s role in those circumstances. The following is an ethical framework based on this structure.

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58. See Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas & Policy Implications; A report on a study for the National Institute for Dispute Resolution*, 1994 J. DISP. RESOL. 1, 7 (distinguishing between “a ‘skills dilemma,’ where the mediator is unsure of how to effectuate the course of action she wants to pursue, and an ethical dilemma, where the mediator knows how to effectuate the course of action but is unsure of whether it is proper to do so at all”).

## B. *An Alternative Framework for Mediator Ethics.*

The integrity of the mediation process relies on three fundamental principles: (1) neutrality, (2) self-determination, and (3) informed consent.<sup>59</sup> Because mediation scholars use these terms to represent slightly different concepts,<sup>60</sup> each requires careful definition. Each of these principles is independently important and measurable in the mediation process. Significantly compromising any one principle would jeopardize the integrity of a mediation, but mediators' actions rarely implicate only one of the principles at a time. Instead, the principles act as interdependent variables, with a single mediator action potentially affecting the measure of each. The framework below defines relevant principles, highlights interactions between principles, and provides guidance to mediation practitioners and consumers who want to understand more thoroughly mediator ethics.

### 1. *Principle One—Neutrality*

Virtually every proposed code of mediator ethics mentions the importance of neutrality,<sup>61</sup> but few of those codes define the term clearly. For our purposes, neutrality takes two equally important forms: internally-perceived neutrality and externally-perceived neutrality.

The principle of internally-perceived neutrality demands that mediators be free of bias toward the parties, the parties' interests, or the substantive outcome of the mediation. Situations in which a mediator has inherent sympathy for one party's perspective may

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59. Mediators almost universally recognize these three principles as central to the mediation process. Some scholars also identify a few other important principles of mediation, such as competency, confidentiality, and integrity of the process. *See id.* at 11–40. In the proposed framework we focus only on informed consent, neutrality, and self-determination because they are the three principles most often in conflict in difficult ethical situations.

60. A common definition of neutrality in mediation prohibits any mediator action that favors one party over the other. Compare MASSACHUSETTS ASS'N OF MEDIATION PROGRAMS, THE MEDIATOR'S AGENDA 4 (Spring 1989) ("NEUTRALITY . . . affirms the parties' right to a mediation process that serves all the parties fairly and equally and to mediators who refrain from perceived or actual bias or favoritism, either by word or by action.") with GARY J. FRIEDMAN, A GUIDE TO DIVORCE MEDIATION 26–27 (1993) (defining the term "positive neutrality" to stand for the mediator's obligation to understand fully each of the parties).

61. *See Riskin, supra* note 28, at 47. Some mediation scholars and practitioners make a distinction between "neutrality" and "impartiality." *See Leda M. Cooks & Claudia L. Hale, The Construction of Ethics in Mediation*, 12 MEDIATION Q. 55, 62–64 (1994) (surveying distinctions between "impartiality" and "neutrality" in the context of mediation). Neither of us has yet been persuaded that this distinction is recognizable in practice, and we use the terms interchangeably.

threaten the mediator's internally-perceived neutrality. For example, a mediator who has recently been through a lengthy legal battle with her landlord may have emotional reactions that jeopardize her neutrality in a landlord-tenant mediation. Conflicts between a mediator's own interests and those of one or both parties pose a more egregious threat to internally-perceived neutrality. For example, if a mediator operates in an environment in which she is evaluated based on settlement rates, there is a potential conflict of interest between the mediator's interest in resolving the case and the parties' interest in settling the case only if the proposed agreement is better than what they could obtain through an alternative means.

The integrity of the mediation process also requires that the parties perceive the mediator as unbiased. The mediator's conduct within a mediation session may affect externally-perceived neutrality. For example, if a mediator carelessly discusses parties' interests or proposes options in a way that might favor one party, one or more of the parties may *believe* that the mediator is biased. Regardless of the mediator's actual motivations, this perceived bias can have a detrimental effect on the integrity of the mediation process. A mediator also can affect externally-perceived neutrality through her conduct before or after the mediation. For example, if a mediator is a former employee of one party, *both* parties may suspect that the mediator is biased. Similarly, mediator acceptance of subsequent employment with one party could cast doubt on the integrity of the previous mediation session.<sup>62</sup> A truly neutral mediation requires that both the mediator and the parties perceive that the mediator is acting without bias.

## 2. Principle Two—Self-Determination

Self-determination stands for the concept that *parties* to a mediation control the substantive outcome of the mediation.<sup>63</sup> To maintain self-determination, the parties must fully understand that the process is voluntary and that they have the right to create, propose, evaluate, accept, or reject any possible solutions. Mediators and

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62. See *Poly Software International Inc. v. Su*, 880 F. Supp. 1487 (D. Utah 1995). But see Michael Moffitt, *Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross-Profession Practice*, 1 HARV. NEGOTIATION L. REV. 203 (1996) (cautioning against overly broad mediator disqualification standards).

63. See MASSACHUSETTS ASS'N OF MEDIATION PROGRAMS, *supra* note 60, at 4 ("SELF-DETERMINATION . . . recognizes that parties to a dispute have the ability and the right to define their issues, needs, and solutions and to determine the outcome of the mediation process. It is the responsibility of the parties to mutually decide the terms of any agreement reached in mediation.").



mediation consumers should recognize that both the mediator and the other parties potentially threaten the principle of self-determination.

One way self-determination and voluntariness may be threatened is through inappropriate influence exerted by the mediator. Voluntariness in the mediation context means *both* that a party must be free to accept or reject possible settlement options *and* that a party must be free to accept or reject continued participation in the mediation process. If a mediator tries to force a party to accept a particular outcome or to mediate a case when the party wants to end the process, that mediator is inappropriately impairing the party's ability to determine *for himself* the resolution of his dispute.

Inappropriate influences from the other party also can impair parties' self-determination. This problem is commonly considered one of "power imbalances." Power imbalances refer to situations in which external factors render one party less capable of participating fully in the mediation process and thereby disadvantage that party.<sup>64</sup> Common examples of this dynamic include imbalances in language skill, legal knowledge, or capacity for self-agency.<sup>65</sup> Parties external to the mediation process may also impair a party's ability to determine for himself the outcome of his dispute. Upholding the principle of self-determination may depend on the mediator's ability to prevent this from happening.

### 3. Principle Three—Informed Consent

In an ideal mediation, the parties would fully understand the impact of their agreements. Informed consent includes both the parties' agreement to participate in the mediation process and their acceptance of any ultimate substantive agreement.

Informed consent requires that parties understand the nature of the mediation process. Parties need not understand every process decision that a mediator makes during mediation. If, on the other hand, parties do not understand the fundamental nature of the process, their decision to participate voluntarily is not "informed." For example, if a party is unaware that he is not required to agree to

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64. "Power" in this context does not refer to the capacity of one party to persuade the other by offering creative solutions or by using threats of litigation. To the extent that this constitutes "power," it is completely legitimate.

65. See generally Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOTIATION L. REV. 85, 87 (1996) (arguing that not all individuals possess equal levels of "self-agency" in negotiations).

*anything* during the course of a mediation, then even if he understands the substance of a deal that he ultimately signs, his consent is not "informed." It is, therefore, important for mediators to help parties understand the mediation process.

Similarly, the principle of informed consent requires that parties understand the substantive content of any mediated settlement in light of that party's own interests. If a party to a divorce mediation does not understand the distinction between alimony and child support, for example, that party is incapable of giving fully informed consent to an agreement regarding these types of payments. For mediators, substance-based informed consent poses the difficulty of determining a party's level of understanding. Additionally, it is difficult to know how much information is enough to satisfy the basic threshold requirement that consent be informed.<sup>66</sup> Informed consent requires that parties understand both the nature of the mediation process and the substantive impacts of any potential settlements.

#### 4. *The interrelation between the principles*

These three principles are useful both as measures of mediator conduct and as a set of interdependent variables by which mediators should monitor the appropriateness of their decisions. As independent measures of the integrity of the mediation process, it is possible to estimate the degree to which a mediator has upheld any one of these principles in a given context. However, the question *is* one of degree. One can conceptualize this measurement by envisioning a scale from one to ten, which measures a mediator's adherence to each of the principles.

To imagine that any mediator achieves perfection in any one of these three principles (let alone on all three) is a fiction of academe. Efforts to uphold one of the principles often have a negative impact on the integrity of the others. If a mediator tries to improve her rating on one principle, her actions may adversely affect her rating on another principle. This interrelation is the source of most ethical dilemmas for mediators and should be recognized explicitly. Yet, many

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66. In a sense, this would be a bit like asking if Miranda warnings are adequate to render statements "informed." An alternative warning, possibly resulting in a more informed consent, would be the following: "You have the right to remain silent. You should know that if you ask for a lawyer I have to stop hassling you. You should also know that a large percentage of people who waive these rights are ultimately convicted based in large part on the statements they give following that waiver."

<u>Table 1</u>		
Sample Scale		
For Measuring Mediation Ethics		
NEUTRALITY	SELF- DETERMINATION	INFORMED CONSENT
10	10	10
9	9	9
8	8	8
7	7	7
6	6	6
5	5	5
4	4	4
3	3	3
2	2	2
1	1	1

discussions of mediators' ethics speak in terms of absolute obligations, inappropriately ignoring the real interrelation between the mediators' responsibilities.

For example, mediators in many contexts confront decisions about the appropriateness of introducing the law into a mediation session. The degree to which the parties operate with informed consent reasonably may concern a mediator. If a Massachusetts tenant is unaware that he could receive treble damage for his landlord's violation of the security deposit law,<sup>67</sup> a mediator may have concerns

67. See MASS. GEN. LAWS ch. 186, § 15B (1996) (providing for damages "equal to three times the amount of [their] security deposit or balance thereof to which the

about the tenant's informed consent to an agreement that allocates three quarters of his security deposit to the landlord.

Although the levels of self-determination and neutrality in such a mediation could be relatively high (perhaps 8 or 9 out of a hypothetical-10 point scale), the mediator may feel that the legal ignorance of the tenant pushes the level of informed consent to an unacceptably low level (perhaps 3 or 4). Some mediators might feel uncomfortable signing off on such an agreement.

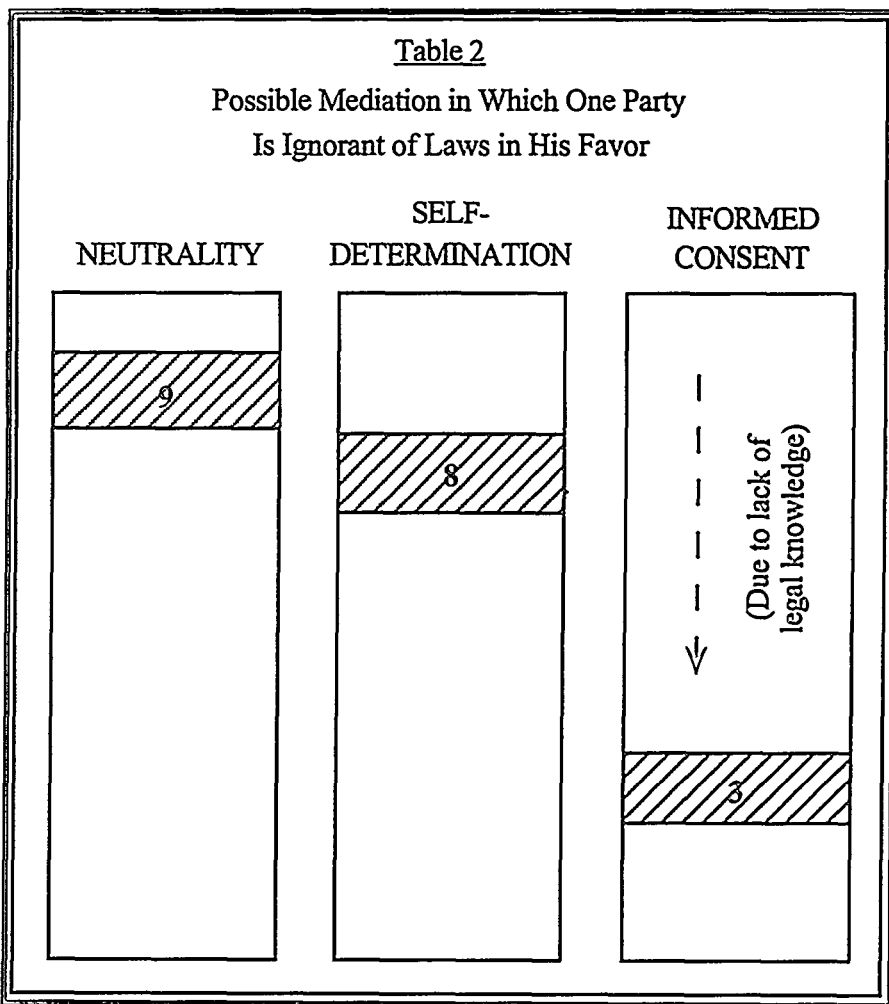
The mediator reasonably may conclude that she should make the tenant aware of the relevant law. Doing so may improve the mediation's "scorecard" with respect to informed consent (raising the level to an 8). Such action may decrease the neutrality rating, however, because the landlord in such a case is likely to view the mediator's introduction of the law into this case as biased.

A set of mediation principles that simply mandated, "(1) Mediators shall be neutral. (2) Mediators shall ensure that parties' consent is informed," would provide no useful guidance to a mediator in a circumstance such as this. Faced with ethical standards phrased as absolute responsibilities, a mediator is likely to respond in one of two unhelpful ways. Some mediators might recognize the existing dilemma, find no way of reconciling the two principles, and withdraw from the process entirely. Other mediators might read the two absolute statements carefully and narrowly and argue that the decision does not implicate one or the other principles. Neither of these responses is consistent with the realities of the mediator's situation, and neither is helpful to the mediation parties.

Under our alternative framework for considering ethical dilemmas, a mediator faced with the decision of whether to introduce the law would find more useful guidance. Before taking this or any action that has the potential to impact the integrity of the mediation process, mediators would have an explicit method for considering the impacts of their decisions. This framework focuses the mediator's attention on a narrow range of fundamental issues and encourages the mediator to consider them in a systematic way. A given situation may not implicate one of the principles in any way, but the mediators should consider the potential impacts of their actions along all three spectra. Having predicted the possible impacts of any particular course of action, they then can craft ways to minimize the negative

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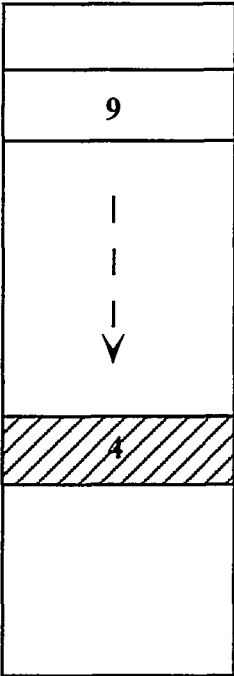
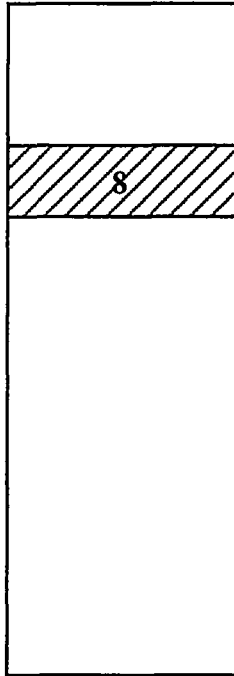
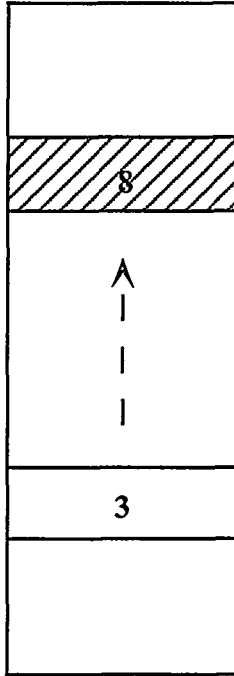
tenant is entitled plus interest at the rate of five per cent from the date when such payment became due, together with court costs and reasonable attorney's fees" if a landlord attempts to keep some of a security deposit after failing to deposit the funds in a separate interest-bearing bank account).



cross-principle impacts while accomplishing primary-principle impact they were seeking.<sup>68</sup>

68. Several programs conducting landlord/tenant summary eviction mediations now use an "Authoritative Resource Manual" to answer questions regarding the law during mediations. These programs believe that the use of this book enables mediators to raise parties' levels of informed consent (by increasing their understanding of the law) in a manner that least threatens externally-perceived mediator neutrality. See generally Joel Kurtzberg & Jamie S. Henikoff, *Freeing the Parties From the Law: Designing an Interest and Rights Based Model of Mediation*, Mo. J. DISP. RESOL. (forthcoming Spring 1997).

Table 3  
Possible Impact of the Mediator Introducing Relevant Law into the Mediation

NEUTRALITY	SELF-DETERMINATION	INFORMED CONSENT
		

*5. Sample Analysis of A Difficult Ethical Situation*

The *Model Standards* fail to include a discussion of many of the difficult ethical dilemmas facing mediators today. Because the drafters developed the *Model Standards* within a framework of absolute duties and obligations, they could include only those issues on which consensus exists. One of the advantages of our proposed alternative framework is that it can provide mediators with a discussion of the many difficult issues upon which there is no consensus. One section of a useful alternative framework could include an analysis of some of the tough issues facing mediators, based on the principles outlined

earlier. The following is an example of how an entry in this analysis section could be presented.

#### SAMPLE ANALYSIS ENTRY

I. **DIFFICULT ISSUE: OPTION GENERATION:** The mediation parties are discussing options for resolving their dispute. Until now, only the parties have suggested and developed the options currently on the table. The mediator believes that the parties have exhausted their creative juices and that they are relatively close to coming to an agreement based on one of the present options. Although the proposed agreement might suit the interests of the parties adequately enough for them to agree to it, the mediator is aware of an option that she believes would be more attractive to the parties. The mediator is relatively confident that the parties, if left to themselves, will not discover this potential solution. What should the mediator do?

II. **INFORMED CONSENT:** The mediator in this case faces a situation that threatens each party's level of informed consent. Because the parties have not discovered the mediator's option, they risk making a decision without knowing all of the information relevant to their dispute. In this case, the missing information relates to the scope of the options among which they may choose. Obviously, parties rarely have *all* relevant information at their disposal. The issue, however, is what level of information is necessary for the mediator to feel comfortable with the parties proceeding. In this case, some mediators may feel obligated to inform the parties of the option. Others, however, may not see the missing information as significant enough to warrant influencing the substantive outcome of the mediation.

III. **NEUTRALITY:** Any actions that the mediator takes to inform the parties of the option may threaten the mediator's neutrality. First, if the mediator's suggested option creates a greater benefit for one party, the less-favored party may view the option as evidence of mediator partiality. More subtly, if one of the parties feels that the mediator's suggestion shifts the focus of the mediation from a potential agreement, which they liked, to a brand new option, about which they may not feel as certain, they also may feel that the mediator inappropriately influenced the mediation. Lastly, even if the suggestion is objectively neutral and beneficial to both parties, one party may subjectively construe the option as biased.

IV. **SELF-DETERMINATION:** Depending upon the context of the mediation and the parties' sophistication, any mediator suggestion put

forth by the mediator could threaten the parties' level of self-determination. Parties participating in many court-annexed mediation programs often view mediators as authority figures. Even though the mediator informs the parties that she does not decide the case, parties unfamiliar with dispute resolution processes often look to the mediator for a decision. In such cases, if the mediator suggests an option, the parties may assume that they must accept such a proposal. Even if the parties understand the mediator's role, the parties may latch onto a suggestion simply because it comes from the mediator. In these circumstances, parties may lose one of the benefits of mediation—the opportunity to craft an agreement that best suits each party's underlying needs. Parties vary considerably in the degree to which they defer to mediators. Mediator actions which would inappropriately influence some parties may be appropriate and welcomed by others.

V. **OTHER CONCERNS:** Mediators should carefully gauge their ability to assess accurately which options may benefit parties. If the mediator has worked with the parties over a series of sessions and has a solid grasp of their underlying interests, she may be able to develop valuable options. In contexts in which the mediator has worked with the parties for only a few hours, however, it is likely that some of the parties' interests and concerns may remain hidden. In situations in which parties are likely to accept the mediator's "suggestions," the mediator's options may not address adequately many of these hidden interests. In such a context, the mediator's proposal would not only threaten the parties' self-determination, it also may destroy value that the parties create in another option.

VI. **POSSIBLE OPTIONS FOR A MEDIATOR:**

- Remain silent about her ideas and simply help the parties to decide among the proposals they have developed
- Ask the parties extremely leading questions so that they "discover" the option on their own
- Ask the parties if they would like the mediator to share her ideas, after explaining to the parties her concerns regarding neutrality or self-determination
- Ask the parties if they would like to hear any ideas from the mediator
- Inform the parties of the mediator's ideas, after discussing her concerns regarding neutrality or self-determination (e.g., "I've thought of one option the two of you might want to consider. I first would like to emphasize that this is only one possible way



to resolve your dispute and that you should disregard it if you feel that it doesn't satisfy your interests. . . .")

- Inform the parties of several options the mediator has developed (including the one that she thinks best satisfies their interests)
- Inform the parties of the option she has developed
- Others?

NOTE: This list of options is not meant to be exhaustive but rather illustrates the range of options available to mediators. Each of the listed actions has costs and benefits, and the order of the list does not represent any form of evaluation.

This sample analysis does not provide mediators with "an answer" to the difficult issue of whether they should actively engage in option generation. Instead, it provides mediators with a framework for thinking about the potential impacts of various actions in light of concrete guiding principles.

### C. *Evaluating the Framework.*

The goals adopted by the drafters of the *Model Standards* serve as one set of criteria for evaluating this alternative ethical framework. The drafters sought to provide guidance to mediators, to educate potential consumers of mediation, and to increase public confidence in mediation as a process of dispute resolution. Our alternative ethical framework better accomplishes each of these goals.

Our ethical framework provides guidance to practicing mediators. While the proposed framework does not *resolve* some of the most important ethical dilemmas facing mediators today, it provides a means of analyzing the difficulties. This kind of analysis may help mediators minimize or avoid ethical difficulties. Furthermore, because this type of framework does not require consensus in drafting, it can address even the most controversial issues, many of which the *Model Standards* do not discuss. It recognizes that while neutrality, self-determination, and informed consent remain constant concerns, the relative value of each principle may change depending on the context. It acknowledges that mediators may differ in their estimation of what constitutes a well-met principle depending on whether the case involves a divorce settlement, a corporate merger, or an international contract claim. Rather than mandating a narrow range of behavior for all circumstances, the alternative framework

provides exactly what the framers of the *Model Standards* set out to provide—guidance.

This ethical framework also serves to inform mediation consumers. While the *Model Standards* create the impression that there is a single process called “mediation,” this alternative ethical framework recognizes that there are many different practices among mediators. It also clearly demonstrates that mediators have a complex set of considerations as they guide parties through the process, predictably leading mediators to differ on the most appropriate process decisions in a given circumstance. This framework may give prospective mediation consumers a “language” with which to discuss the mediation process with potential mediators. A structure like that of the *Model Standards* makes it unlikely that parties would recognize that there are tradeoffs and different ways to approach the process. With the alternative framework, parties may recognize potential difficulties and raise them in an informed manner.

Unfortunately, as with the *Model Standards*, this alternative framework will have minimal impact upon the public perception of mediation because the general population is unlikely to read and understand it. However, those members of the public who read the proposed framework will have a much better understanding of the process and its complexity. The reality of mediation is that it often presents mediators with difficult choices. Some segments of the public may prefer to believe that it is a cleaner process than it is. The existing *Model Standards* help that segment of the population to believe this, and in so doing, promote at least short-term confidence in mediation. In reality, however, the process is rife with unresolved and difficult ethical dilemmas. Explicitly recognizing these difficulties and developing an understanding of how potential solutions interrelate will better serve the public and the mediation community in the long run. To the extent that public confidence in the process stems from a more thorough understanding of all aspects of the mediation, the proposed framework increases public confidence for those members of the general population who read it in a way the *Model Standards* cannot.

#### CONCLUSION

The drafters of the *Model Standards* aspired to create a final product that would provide mediators with guidance regarding difficult issues, inform the parties to a mediation of the process, and raise the level of public confidence in mediation as a dispute resolution process. Unfortunately, however, the drafters’ decision to model their

standards after those found in the legal profession rendered the achievement of each of these goals much more difficult. Because the context in which mediators practice is different from that of attorneys, the *Model Standards* fall far short of achieving each of these purposes. Its set of vague "principles" presented in combination with a few specific rules (on non-controversial issues) do little to inform parties or mediators. The drafters framed their list of principles as absolutes and included only those ideas upon which they all agreed. The final product of their work, therefore, fails to represent adequately the complexities of the issues facing mediators. Despite the fact that the *Model Standards* themselves appear rather simplistic and vague, it is likely that the discussions creating those standards were full of debate and detail. Unfortunately, the final product fails to capture much of that rich discussion. If the drafters had chosen to use a different framework to present their ideas, readers might be able to understand better the rich range of issues that surfaced during the process of creating the *Model Standards*. A framework such as the one outlined in this paper allows readers to derive far more information and guidance regarding appropriate mediator conduct.

