1997

The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice

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The Silences of the *Restatement of the Law Governing Lawyers*: Lawyering as Only Adversary Practice

CARRIE MENKEL-MEADOW*

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the *nominal* winner is often a *real* loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.¹

— Abraham Lincoln, 1850

This Restatement . . . aims to restate the law. It reflects decisional law and statutes and takes account of the lawyer codes in its formulations . . . . Because this is a Restatement of the law, the black letter and commentary do not discuss other important subjects, such as considerations of sound professional practice or personal or professional morality or ethics.²

— Reporter’s Memorandum, March 29, 1996
Proposed Final Draft No. 1

I know that mediation requires some formal rules but I hope they are few. Too many and we will lose the essence.³

— Letter from Jacob A. Stein, Esq.
April 29, 1997

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I thank Elena Ro for excellent research assistance; Elizabeth Plapinger, Vice President of the CPR Institute for Dispute Resolution and the Conflicts Drafting Sub-Committee of the Working Group on Mediation as the Practice of Law of the CPR-Georgetown Commission for consultation, ideas, and hard work; the editors of *The Georgetown Journal of Legal Ethics* for hosting the Symposium; and the Reporters of the *Restatement* and Geoffrey Hazard, Director of the American Law Institute (ALI), for their devoted labors over the years to the larger effort of the *Restatement* and for their willingness to listen to me.

1. Abraham Lincoln, Fragment: Notes for a Law Lecture (1850), in *The Collected Works of Abraham Lincoln: Supplement 1832-1865*, 18, 19 (Roy P. Basler, ed. 1974). This fragment was re-edited from the original manuscript, which began with “Never encourage” rather than “Discourage.”


I. INTRODUCTION: THE SOUNDS OF SILENCE

The attempt to "restate" the law governing lawyers is a noble effort. The drafts, to date, have presented a heroic gathering, in one place, of case law and competing formulations of a variety of the professional disciplinary codes. The drafters have attempted to settle some difficult and often contentious issues regarding lawyer responsibilities to clients, to courts, to third parties, and to themselves. At the same time, this Restatement suffers from the temporal flaws of all its sisters and brothers — in its efforts to "restate," the law it looks backward, not forward, and thus will provide little guidance, at least on some important issues, for the practicing lawyer, judge, or disciplinary committee of the twenty-first century.

The silences, by which I mean absences, of the Restatement are comprised of a growing diversity of lawyer, third party neutral, and judge-like roles that are simply not dealt with in the Restatement. If Abraham Lincoln could see the value in preventing and discouraging litigation where possible, then it seems important for any statement of the law governing lawyers to deal with the increasing array of issues confronting the lawyer in these new roles. The sounds of silence on these issues are deafening to me as I grapple with ethical and regulatory issues related to conflicts of interest, confidentiality, multi-disciplinary practice, fees, disclosure obligations, consent, accountability, third-party liability, and a whole host of issues that now confront the newer practices of law encompassed under the broad umbrella of Alternative, or as we now prefer, "Appropriate," Dispute Resolution (ADR).

I know my colleagues who care about legal ethics will say that there are a few silences for them. Through correspondence with all of the

4. As Professor Nancy Moore points out in this issue, the Restatement has several purposes. In addition to "clarifying the law and... providing a text that courts and other legal bodies deciding contested cases can employ... as a general statement of relevant legal doctrine," Nancy Moore, Restating the Law of Lawyer Conflicts, 10 GEO. J. LEGAL ETHICS 541 (1997), the Restatement is intended to "serve as an educational and reference tool" for lawyers, judges, law students, and others who need to understand the legal duties, obligations, and other requirements that are imposed on those who practice law, including disciplinary, civil, and, in some cases, criminal liabilities that may flow from professional activity. Id.

5. Others have argued that restatements have never really simply restated the law. Every restatement has "resolved" controversial issues, sometimes by accepting the majority view, other times by preferring a minority view that the elite group of lawyers, judges, and academics who comprise the ALI find better suited to their own deliberations or political processes. See, e.g., Ted Schneyer, The ALI's Restatement and the ABA's Model Rules: Rivals or Complements, 46 OKLA. L. REV. 25, 26-27 (1993) (expressing concern that the ALI, in its efforts to restate the law of lawyering, may yield to narrow interests in the profession and stands to undermine the American Bar Association's (ABA) role as "lawgiver for the practice of law" due to both overlapping and differing treatments of some ethical issues).

6. See 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, 408-09 (1997) (focusing on dilemma of developing standards or rules of ethics specifically related and responsive to ADR practices, because ADR employs a "different set of underlying values than informs traditional adversary ethics"). The Restatement is silent on a variety of other issues that have been proposed to the Reporters for coverage: the ethical duties of lawyers in class actions and in bankruptcy and similarly contextually specific settings where traditional models of representation may not be adequate.
Reporters, I have continually expressed my concerns about the absence of issues relevant to the different, less adversarial practice of some forms of ADR. Most have responded that the current rules and the Restatement will answer the complicated questions about conflicts of interest, fees, disclosures, liability, and confidentiality, and that the Judicial Code of Conduct will serve as a useful reference for issues relevant to third-party neutrals, such as arbitrators and mediators. An alternative response has been that when lawyers act as mediators they are not representing clients, and thus their activity is beyond the scope of the Restatement.

Although the Restatement does, on occasion, acknowledge the existence of

7. For example, to the extent that Restatement section 201 ("Basic Prohibition of Conflict of Interest") provides that "all affected clients and other necessary persons" consent (to "consentable" conflicts) and that a conflict of interest is presented if "there is a substantial risk that the lawyer's representation of a client would be materially and adversely affected by the lawyer's . . . duties to . . . a third person," RESTATEMENT DRAFT 1 § 206 (including here possible "non-clients"), such as parties to a mediation, it can be argued that lawyers' duties to non-client parties to a mediation may be included within the rubric of the lawyers' representational conflict of interest rules. The current rules do not make this clear and do not seem to intend to include lawyers' possible conflicts of interests that can occur when lawyers serve as mediators, as well as representational lawyers or when, even if they are solely mediators, their partners may take on representational duties that may be in conflict with mediation or arbitration relationships of other partners. Thus, despite the arguable applicability by text, or by analogy, of some of the Restatement sections, I still think the Restatement is largely silent on the issues affecting lawyers acting as third-party neutrals who are not representational or adversarial lawyers.

8. In an unpublished ruling, Steinberg v. Commonwealth, No. CL96000504-00 (Cir. Ct. Henrico County, Va. Sept. 17, 1996), a court in Virginia held that mediators were engaged in the unauthorized practice of law when they informed parties that they would serve as "legal counselor[s] and mediator[s]" and would advise the parties as to their "rights and obligations under the law." See Geetha Ravindra, When Mediation Becomes the Unauthorized Practice of Law, ALTERNATIVES TO HIGH COST OF LITIG., July/Aug. 1997, at 94 (reporting on the significance of the Steinberg opinion in light of the fact that mediator certification requirements in Virginia do not require that mediators be licensed attorneys).

9. Over the years there has been some confusion about the applicability of Model Rule 2.2 to mediation. I read that section, especially the comment, to suggest that "intermediation" contemplates a lawyer who represents two clients (such as in joint ventures, purchases, partnerships) and that the section does not apply to mediation where the mediator has no representational relationship to the participants in the mediation. In fact, Model Rule 2.2 "does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties." MODEL RULES Rule 2.2 cmt. 2. The Restatement adopts this position. Letter from John Leubsdorf, Professor of Law, The State University of New Jersey, Rutgers University, School of Law-Newark, S.I. Newhouse Center for Law and Justice, to Carrie Menkel-Meadow, Professor of Law, Georgetown University Law Center (July 7, 1996) (on file with The Georgetown Journal of Legal Ethics) [hereinafter Letter from John Leubsdorf, July 7, 1996] (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 153 (Am. Law Inst. Tent. Draft No. 8, 1997) [hereinafter RESTATEMENT (THIRD) of the Law Governing Lawyers § 153]).

10. See, e.g., Letter from Charles W. Wolfram, Charles Frank Reavis, Sr. Professor of Law, Cornell Law School, to Carrie Menkel-Meadow, Professor of Law, Georgetown University Law Center (July 3, 1996) (stating that "the specific substantive content" of regulations regarding lawyers performing functions other than the representation of clients is "a matter clearly beyond the scope of the Restatement") (on file with The Georgetown Journal of Legal Ethics); Letter from Thomas D. Morgan, Oppenheimer Professor of Law, The George Washington University Law School, to Carrie Menkel-Meadow, Professor of Law, Georgetown University Law Center (July 1, 1996) (on file with the Georgetown Journal of Legal Ethics) (stating belief that ADR should be acknowledged as "sui generis" and offering analogies between issues related to ADR and those the Restatement actually does address).
ADR, it is mostly in reference to protecting lawyers’ own interests,\(^{11}\) such as recognition of arbitration for fee disputes and malpractice claims or preservation of the more adversarial qualities of ADR by extending work product protection to materials prepared for ADR proceedings. It does not, however, deal with some of the more reform-oriented issues of ADR — less adversarial behavior required of lawyers within some kinds of ADR proceedings,\(^{12}\) duties and obligations of third-party neutrals to the parties before them in a dispute,\(^{13}\) and duties and obligations to subsequent parties or clients. Thus, while the *Restatement* is a noble effort to restate the law, in its present form it will provide continued grist for the mill of those who argue that lawyers’ ethics codes are a self-serving\(^{14}\) attempt to preserve the status quo\(^{15}\) by acknowledging ADR only when it

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11. Critics of ADR suggest that ADR often is chosen by the more powerful party to a contractual relationship in order to establish control over the choice of forum, the decision-making party, and the procedural timing, as well as to provide for a more private, secret form of dispute resolution. See, e.g., *The Downside of ADR*, CCM—THE AMERICAN LAWYER’S CORPORATE COUNSEL MAGAZINE, Apr. 1997, at 43 (discussing, between on-line participants, corporate advantages realized through ADR, including the deterrence of litigated lawsuits and the institutionalization of privatized justice). Control over these factors sometimes is sought by lawyers who seek to protect themselves and their reputations when engaged in disputes with their own clients. See Stephen Gillers, *Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements With Lawyers*, 10 GEO. J. LEGAL ETHICS 581 (1997) (arguing that the *Restatement* leaves unsophisticated consumers of legal services inadequately protected because the duties it imposes on lawyers regarding fee arrangements are framed in the language of uncertain standards, such as the concept of “reasonable” fees).

12. Less adversarial aspects of ADR include disclosure of more sensitive settlement facts, needs, or interests than would otherwise be disclosed in discovery or litigation, a more problem-solving approach to participation in mediation, a greater degree of candor, and a greater degree of participation by the parties in settlement and mediation activities. Carrie Menkel-Meadow, *Ethics in ADR Representation?*, DISP. RESOL. MAG. (forthcoming Winter 1998) (manuscript on file with the author). For more focused discussion of these and additional relevant factors, see, for example, John W. Cooley, *Mediation Advocacy* 4-6 (1996) (stating that mediators simultaneously employ intuition, instinct, interpersonal communication skills, and the ability to apply logical, rational thinking to situations to encourage flexibility among the parties and to reach creative, amenable solutions that generate less expense but significant compliance); Dwight Golann, *MEDIATING LEGAL DISPUTES* § 3.4 (1996) (stressing that mediators should establish a rapport between themselves and the disputant parties in an informal yet controlled context in which psychological barriers can be identified and responsive strategies implemented to discharge the potential for settlement impasse).

13. Such duties and responsibilities are spelled out in a variety of other professional codes that the *Restatement* does not address, such as the *Code of Ethics for Arbitrators in Commercial Disputes* (Am. Arbitration Ass’n, 1977) [hereinafter *ARBITRATORS IN COMMERCIAL DISPUTES*], the *Commercial Arbitration Rules* (Am. Arbitration Ass’n, 1993), the *Commercial Mediation Rules* (Am. Arbitration Ass’n, 1990), and the *Joint Standards of Conduct for Mediators* (Am. Bar Ass’n, Am. Arbitration Ass’n, Society of Prof’l Mediators, 1994) [hereinafter *JOINT STANDARDS FOR MEDIATORS*]. Many states have passed statutory schemes that regulate and provide for ethical duties and responsibilities for lawyer mediators. E.g., Fla. St. MEDIATOR R. 10.090; MInn. Gen. R. PrAC. Rule. 114.

14. See Richard Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEx. L. REV. 639, 643-44 (1981) (arguing that the *Model Rules* are not likely to promote ethical behavior because, while they may hold lawyers to selfless standards, they are advanced by particular segments of the bar who seek to maximize their own, as well as their clients’, self-interests.

15. See, e.g., Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 302 (1976) (describing the history of the promulgation of ethical rules, reflecting the financial, sociological, and professional biases of lawyers seeking to preserve their positions and arguing that “[a]s long . . . as lawyers [are]
facilitates lawyers' conventional interests as adversarial advocates or as parties to disputes with their own clients, rather than as potential third-party neutrals, whether as problem-solving facilitators or as more conventional decision makers.  

In the move from the *Model Code of Professional Responsibility*\(^\text{17}\) to the *Model Rules of Professional Conduct*,\(^\text{18}\) the Kutak Commission admirably recognized a greater variety of lawyer roles than just the assumed model of the litigator and the criminal defense lawyer. The *Model Rules* recognize such lawyer roles as counselor, advisor,\(^\text{19}\) intermediary,\(^\text{20}\) government official,\(^\text{21}\) prosecutor,\(^\text{22}\) former judge, arbitrator,\(^\text{23}\) representative of entities,\(^\text{24}\) as well as individuals, and as evaluators (with potential liability to third parties who rely on such lawyers' work or representations).\(^\text{25}\) At the same time, the Kutak Commission rejected the separate treatment of certain other lawyer roles; there were efforts to require candor and fair agreements from negotiators\(^\text{26}\) and drafters,\(^\text{27}\) to institute mandatory pro bono requirements,\(^\text{28}\) and to formulate separate rules for some kinds of public interest lawyers.\(^\text{29}\)

During this time, the *Model Rules* began to recognize the increasing diversity,
specialization, and complexity of the legal profession,\textsuperscript{30} while at the same time trying to hold to the notion of a unified profession that could be regulated by one set of rules in spite of potentially different loyalties or claims of role.\textsuperscript{31} In my view, shared by others,\textsuperscript{32} the Model Rules began a project to recognize the role diversity of lawyers, and the time has come to fully acknowledge that differentiation of roles. The practice of law includes a wide array of complex responsibilities, duties, obligations, and liabilities, and as some have claimed,\textsuperscript{33} the different nature of these activities should be addressed in our ethical codes.

To the extent that the Restatement "restates" the law, it goes no further than the Model Rules in recognizing some of these new or differentiated roles.\textsuperscript{34} The question, as I see it, is whether the Restatement, in its goal to "restate" the law governing lawyers, can or should be responsive to some of the changing roles of lawyers.

\begin{quote}

31. As someone with sociological training, the attempt to define and differentiate different lawyer roles and, at the same time, cabin them as a unified role of lawyer in the ethics codes always has seemed somewhat problematic and ironic to me. Sociologists of professional work long have been students of this phenomenon. See, e.g., Richard Abel, AMERICAN LAWYERS (1989) (tracing historical factors that have made it difficult for American lawyers to speak with a single voice); Eliot Friedson, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE (1986) (demonstrating the difficulty in delineating professional groups by attributes, traits, or defining characteristics); Andrew Abbott, Professional Ethics, 88 AM. J. SOCIOLOGY 855 (1981) (comparing professional ethics codes from functionalist, monopolist, intra-professional, and extra-professional perspectives); Andrew Abbott, Jurisdictional Conflicts: A New Approach to the Development of the Legal Profession, AM. B. FOUND. RES. J. 187 (1986) (outlining conflicts of roles within the American and English legal professions).

32. Currently proposed changes to the Multistate Professional Responsibility Examination (MPRE) recognize the new roles of lawyers as mediators and arbitrators by including subjects for testing such as conflicts of interests in mediation, arbitration, and judicial proceedings, so that the MPRE no longer merely tests solely on the Model Rules. Letter from Erica Moeser, National Conference of Bar Examiners, to law school deans (Feb. 28, 1997) (on file with the National Conference of Bar Examiners). In addition, the authoritative Model Rules of Professional Conduct Annotated (1996), prepared by the American Bar Association's Center for Professional Responsibility, reports on recent cases involving these new roles as they may affect interpretations of the current Model Rules. MODEL RULES OF PROFESSIONAL CONDUCT ANNOTATED (1996), prepared by the American Bar Association's Center for Professional Responsibility, reports on recent cases involving these new roles as they may affect interpretations of the current Model Rules. MODEL RULES OF PROFESSIONAL CONDUCT § 2:101, at 497 (Supp. 1986) (suggesting that mediators are governed by Model Rule 2.2 (Intermediary) and therefore represent all parties).

33. In Los Angeles, entertainment lawyers plead (formally in court and elsewhere) that they cannot be held to the same standards of conflicts of interests, as they are "lawyers for the deal." Corie Brown, That's Entertainment, CAL. LAWYER, June 1993, at 38; Alan Citron & Robert W. Welkos, The "Pope of Hollywood" — Ziffren's Representation of Studios, Stars is Challenged, LOS ANGELES TIMES, Aug. 23, 1992, at D-1.

34. However the Model Rules recently have recognized some new complexities of practice, such as in Model Rule 5.7, adopted in 1994, which governs ancillary "law-related services."
In this paper, I will focus principally on the new or more varied roles produced by the increase of what I call ADR or “less adversarial” practice, although there are other examples of these varied roles. Even though the Reporters may claim these roles are beyond the scope of the Restatement, I offer the fact that there have been a number of cases in recent years that have had to confront such issues as: when mediators become advocates, and conflicts of interest and disqualification motions arise; when former judges mediate and then join the law firms of parties previously before them; or when arbitrators learn that their former law firm represented one of the parties before the arbitration. Similarly, issues of mediator liability to third parties — i.e., participants in a mediation — for advice given in non-privity or non-representational settings, confidentiality obligations, and breaches are likely to become of increasing relevance as mediation and other forms of ADR grow in both the private contractual settings and in the public, court-annexed context.

While analogies to current Model Code, Model Rule, and Restatement sections may work in some cases and were effectively employed in the cases cited thus far, common ADR practices probably will not be adequately dealt with by the

35. The highly contested debate about the obligations of insurance defense counsel has been complicated in part by concerns that special rules for insurance lawyers might affect other “third-party lawyers,” such as legal services lawyers, or other third-party payers for legal services. Moore, supra note 4, at 550 & n. 69-70. Thus, formulating special regulations for specialized lawyers may be preferable to attempting to apply broader principles for all lawyers that may have disparate effects on different kinds of lawyers.

36. See Poly Software Int'l, Inc. v. Yu Su, 880 F. Supp. 1487, 1494 (D. Utah 1995) (holding that a mediator who obtained confidential information in the course of mediation was precluded from later representing anyone in connection with the “same or substantially factually related matter” unless all parties to the mediation consented after disclosure). In the criminal context, see State v. Tolias, 929 P.2d 1178, 1181 (Wash. Ct. App. 1997) (reversing criminal conviction where prosecutor previously served as mediator in dispute between defendant and victim, thus creating an “appearance of unfairness”).

37. See Cho v. Superior Court, 45 Cal. Rptr. 2d 863 (Ct. App. 1995) (disqualifying law firm as counsel in lawsuit after it hired the retired judge who had presided over the action and who had received ex parte confidences from the opposing party in the course of settlement conferences).

38. See Al-Harbi v. Citibank, 85 F.3d 680 (D.C. Cir. 1996) (holding that the fact that an arbitrator does not conduct an investigation sufficient to uncover the existence of the facts of a firm’s prior representation of a party is not sufficient to vacate an arbitration award for evident partiality).

39. See, e.g., Loretta W. Moore, Lawyer Mediators: Meeting the Ethical Challenges, 30 Fam. L.Q. 679, 700 (1996) (citing case in which arbitrator was sued by one party for failing to disclose prior relationship with other party).

40. The question of whether different ethics or standards should govern private contractual and court ordered ADR is itself a very difficult question, implicating both ethical and substantive issues. See, e.g., Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331 (noting that the Supreme Court has both enforced arbitration clauses that weaken national law regulating commerce and, through its decisions regarding arbitration, federalized the regulation of commercial and employment transactions, ordinarily a subject of state law); Jeffrey Stempel, supra note 16, at 347 (acknowledging the debate concerning the relationship between public and private sector ADR, yet arguing that a stable national ADR policy must be developed through lengthy and forthright discussions); Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration, 74 Wash. U. L.Q. 637 (1996) (criticizing the Supreme Court for its overzealous preference for binding arbitration over litigation in commercial settings).

current rule configurations. As a result, the Reporters have the choice of either specifying and clarifying where current law will help aid in resolving these issues and where new rules might be necessary, or ignoring these issues and waiting to restate them in the Law Governing Lawyers Fourth. At the very least, it seems the Restatement should acknowledge what is already widespread practice — lawyers are serving as third-party neutrals and rules contemplating representational practices do not provide adequate guidance for these activities. When lawyers act as third-party neutrals, they are still lawyers. If the Restatement is truly a Restatement of the Law Governing Lawyers, then it should include the law that does and should cover these lawyers.

In this paper I will briefly canvass what, if anything, the Restatement has done with respect to these issues. I will explore the differences of lawyer roles and why a conventional adversarial representational model will not work to deal with issues of ADR practice. Finally, I will conclude by offering a proposed rule and sections of the Restatement that will give some guidance to these practices where now there is silence.

II. THE RESTATEMENT and Dispute Resolution: Lawyers Principally As Advocates

Like other codifications of rules governing lawyers, the Restatement sees lawyers as representatives of clients, usually in one of two roles — as an advocate or as an advisor-counselor. Also, the Restatement does recognize other lawyer roles — as "representative," including potential lobbyist, before a legislative or administrative body, as evaluator for third persons, and in the


42. The CPR-Georgetown Commission's Working Group on The Practice of Law currently is trying its collective drafting hand (as others have before it) on composing a rule for lawyers as third-party neutrals. This rule will attempt to specify some of the conflicting and different duties and obligations of lawyers who act as non-adversarial facilitators of dispute resolution. In my view, another set of standards of rules may be needed for advocates or representatives who act within certain ADR proceedings, such as mediation or early neutral evaluation where different duties of candor, cooperation, or problem solving may be necessary.

43. I am, at the same time, mindful of the admonition indicated at the beginning of this Article, that the field of mediation is both relatively new and dependent on flexibility for its success. Too much rule-making and too many standards may limit its very advantages over the litigation process. Many feel this has already happened with arbitration, where high costs and long time delays may make arbitration more expensive and more costly than litigation. See Engalla v. Permanente Medical Group, Inc., 43 Cal. Rptr. 621, 629 (Ct. App. 1995) (noting that in Oakland, California, the average time for arbitration of medical malpractice cases is over 800 days whereas the average time for litigation of such cases is just over 400 days), rev'd. on other grounds, 938 P.2d 903 (Cal. 1997).

44. RESTATEMENT DRAFT 8 Ch. 7.
45. Id. Ch. 6.
46. Id. § 164.
47. Id. § 152.
specialized role of government lawyer.\(^4^8\) However, totally missing from the Restatement is any definition or conception of the many new roles that lawyers serve in dispute resolution — arbitrators,\(^4^9\) mediators,\(^5^0\) early neutral evaluators,\(^5^1\) or most controversially, representatives or advocates within new formats of dispute resolution.\(^5^2\)

I will briefly review the Restatement’s treatment of sections that would logically be related to lawyers’ different roles in ADR. In my view, the drafters of the Restatement should redraft existing rules, including comments and reporter’s notes, to recognize the ethical duties, responsibilities, and obligations that are implicated in these new roles. They also should make some reference in comments and notes where analogies to advocacy rules may have applicability to ethical concerns in ADR. Alternatively, as I will illustrate in Section III, the drafters could create a separate topic or set of rules to consider some of the ethical concerns of “The Lawyer As Neutral.” Without adopting the changes advocated above, the silences of the Restatement will remain deafening.

A. EXAMPLES OF THE SILENCES

1. Candor to Which Tribunal?

In many of the existing sections of the Restatement that relate to these new roles, no mention is made of the possible analogies or issues that might apply to such roles. For example, when the lawyer has a duty to disclose legal authority to a tribunal,\(^5^3\) there is no consideration of whether an early neutral evaluation or

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\(^{4^8}\) Id. § 156.

\(^{4^9}\) Arguably, arbitrators closely resemble judicial officers and therefore may be covered by the Judicial Code of Conduct or specialized rules of arbitration fora such as the Code of Ethics of the AAA for Arbitrators in Commercial Disputes or the National Academy of Arbitrators Code of Professional Responsibility. See generally, e.g., IAN MACNEIL, AMERICAN ARBITRATION LAW (1991) (tracing the historical development of federal arbitration law); IAN MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT (1994) (presenting an overview of the current status of federal arbitration law); George Nicolau, The National Academy of Arbitrators (NAA) at 50, Disp. Resol. J., Spring 1997, at 61 (celebrating the 50th anniversary of the NAA, a professional organization whose goal is to further the use of alternative means of dispute resolution in industrial disputes).

\(^{5^0}\) Attempts to specify ethical standards of conduct for mediators may be found in the ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (Soc’y of Prof’ls in Dispute Resolution, 1986); STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (Academy of Family Mediators); RULES AND PROCEDURES FOR MEDIATION / ARBITRATION OF EMPLOYMENT DISPUTES (J.A.M.S.-Endispute), available at <http://www.jams-endispute.com/arbitrationrules/medemprules.html>.

\(^{5^1}\) See Joshua D. Rosenberg & H. Jay Folberg, Alternative Dispute Resolution: An Empirical Analysis, 46 STAN. L. REV. 1487 (1994) (setting forth the findings and recommendations of the authors, who were advisors to a task force conducting a study of the early neutral evaluation (ENE) program in the Northern District of California).

\(^{5^2}\) As I have discussed elsewhere, there is a serious question about whether lawyer duties or behavior should be different in less adversarial, more problem-solving fora. Carrie Menkel-Meadow, The Trouble with the Adversary System in a Post-Modern Multi-cultural World, 38 WM. & MARY L. REV. 5, 6 (1996).

\(^{5^3}\) RESTATEMENT DRAFT § 171.
medication session conducted under the auspices of a court — whether in the courthouse or in a private office — would constitute a tribunal for purposes of section 171 of the Restatement.54

2. Conflicts of Interest

The majority of conflict of interest rules found in Chapter Eight of the current draft fail to address a wide variety of conflicts that occur every day, especially conflicts that occur when lawyers, either individually, or in the context of law firms, mix practices. Thus, as I have written at greater length elsewhere,55 there may be a unique breed of conflicts when lawyers serve as mediators, arbitrators, and advocates over time, or when they share such functions with their partners.56

Conflicts may exist when mediators, who have facilitated solutions at arms-length and have learned confidential and proprietary information about the disputing parties,57 discover that a party to a previous mediation is seeking representation from the mediator or arbitrator’s law firm. Does this give the appearance of having “earned” the representation by facilitating a favorable settlement?58 An even worse scenario presents itself if one of the parties to a mediation asks the law firm whose member acted as a neutral to sue a former party to a mediation. In such situations, questions arise as to whether a mediator who learned damaging facts during a mediation would or could use those facts against the now adverse party, or whether a mediator can mediate a case involving former clients of the firm in a related matter or in a non-related matter. Thus, conflicts may occur because the roles of a lawyer can change from third-party neutral to advocate or vice versa and because there are different considerations depending on the order of the relations from adjudicative distance or settlement “intimacy” to advocacy and representation. The courts in Poly Software International v. Yu Su59 and Cho v. Superior Court60 were able to

54. This same ambiguity exists with respect to what a tribunal is under Model Rule 3.3 (Candor Toward the Tribunal). The Restatement includes arbitration and other contested hearings as tribunals, but it excludes mediation. Restatement Draft 8 Ch. 7, Introductory Note.

55. See, e.g., Carrie Menkel-Meadow, Ancillary Practice and Conflicts of Interest: When Lawyer Ethics Rules Are Not Enough, Alternatives to High Cost of Litig., Feb. 1995, at 15 (questioning whether the standard conflict of interests rules of legal representation can be applied to lawyers who act as third-party neutrals while working in a conventional law firm) [hereinafter Ancillary Practice]; Menkel-Meadow, supra note 6, at 453 (calling for standards for ADR lawyers that are not based in an adversarial conception of law).

56. See Elizabeth Plapinger, CPR-Georgetown Commission, Draft White Paper on Conflicts of Interest Rules for Lawyer Mediators and Their Institutions (Preliminary Draft, 1996, on file with the author) (assessing current approaches to regulating conflicts of interest among members of law firms who act as third-party neutral mediators).

57. Such confidential information may include trade secrets, financial conditions, or personnel matters.

58. See Larry Fox, What if the Rules are Different? 26-27 (1997) (unpublished manuscript on file with author) (claiming that a mediator’s ethical duties are more akin to those of a judge than to those of a lawyer because a mediator must not merely “do right,” he must also make it look as if he is doing right).


60. 45 Cal. Rptr. 2d 863, 868-70 (Ct. App. 1995).
analogue conflict situations from *Model Rules* 1.7 and 1.9 by treating former mediations as if they were "substantially related" prior representations and rejecting the "screening" asked for by reference to *Model Rule* 1.12. Nevertheless, I believe the current rules and *Restatement* sections will not solve all of these problems.

The cases that have already been decided provide illustrations of the difficulties of these issues. First, in *Cho*, a former judge who had used mediation techniques, such as meeting privately with the parties and learning about their "real" interests and confidential information, later joined a law firm that represented one of the parties. The firm sought to utilize *Model Rule* 1.12, suggesting that the judge could be screened from his new partners. However, the court appropriately rejected this approach, suggesting that even if the judge effectively could be prevented from sharing any damaging information he may have obtained, the very appearance of a neutral joining "the fray" undermined the appearance of propriety so vital to our legal system.

Note that a number of important values, played out differently in this new context, are at issue. Some have argued that mediators are appropriate candidates for screening precisely because they promise complete confidentiality to the parties when they mediate or conduct settlement conferences. Yet, mediators and settlement judges learn particularly significant facts, what I will call "settlement facts," that go beyond what a judge sitting at an arms-length and decisional distance from the parties may learn. When trying to facilitate a solution and learn what is really going on with the parties, third-party neutrals learn entity or individual proprietary information that could go beyond the legal relevance of the facts of a particular case. This information could turn out to be quite significant later on in any adverse representation against a former party to a settlement proceeding. Thus, with the general danger of leakages from screens, the fact that information may be used in a damaging way, even in a "substantially

61. *Id.* at 863-65.
62. *Id.* at 864.
63. *Id.* at 870. At the symposium, Professor Geoffrey Hazard commented that he did not want to return to the ambiguous and "garbage" term of "appearance of impropriety," a term that was used in the *Model Code* to deal with some of these conflicts issues. *Pros and Cons of Restatement Are Debated at D.C. Conference,* [13 Current Reports] LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 29, 31-32 (Feb. 19, 1997) [hereinafter *Pros and Cons*]. He did suggest, however, that the kind of loyalty expected by and of CEOs of corporations might be useful here (not joining the competition, for example).
65. See infra text accompanying notes 110-11 for a definition of this term.
66. Yet some judges, like the one in *Cho*, can learn such confidential "settlement facts" (like the financial status or needs of the parties, business considerations, trade secrets, privacy concerns, etc.) in settlement conferences, especially when mediation-like "caucus" sessions are held in such settings. See Carrie Menkel-Meadow, *For and Against Settlement: The Uses and Abuses of the Mandatory Settlement Conference,* 33 UCLA L. REV. 485, 503-04 (1985) (describing the empirical practices of judges in settlement conferences).
67. See *ALI Nears Finish Line on Lawyer Ethics, Product Liability Projects,* 64 U.S. L. Wk. 2739, 2740 (1996) (paraphrasing remarks of Larry Fox, Esq., who claimed that "inadvertent disclosure in larger firms is a significant problem when the number of screens begins to mount up").
unrelated matter," requires a particular attention to conflicts issues that goes beyond the analysis of former or concurrent representational relationships.68

While it is true that lawyers, through representation roles, also learn proprietary confidential information about clients that could be damaging to the client if the lawyer or the lawyer’s firm were subsequently allowed to be adverse to that client, current rules that deal with such situations do so only in representational capacities.69 Under these rules, unless other rules require or permit it, a lawyer may not use information acquired in a prior representation against that party in a subsequent adverse representation.70

There are several solutions to the lack of rules for mediators and third-party neutrals with respect to conflicts of interest. As the court did in Poly Software,72

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68. In correspondence, the Reporters have indicated that they are still pondering the issue of whether conflicts in the mediation context can and should be handled in the Restatement, either by commentary or by reference to the considerations of Model Rule 1.7 (governing general conflicts) or Model Rule 2.2 (governing intermediation between existing clients). See Restatement Draft 1 § 211 rep. note cmt. b (noting that the two types of cases covered by section 211, representation of multiple clients with common interests and representation of multiple clients with different interests, that need to be resolved in order to accomplish a common objective, are covered by counterparts in Model Rules 1.7 and 2.2).

69. Such rules include Model Rules 1.7 (general conflicts), 1.9 (conflicts involving former clients), and 1.10 (imputed disqualification). Model Rules Rule 1.7; id. Rule 1.9; id. Rule 1.10.

70. Model Rule 1.9(c)(1) allows a lawyer to use information, gained from a formerly represented client, to the disadvantage of that client when the information “has become generally known.” Id. Rule 1.9(c)(1). Model Rule 1.6 also permits use of such information when the client consents after consultation or when the lawyer “reasonably believes” it necessary in order to prevent the client from committing a criminal act that could result in “imminent death or substantial bodily harm,” id. Rule 1.6, or to establish a claim or defense in a variety of proceedings where the lawyer-client relationship becomes attenuated. Id. Lastly, Model Rule 3.3 forbids a lawyer from knowingly failing to disclose a material fact to a tribunal when such disclosure would be necessary to avoid assisting “a criminal or fraudulent act” by the client. Id. Rule 3.3. This rule also requires a lawyer, in ex parte proceedings, to disclose “material facts . . . which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” Id.

71. Model Rules Rule 1.7(c)(1)-(2).

72. Poly Software Int’l, Inc. v. Yu Su, 880 F. Supp. 1487, 1491-95 (D. Utah 1995). In Poly Software, a substantively expert lawyer in intellectual property matters served as a mediator for two former employees and their employer over the alleged misappropriation of software documentation. Id. It is likely, if not totally certain, that in that context the mediator learned who actually was responsible for the alleged theft of software documentation. Following the successful resolution of the mediation, the two employees formed their own entity, and eventually one of them accused the other of software documentation theft. Id. One of the parties sought representation from the knowledgeable mediator who was disqualified in the subsequent legal action between the parties because of his obvious ability to take advantage of the information he had learned about the adverse party in the mediation. Id. This case typifies a real and continuing theoretical and practical problem in the mediation field. Some choose wise and knowledgeable mediators precisely because they know the field, the parties, and/or how the industry conducts its business. This practice parallels historical use of the “wise elder” in mediation, who was often quite embedded in the community from which the dispute or problem arose. See, e.g., Martin Shapiro, Courts: A Comparative and Political Analysis 6 (1981) (discussing history of “big men” wise elders in dispute resolution); Jerold Auerbach, Justice Without Law? (1983) (describing history of alternative dispute resolution in the United States). Such mediators are skillful, expert, and knowledgeable; they are also likely to be deep in conflicts. The American model of mediation has demanded neutrality and objectivity, paralleling the requirements for our disinterested judges. See 28 U.S.C. § 455 (enumerating the circumstances under which a judge must disqualified himself for lack of impartiality). Thus, the American system often has difficulty with the tensions between expertise, and the conflicts it can bring, and neutrality, which is
the role of the mediator can be analogized to that of the lawyer representative when information is learned that is considered confidential and proprietary. Under the rubric of Model Rule 1.9 and its equivalents in Restatement sections 201, 202, and 213, the former mediator could not subsequently represent one of the parties to a mediation against the other former party without consent. In the Poly Software court's analysis, the mediator's subsequent representation was deemed to be a "substantially related matter" and the mediator and his firm could not participate in the knowledge or use of information learned through the prior mediation. This reasoning by analogy could easily be applied to "subsequent" representation from mediation problems, and rules that track Model Rule 1.9 but apply to mediation easily could be written. Similarly, Restatement section 213 could be re-drafted to include this situation, or at the very least, often accompanied by lack of knowledge about the underlying context of the dispute. In reality, this problem is particularly acute in relatively small specialized areas of law, like intellectual property, where as in Poly Software, 880 F. Supp. at 1491-95, the most knowledgeable lawyers are sought after as the most competent to both mediate and represent in the same geographical area. This problem has become real in at least one court program that utilizes expert "neutral evaluators" and adheres to the standards of 28 U.S.C. § 455, thus preventing lawyers from having interests in ongoing litigation and mediation at the same time. The result has been that lawyers, who see themselves as making more money through representation, refuse to serve as court-appointed neutrals, especially in voluntary, non-paid court programs. While I owe this observation to the thoughtful comments of Stephanie Smith, former Director of Alternative Dispute Resolution Programs for the Northern District of California, I am unable to find anything in her writings to memorialize it.

73. Note that the Restatement has taken a different position on law firm imputation and screening in section 204 than currently exists in Model Rule 1.10. Compare RESTATEMENT DRAFT 1 § 204(2)(b) (providing that if a lawyer is subject to screening measures with respect to involvement in prior representation, his or her firm affiliates are not subject to imputation) with MODEL RULES Rule 1.10(a) (requiring imputation for all members of a firm whether or not screening measures are taken). The change to permit screening under the Restatement, where it was not strictly allowed in the Model Rules (though often permitted by decisional law in many jurisdictions), has implications for the ADR conflicts I discuss here, as it has provoked more general debate in the area of representation. It is possible to argue that if screening is sanctioned in any situation, it might be both more appropriate (confidentiality of the mediator is promised as against all persons anyway) and less appropriate (the public appearance of impropriety when a former neutral joins forces with the now adversary representative) in the mediation or even arbitration context. Note that the current rules do permit screening in the judicial and arbitration context. MODEL RULES Rule 1.12. This approach, however, was rejected in Cho v. Superior Court where a judge, though acting in a judicial capacity, actually was performing a mediative role. Cho v. Superior Ct., 45 Cal. Rptr. 2d 863 (Cl. App. 1995).

74. MODEL RULES Rule 1.9.
76. See text accompanying notes 130-36 for one such suggested formulation.
77. § 213. Representation Adverse to Interest of Former Client

Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in § 202, a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse. The current matter is substantially related to the earlier matter if:

1. the current matter involves the work the lawyer performed for the former client; or
2. there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

RESTATEMENT DRAFT 1 § 213.
illustrations and examples taken from these decided cases could inform the readership of the Restatement that such principles of conflict of interest will be applied in mediation to subsequent adversary representation situations.

Another possibility, with perhaps less work required of the drafters, would be to adopt Professor Nancy Moore's view that section 216 of the Restatement could be read or interpreted to impose on the mediator a fiduciary obligation to parties in a mediation. Thus, mediators would have a responsibility not to accept subsequent representation of any party to a mediation, unless both parties consent.

Both Cho and Poly Software demonstrate that conflicts may occur when a lawyer acts as a mediator, judge, or arbitrator and then either that same lawyer or someone in the lawyer's law firm seeks to take on a subsequent adversary representation of a party to the earlier dispute resolution case. It is important to note, however, that analogous but somewhat different problems arise from the reverse order of events. The propriety of whether a lawyer can serve as a third-party neutral in a matter in which the lawyer or the lawyer's firm previously represented one of the parties in an adversary matter comes into question. Also questionable is the issue of whether it matters that the case is either related or unrelated. The difference with representation prior to a mediation is that the

78. § 216 Lawyer with Fiduciary or Other Legal Obligation to Third Person

Unless the affected client consents to the representation under the limitations and conditions provided in § 202, a lawyer may not represent a client in any matter with respect to which the lawyer has a fiduciary or other legal obligation to another if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's obligation.

79. Professor Moore made this suggestion for interpretation, perhaps with a clarifying illustration in section 216, at the February 7, 1997 Symposium sponsored by The Georgetown Journal of Legal Ethics. Pros and Cons, supra note 63, at 32. Note that the description of "other legal obligation" found in Restatement section 216 could be construed to include both contractual and court-defined rules and responsibilities defining the mediator-party relationship from the mediation itself as limiting subsequent representation (unless the clients consent, as provided in that section). Note also that the important issue of how and when contracts between legal professionals and their "clients" (including parties to mediations or arbitrations) will affect both ethics rules and the Restatement is particularly significant in the ADR area where contracts between the parties, rules of courts, and the ethical codes promulgated by professional associations or provider organizations, such as the American Arbitration Association (AAA), provide a rich source of ethical pluralism and potential conflicts of law problems. In the absence of clear text in the Model Rules and now in the Restatement, judges and disciplinary bodies providing the analysis and sources of ethics standards and reasoning can look to such multiple sources of law. Cases often refer to the contracts between the parties, the rules of the court, and the standards or codes of professional associations like the Model Rules or the governing ethical codes for different kinds of disputes promulgated by ADR provider organizations such as the AAA. See, e.g., Elizabeth Plapinger and Donna Stienstra, ADR and Settlement in the Federal District Courts: A Source Book for Judges and Lawyers (1996) (surveying the rules, including some ethical requirements, of current ADR and settlement procedures in the ninety-four federal district courts); Linda Mullenix, Multiforum Federal Practice: Ethics and Erie, 9 Geo. J. Legal Ethics 89 (1995) (addressing the absence of a uniform code of professional conduct in federal courts where litigators are likely to be subject to unfamiliar and unpublished local court rules).


conflicts issues more easily can be dealt with by consent of all the parties. The current parties to a mediation would likely know or be informed of the firm's prior involvement with either of the parties. Thus, once the firm's prior involvement is recognized, the parties may decide if, in fact, the mediator or arbitrator can be neutral. However, as the Al-Harbi v. Citibank82 case makes clear, in modern practice such conflicts may not be knowable at the relevant time.

It is important to note that the court in Al-Harbi confined itself to the potential harm to the parties alone, as distinguished from the concern that the "appearance of bias"83 must not exist in any "tribunal permitted by law to try cases and controversies" addressed by the Supreme Court in Commonwealth Coatings Corporation v. Continental Casualty Co.84 Thus, when an attorney changes roles from third-party neutraling to representation or vice versa the more general ethical principle, and one eschewed by the Restatement, of avoiding the appear-

82. 85 F.3d 680 (D.C. Cir. 1996). In Al-Harbi, a party learned that the arbitrator's previous law firm had represented one of the parties only after the previously represented party had won the arbitration. Id. at 682. The discovering party claimed that the arbitration had to be set aside on the grounds of evident partiality under the fairly strict standards of the Federal Arbitration Act. Id. at 682. A federal circuit court of appeals rejected the claim, holding that the arbitrator did not know of the representation and therefore was not biased. Id. at 683. Further, the court noted that his relationship to the law firm no longer existed. Id. at 682.

83. Id. at 683.

84. 393 U.S. 145, 150 (1968). As I suggested at the Symposium, ethics rules on conflicts for third-party neutrals might have to refer back to the dreaded language of "appearance of impropriety" from the old Model Code of Professional Responsibility. MODEL CODE Canon 9 (1983). This language animated much of the conflicts rules, as well as its own separate canon. Id. Geoffrey Hazard responded that this "appearance of impropriety" was a "garbage standard;" he would prefer to reconsider explicitly making the disqualification in Model Rule 1.12 stronger by eliminating screens in cases where judges, as in Cho v. Superior Ct., 45 Cal. Rptr. 2d 863 (Ct. App. 1995), join practices with attorneys representing cases that were formerly before the judge. Pros and Cons, supra note 63, at 31-32. I am no fan of this vague and broad term either, but recently I have had occasion to see that it expresses the values of what our lawyering activities look like to outsiders, which seems particularly relevant to consideration of ethical issues in the use of alternative dispute resolution. The ABA Conference on Professionalism devoted a session to the question of whether we need to restore more general statements of values in our ethics codes. Program, ABA 23rd National Conference on Professional Responsibility, Naples, Florida, May 29-31, 1997, The Model Rules of Professional Conduct: Have We Lost Our Professional Values? (on file with the author). Another circuit court of appeals has ruled that, in certain circumstances, arbitrators may have a higher duty of investigation of conflicts. See Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994) (holding that under the Arbitration Rules of the National Association of Securities Dealers, an arbitrator has a duty to investigate all possible conflicts and can be disqualified for failing to uncover one). Without exploring all of the distinguishing details here, it is significant to note just how contradictory the different requirements are in conflict situations of different ethical standards in the variety of contexts in which arbitration (or mediation) is conducted. As at least one judge has opined that just because the AAA has chosen to enact "higher" standards in its disclosure and impartiality ethics codes, does not mean that a court must enforce them if the parties' conduct meets the "weaker" statutory standards of the Federal Arbitration Act under section 10. Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983) (Posner, J.). For a discussion of the standards that are supposed to be applied under the Federal Arbitration Act for impartiality of arbitrators, see Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) (holding that prior relationship between a "neutral" third arbitrator and one of the parties was sufficient to overturn the arbitral award). Some current rules, including the Model Rules, recognize that in tri-partite arbitration panels, "partisan" party-appointed arbitrators are exempt from neutrality requirements, as well as subsequent representation disqualifications. MODEL RULES ANN., supra note 32, Rule 1.12, at 198 ("When a party to an arbitration selects 'its' member of an arbitration panel, that arbitrator is exempt from the ban of Rule 1.12.").
ance of impropriety might express the concerns of outsiders looking at a particular act of representation or dispute resolution. It may not seem fair to outsiders looking in when seemingly neutral actors represent former parties to a mediation or arbitration, or when representation occurs before a dispute resolution process. The neutrals may have financially gained from the prior representation, and they may not be able to easily forget or disregard their loyalty or allegiance to a prior client.

3. The Variety of Roles in ADR

The variations of roles performed by third-party neutrals in ADR, including mediators of both facilitative and evaluative stripes,\(^{85}\) neutral and partisan arbitrators, and early neutral evaluators — all distinguished from judges and judicial officers\(^ {86} \) — may be so complex and new in their development that the construction of different rules and responsibilities for these new roles may be too advanced for a backward looking restatement of the law.\(^ {87} \) Given the complexity of the different roles, the Reporters may prefer to let other professional associations or bodies attempt to regulate the difficult requirements of disclosures, neutrality, confidentiality, conflicts of interest, fees, and other matters,\(^ {88} \) and wait until adequate case law permits fuller restatements of the law. Nevertheless, the

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85. Numerous articles distinguish between evaluative mediators who, as part of their settlement efforts, go so far as to predict how a court would resolve a dispute, and facilitative mediators who avoid offering evaluations, focusing instead on enhancing communication between the parties so they can decide what to do. E.g., Dwight Golann, Mediating Legal Disputes § 1.1.4 (1996); Leonard Riskin, Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed, 1 Harv. Negotiation L. Rev. 7, 23-24 (1996); Kimberlee Kovach & Lela Love, “Evaluative” Mediation is an Oxymoron, Alternatives to the High Cost of Litig., March 1996, at 31 (arguing that mediators should only perform facilitative functions because evaluative mediation jeopardizes neutrality and discourages understanding between the parties).


87. This view often has been expressed by the Director of the American Law Institute, Geoffrey Hazard, and the reporters of the Restatement. However, I am unable to find anything in the writing to memorialize it.

88. Because I think that current efforts of some professional associations have been inadequate to the task of specifying standards and rules, I entreat the reporters of the Restatement to consider what they can do to acknowledge the important role of non-adversarial duties of third-party neutrals. The current and much touted Joint Standards for Mediators, supra note 13, provides only the most general of statements and thus, is particularly unhelpful in particular instances. Id. For example, the conflict of interest section appears to be based primarily on principles of voluntary disclosure and consent by the parties, but does not provide an adequate definition of conflict or bias. Id. § III. The comments to the section on “quality of the process” provide that mediators should facilitate the parties’ voluntary agreements and not give professional advice to the parties. Id. § VI cmt. This section flies in the face of the actual practice of many mediators who predict, evaluate, and in some cases, even suggest substantive solutions to the parties, based on their assessments of potential liabilities. Margaret Shaw, Continuum for Mediator Evaluator Roles, Presented to CPR-Georgetown Commission on May 6-7, 1996 (on file with the author). To the extent the Joint Standards for Mediators were an effort to create a multi-disciplinary code of conduct for lawyers and non-lawyer mediators, its achievement at generalizing is a failure to provide specific guidance about actual practices.
Reporters should reconsider whether they need to take account, in some way, of these new and varied roles of third-party neutrals who are lawyers, given that they are affected by currently existing ethics rules and particular sections of the Restatement.

4. The Restatement’s View of ADR: It Exists Only if it Confirms Conventional Lawyer Roles of Self-Protection and Adversarial Representation

It is somewhat ironic to note that in a detailed review of the currently considered sections of the Restatement, I uncovered several references to alternative dispute resolution. However, arbitration and mediation were referenced almost exclusively in the context of protecting lawyer interests in such areas as fee and malpractice matters, and protecting work resulting from the adversarial work of representative lawyers in ADR proceedings. There is a suggestion of mediation or some such procedure where multiple clients have conflicting interests in a transactional matter. One does not have to be a conspiracy theorist to note that ADR is only recognized by ethics rule drafters when it protects the lawyer’s interest in privacy, the processing pace of fee and malpractice arbitrations, and the choice of forum and decision maker, or when the rules focus on the more traditional adversarial role of lawyers within ADR, such as work-product protection.

Even though reference is made to ADR, the Restatement does not explicitly deal with such important issues as candor to the tribunal, attorney conflicts of interest, neutrality or impartiality requirements, specialized disclosure and

89. RESTATEMENT DRAFT 1 § 54 cmt. b.
90. RESTATEMENT DRAFT 8 § 76 cmt. b.
91. RESTATEMENT DRAFT 1 § 136 cmt. h.
92. This echoes the increasing use of arbitration in medical care, banking, consumer transactions, and other places where the powerful are alleged to be taking advantage of less informed or less powerful clients. See Barry Meier, In Small Print, Customers Lose Ability to Sue, N.Y. TIMES, March 10, 1997, at A1, D7 (claiming that large corporations and medical providers use small print to contract away consumers’ rights to sue by requiring them to resolve disputes through arbitration); see also Engalla v. Permanente Medical Group, Inc., 938 P.2d 903, 917-20 (Cal. 1997) (holding that statements made in health plan’s advertising campaign regarding the speed, efficiency, and cost of arbitration process can be read as fraudulent misrepresentations to the subscriber where there is no compliance with represented terms in actual arbitration programs).
93. The concern about impartiality in the functioning of ADR neutrals has led to the suggestion that the Judicial Code of Conduct may be the appropriate place to look for guidance in these matters. MODEL CODE OF JUDICIAL CONDUCT (American Bar Ass’n, 1990). I do not think these rules guide the attorney neutral, who may be faced with evaluating or giving legal advice during an ADR proceeding that might, whether correctly or not, lead to reliance by parties in ways for which judges could not ever be liable, or disciplined for giving an opinion about the law in their proceedings. As I have stated elsewhere, mediators who are lawyers may be interjected into the legal process, with concomitant ethical obligations in ways that are different from arbitrators and judges. Menkel-Meadow, Ancillary Practice, supra note 55, at 15; Carrie Menkel-Meadow, Is Mediation the Practice of Law?, NIDR NEWS, Mar./Apr. 1996, at 1, 4. To the extent that the substantive law of third-party liability is increasing lawyers’ liabilities to third parties outside the privity of the legal representational relationship, this presents different dilemmas for the lawyer mediator who has parties — particularly if
confidentiality requirements, as well as the more arcane issues of fees, interdisciplinary practice, and liability to third parties. While the Restatement does recognize the existence of practices of ADR in a number of sections, there is little recognition of the less adversarial roles of lawyers or of how clients might be apprised of or benefit from other legal problem-solving processes.\(^94\) Thus, the drafters should consider how these processes are affected by other Restatement pronouncements on lawyers' duties and obligations.

For example, should the proposed Chapter One of the Restatement, which outlines the regulation of the legal profession, provide some guidance for how lawyer-mediators/arbitrators might be held accountable for their actions? Such guidance might include proposed regulations for application of standard disciplinary proceedings, motions to disqualify, and dispute resolution processes like those adopted in Cho\(^95\) and Poly Software,\(^96\) as well as separate disciplinary proceedings for court appointed mediators like those currently used in Florida\(^97\) and Minnesota.\(^98\) Moreover, should Chapter One make reference to court interpretations of both statutory and contractual language on such matters as bias, neutrality, disclosures, conflicts, and incompetence?\(^99\) Finally, in Chapter Two where the lawyer's duties to the client are elaborated, why not follow Colorado's

\(^94\) In this sense, the treatment of ADR in the Restatement could be said to suffer from the kind of lawyer self-interest that Stephen Gillers notes with respect to fee regulation. See generally Gillers, supra note 11 for such a discussion regarding lawyer self-interest and fee regulation. Others have noted judicial self-interest in some forms of judicial action. Compare Jonathan R. Macey, Judicial Preferences, Public Choice, and the Rules of Procedure, 23 J. LEGAL STUD. 627 (1994) (developing a framework that will predict the contours of federal procedural rules based on the valid assumption that such rules will reflect judicial self-interest because they are usually construed by and promulgated under the direction of judges) with Janet Cooper Alexander, Judges' Self Interest and Procedural Rules: Comment on Macey, 23 J. LEGAL STUD. 647 (1994) (focusing on judges' self-interest with respect to caseload reduction, and claiming that Macey's framework fails to acknowledge the fact that most federal judges are white, male, middle-aged or older, and wealthy, thus explaining why procedural rules are often aligned with maintaining the status quo rather than upholding the public interest).

\(^95\) Cho v. Superior Court, 45 Cal. Rptr. 2d 863 (Ct. App. 1995).


\(^97\) See, e.g., FLA. STAT. ch. 44.106 (1990) (empowering Florida Supreme Court to establish minimum disciplinary standards and procedures for mediators and arbitrators); Robert B. Moberly, Ethical Standards for Court-Appointed Mediators and Florida’s Mandatory Mediation Experiment, 20 FLA. ST. L. REV. 701, 719-23 (1992) (describing how the Florida Mediator Qualifications Board, complaint committees, and the staff of the Florida Dispute Resolution Center work together to enforce the mediator standards of conduct that are promulgated by the Florida Supreme Court).

\(^98\) See Duane W. Krohnke, Minnesota Takes Up ADR Ethics Challenge, ALTERNATIVES TO HIGH COST OF LITIG., Nov. 1996, at 121 (reporting on the efforts of the Minnesota Supreme Court’s ADR Review Board to develop a code of ethics for ADR neutrals, later passed as MINN. GEN. PRAC. R. 114 (1997)).

\(^99\) Court consideration of such matters can arise under attempts to void arbitration awards or mediation agreements on statutory or other grounds or in liability claims against mediators or arbitrators based on such theories as breach of contract or breach of fiduciary or statutory duty to the parties. Engalla v. Permanente Medical Group, Inc., 938 P.2d 903, 917-20 (Cal. 1997).
example\textsuperscript{100} and include some reference to the lawyer's duty to counsel and advise clients with respect to all the various methods of case disposition, including ADR,\textsuperscript{101} thus advancing a client's lawful objectives?\textsuperscript{102}

It is somewhat ironic to note that the Restatement only recognizes the role of arbitration in fee disputes between lawyers and clients and in malpractice actions,\textsuperscript{103} yet suggests that an arbitration agreement "should meet standards of fairness."\textsuperscript{104} Mediation, arbitration, and even "alternative dispute resolution

\begin{itemize}
\item \textsuperscript{100} See COLO. CT. R.P.C. Rule 2.1 (requiring a lawyer, when anticipating litigation, to "advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought"); see also Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp., Informal Op. 90-125 (1991) (advising that an attorney is obligated to communicate to client a proposal of mediation made by opposing counsel); State Bar of Mich. Standing Comm. on Prof. and Jud. Ethics, Op. RI-255 (1996) (holding that an attorney must inform client of opposing party's offer to resolve a pending dispute through alternative dispute resolution forums); State Bar of Mich. Standing Comm. on Prof. and Jud. Ethics, Op. RI-262 (1996) (holding that an attorney must recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interests, or if the attorney has any reason to think that the client would find the alternative desirable); Arthur Garwin, \textit{Show Me the Offer: When Opposing Counsel Suggests Mediation, Your Client Needs to Know}, A.B.A. J., June 1997, at 84 (reporting on states that require lawyers to counsel clients about offers to mediate).
\item \textsuperscript{101} Section 211 of the Restatement, the equivalent of Model Rule 2.2, addresses representation of "co-clients" in transactional, non-litigation matters, and recognizes that multiple prospective clients might have interests and objectives that are antagonistic to some degree. Restatement Draft 1 § 211 cmt. a. That Restatement section suggests that service by a lawyer, arbitrator, or mediator, not representing the parties, might serve such clients' interests. If mediation or arbitration might be appropriate in transactional multi-party situations, one begins to wonder why a lawyer should not also explore the possible assistance of an arbitrator or mediator in litigation matters as well. The failure of the Restatement to suggest ADR counseling to litigation clients may be an indication of how powerful the anti-ADR forces are among litigating lawyers who dominate the drafting of all ethics rules.
\item \textsuperscript{102} See Restatement Draft 1 §§ 28, 31, 33 (addressing lawyer's duty to inform and consult with client on decisions regarding the representation, especially in settlement decisions); Carrie Menkel-Meadow & Bea Moulton, \textit{Who Decides: Lawyer and Client Decision making About Dispute Resolution} (Sept. 1989) (unpublished manuscript on file with the author) (exploring new issues that have emerged to challenge traditional and alternative models of lawyer-client decision-making about how to proceed with a dispute).
\item \textsuperscript{103} For a good review of the current status of arbitration in legal malpractice actions, see Robert A. Creamer, \textit{Arbitration of Lawyer-Client Disputes, ATT'YS' LIABILITY AND ASSURANCE SOC'Y LOSS PREVENTION J.}, May 1996, at 12.
\item \textsuperscript{104} Restatement Draft 1 § 54 cmt. b(iv). Section 54, which suggests arbitration as a possible remedy for a fee dispute between a lawyer and client, is the first formal recognition of alternative dispute resolution in the Restatement. The Restatement also suggests that clients and lawyers may agree to arbitrate legal malpractice claims. Restatement Draft 8 § 76 cmt. b. However the Restatement ignores the use of ADR in general litigation or problems with others, supporting the cynical view that ADR is referenced only when it might be favored by lawyers to resolve their own professional disputes.
\item One of the Reporters advises me that he expects to "draft some words on the immunity from damages suits of lawyers acting as judges, arbitrators and mediators" that would accurately reflect and restate the current case law. Letter from John Leubsdorf, July 7, 1996, \textit{supra} note 9. See also, e.g., Restatement Draft 8 § 71 rep. note cmt. d (reviewing situations where lawyers act in capacities in which they are immune from civil liability); Wagshal v. Foster, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (holding that "[a]bsolute quasi-judicial immunity extends to mediators and case evaluators in the [D.C.] Superior Court's ADR process"); cf. Howard v. Drapkin 271 Cal. Rptr. 893, 905 (Ct. App. 1990) (extending quasi-judicial immunity to a psychologist acting as a neutral third person engaged in efforts to resolve a family law dispute); Myers v. Contra Costa County Dep't of Social Services, 812 F.2d 1154, 1159 (9th Cir. 1987) (extending absolute immunity to conciliation court employees participating under court directives in the resolution of family disputes).
proceedings such as mediation or a mini-trial\textsuperscript{105} are similarly, if ironically, referenced in the adversarial context of protecting material in preparation for these proceedings as "work-product."\textsuperscript{106}

To the extent that most sections of the Restatement contemplate a lawyer-client relationship, reference to additional duties and obligations as a result of non-client relations may be difficult to accomplish. On the other hand, as John Leubsdorf\textsuperscript{107} has suggested, it might be possible to specify in the introductory portions of the Restatement that some professional rules apply to lawyers acting as third-party neutrals and that others do not.\textsuperscript{108} Another possibility is to create a whole separate section on third-party neutrals and place it within Topic Three of Chapter Six. Such a section could specify the current legal rules and obligations of lawyers serving in these neutral roles. A final possibility is to handle specific topics like conflicts of interest and duty to the tribunal seriatim.

5. Confidentiality

It should be recognized by the Restatement that conventional duties such as confidentiality\textsuperscript{109} should be addressed with respect to ADR. For example, third-party neutrals, who would not ordinarily have the conventional attorney-client privilege or confidentiality rules applied to them, may in fact hear information that is quite proprietary. Settlement facts — information learned within the neutral setting that may not be legally relevant but that affects the possibility of settlement — are not unlike the secrets of clients protected under the Model Rules. While third-party neutrals may offer parties confidentiality pursuant to contracts, court rules, statutes,\textsuperscript{110} or professional norms or rules, the Reporters have not clarified that there are situations outside of the conventional lawyer-client role in which a lawyer might obtain confidential information that should be protected and could, in fact, be the subject of a disciplinary action or liability if revealed.\textsuperscript{111}

\begin{footnotes}
\item[105] \textsc{Restatement Draft I \textsection 136 cmt. h.}
\item[106] \textit{Id.} This shows that the drafters clearly know such ADR proceedings exist and that they recognize ADR when adversarial values, such as the proprietary attorney work-product doctrine, are to be protected. If the Restatement can protect the work of advocates in the ADR process, one wonders why it cannot consider the protections needed and rules necessary to guide and discipline the third-party neutrals of ADR.
\item[107] Professor of Law, The State University of New Jersey, Rutgers University, School of Law-Newark, S.I. Newhouse Center for Law and Justice.
\item[108] Letter from John Leubsdorf, July 7, 1996, \textit{supra} note 9.\textsuperscript{106}
\item[109] \textsc{Restatement Draft I \textsection 111-142 (covering confidentiality responsibilities of lawyers, attorney-client privilege, and lawyer work-product immunity).}
\item[110] Increasingly, states are passing independent confidentiality protections for conversations and document exchanges in mediation. Some grant a mediator privilege against disclosure, and others promise no more confidentiality than would be accorded under the appropriate evidence code to any statements made in contemplation of settlement. For a survey, see Nancy H. Rogers and Craig A. McEwen, \textit{Mediation: Law, Policy and Practice} Ch. 9 (2d. ed. 1994 & Supp. 1996).
\item[111] See Joshua P. Rosenberg, Note, \textit{Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of}
\end{footnotes}
With respect to mediator confidentiality, the general rule that lawyers may “divulge confidences to facilitate law practice within a firm”\textsuperscript{112} proves problematic. Trouble arises in cases like \textit{Cho}\textsuperscript{113} and in the application of screens in firms with ADR practices where mediators promise complete confidentiality to the parties to encourage candor on the theory that this will improve the possibility of settlement in situations where adverse parties are disclosing information in each other’s presence.\textsuperscript{114} Then to the extent that mediators seek advice in their own law firms about their cases, the traditional rule that “you can share it with your firm” conflicts with what the mediator guaranteed the parties. It is because we fear, and in some cases know, that mediators, like all professionals, will share some information with their co-workers to obtain assistance with their work, that we fear the screen will not really work in conflict situations. Of course, it is also problematic that this appears to be an acknowledgment that confidentiality promises are often breached in mediation practices.

6. Liability

In providing the standards and terms of lawyer liability, the \textit{Restatement} recognizes, in comments if not text, that lawyers may act as mediators. Section 71 recognizes that lawyers may act in capacities other than legal representation, such as trustees, executors, escrow agents, brokers, or mediators and thus would be liable under “applicable law assigned to that capacity.”\textsuperscript{115} The same section provides that if a certain function is immune from civil liability, such as “judges, arbitrators and other neutrals who resolve disputes,”\textsuperscript{116} then a lawyer acting in such a capacity is likewise immune from civil liability.\textsuperscript{117}

While section 73 of the \textit{Restatement} imposes duties of care on lawyers to

\textit{Laws, 10 Ohio St. J. on Disp. Resol.} 157, 181 (1994) (arguing that because “[a] sense of trust and informality is paramount to mediation proceedings,” courts should recognize a confidential communications privilege in the mediation context to help bolster the effectiveness of ADR); \textit{cf.} Shabazz v. Scurr, 662 F. Supp. 90, 94 (S.D. Iowa 1987) (holding that communications received by a prison ombudsperson are privileged and cannot be repeated in court or used in investigations); Garstang v. Superior Ct., 46 Cal. Rptr. 2d 526, 533-37 (Ct. App. 1995) (holding that communications made during mediation sessions before ombudsperson employed by private educational institution were protected by qualified privilege based upon right to privacy conferred by California Constitution). \textit{But see} Carman v. McDonnell Douglas Corp., 114 F.3d 790, 792-95 (8th Cir. 1997) (holding that confidential communications made by employee to company ombudsperson who investigated and mediated workplace disputes were not privileged from disclosure in employment discrimination lawsuit).

\textsuperscript{112} \textit{Restatement Draft} 1 § 112 cmt. g.

\textsuperscript{113} \textit{Cho v. Superior Court}, 45 Cal. Rptr. 2d 863 (Ct. App. 1995).

\textsuperscript{114} To the extent that section 125 of the \textit{Restatement} specifies a privilege of confidentiality of information as between two co-represented parties and their lawyer, this section could be read, by analogy, to include the obligation of a third-party neutral to protect the confidences of non-client parties, at least as against anyone else. \textit{Restatement Draft} 1 § 125(1).

\textsuperscript{115} \textit{Restatement Draft} 8 § 71 cmt. d.

\textsuperscript{116} \textit{Id}. Once again, ADR is recognized here as a way of protecting lawyers from accountability or malpractice in such a third-party neutral role, so long as applicable law outside of the \textit{Restatement} so provides.

\textsuperscript{117} \textit{Id}.
non-clients (most often those interacting with or relying on the actions of a
represented client), there is no formal recognition in the Restatement of duties
to non-clients (such as parties to ADR proceedings) who may also rely on the
statements, representations, evaluations, or predictions of third-party neutrals.
While no case that I am aware of has yet held a mediator liable to a non-client
(usually an unrepresented party) to a mediation or other form of ADR, I have
heard of parties who rely on what third-party neutrals tell them, both in
court-mandated programs and in contracted for arbitration or mediation programs
(especially when being told what the "likely outcome" of a case is for purposes
decking whether to accept a settlement or not). Eventually courts will likely
face the question of whether, with all the proper disclosures, third-party neutrals
who are not "representatives" of clients can safely disclaim any liability in such
circumstances. If those who rely on legal opinions prepared for others, or
members of organizations, unions, or beneficiaries of wills, can hold lawyers
liable (as the trend seems to indicate), non-client parties to certain kinds of
ADR proceedings may eventually be able to hold third-party neutrals to some
standard of care.

Of course, the answer that arbitrators are not practicing law when they decide
cases (as judges are not) and that mediators may be held to whatever malpractice
standard mediators are held to as a matter of other applicable law may take the
issue of third-party neutral liability outside the scope of the Restatement, but let
me suggest that the issues are more complicated. In current practices of different
kinds of mediation, including more evaluative mediation, non-represented parties
may rely on mediator predictions of legal rights and outcomes, potentially to a
greater extent even than those who rely on attorney opinion letters. While the
mediator is clearly not the party's agent, in other contexts some (including
Restatement Adviser Nancy Moore) have suggested that third-party neutrals may
have fiduciary responsibilities toward parties in some forms of ADR. Thus, some
expression of the potential claims or bases for liability of third-party neutrals
might require, at the very least, some explanatory material or illustrations.

118. Id. § 73.
119. See generally Symposium, supra note 93 (discussing lawyers' duties to third parties, including
beneficiaries of wills, those who rely on legal opinions prepared for others, and members of organizations and
labor unions).
(claiming that "[t]he notion of privity has lost its place as a limitation on liability in practically all spheres of tort
liability except that of lawyer malpractice").
121. See generally, e.g., Edward A. Carr, Attorney Opinion Letters: Model Rule 2.3 and the Texas
Experience, 37 S. Tex. L. Rev. 1127 (1996) (focusing on professional responsibility and lawyer liability issues
in the situation where a client asks the lawyer to prepare an evaluation or an opinion for use by a third party);
1191 (1996) (arguing that lawyers should be subject to the same legal and moral standards as all other
professionals when they offer opinions or evaluations to third parties).
122. I recognize that the Reporters may not have sufficient familiarity with the different processes of ADR to
be able to comment, on or define the potential types of, liability, but given that the Restatement is more than a
A related, but somewhat distinct, issue arises with respect to the troubling issue of whether a lawyer-mediator who presides over a mediation and comes to know (under the requisite definitions of knowledge) that a lawyer has committed a violation of an applicable rule of professional conduct that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer," has a duty to report such actions to the appropriate disciplinary authorities, which as a lawyer, he or she would have a duty to do. Failure to comply with this section subjects the lawyer to his or her own possible disciplinary action (and far-fetched as it might seem now, possible liability to parties injured by the "guilty" lawyer's mal- or misfeasance in the mediation). There are several interpretations of this rule as they affect mediation that may render this concern somewhat insubstantial, but they may remain problematic within the mediation community, and the Reporters might help clarify these points. First, it easily can be said that the mediator, like anyone else performing other than strictly conventional legal roles (like real estate broker, trustee, sales agent, etc.) or anyone engaged in "ancillary" practice must still abide by the lawyers' ethical rules and violates them at the risk of disciplinary action as a lawyer. As a result, a real estate broker, like a mediator, who violates an ethical rule may be censored, suspended, or disbarred as a lawyer for acts performed in "non-legal" capacities. Thus, the current rules could be seen to cover the mediator who is also a lawyer, in this, as in all other contexts; perhaps, though, some clarifying language is necessary.

More problematic, however, is the exception for disclosure of ethical violations (going to the lawyer's honesty, trustworthiness or fitness as a lawyer) when...
that information is learned in situations protected by Model Rule 1.6\textsuperscript{128} (protection of client’s confidences). There are several problems here. First, the lawyer-mediator who becomes knowledgeable about ethical violations during a mediation is not learning such information in what is otherwise called client confidentiality situations precisely because we have otherwise defined the mediator’s role to be one not of representation — thus, no client confidentiality, strictly defined, applies. On the other hand, mediation promises confidentiality to all of the parties, either contractually, or as is true now in many cases, statutorily.\textsuperscript{129} Just as some states now protect lawyer assistance programs (for alcohol or drug or other counseling assistance) from disclosure requirements on policy grounds,\textsuperscript{130} arguments could be made that complete confidentiality (as in the attorney-client relationship) is necessary to protect the purposes and integrity of the mediation process. The difficulty is that mediator-lawyers are often in a position to see ethical violations, perhaps more easily than judges and other lawyers in more conventional adversary proceedings. Lawyers, as well as clients, are told, in mediation, to be candid and to disclose information that might not be relevant or discoverable in litigation but that might help facilitate a business or other interest-based solution. Lawyer-mediators who work closely with parties and their lawyers in confidential caucus sessions, and thus hear such sensitive information from both sides, may be particularly well situated to learn of fraudulent statements, to see serious legal malpractice (failure to research, lack of knowledge of important legal authorities, failure to investigate, etc.), and to see lawyers make misrepresentations of facts or law to each other or to the mediator-tribunal.\textsuperscript{131} At any meeting of mediator-lawyers, these issues arise, and I am convinced there is wide disparity in our practices.\textsuperscript{132}

The Restatement might clarify what I have always taken to be the applicable standard: lawyer-mediators are still subject to lawyers’ ethics rules. The Report-

\textsuperscript{128} Id. Rule 1.6 (“Confidentiality of Information”).

\textsuperscript{129} See, e.g., CAL. EVID. CODE § 1152.5 (Deering 1986) (providing that when certain conditions are met, “[e]vidence of anything said . . . in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action . . .”).

\textsuperscript{130} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3(3) rep. note cmt. d (Am. Law Inst. Preliminary Draft No. 12, 1996) [hereinafter RESTATEMENT DRAFT 12].

\textsuperscript{131} For the question of whether there is a duty to be candid and reveal adverse authority in the mediation context, see text accompanying note 54. One wonders when an ADR session can be considered a tribunal.

\textsuperscript{132} At a recent conference sponsored by Forbes and the AAA, the ADR Superconference, April 28-29, 1997 in Washington, D.C., mediator-lawyers differed as to whether they would report such violations to the appropriate disciplinary bodies. As one lawyer said, it would have a chilling effect on mediation if lawyers thought they could be reported by the mediator. However it might also have a chilling effect on unethical conduct if lawyers knew that they could be reported. Of course, there is always the possibility that unethical lawyers could choose non-lawyer mediators who have no duty to report them. This paradox is a major concern of lawyer-mediators who fear that too much regulation of lawyer-mediators qua lawyers will disadvantage them vis-à-vis other professionals practicing mediation. What is difficult to understand in this debate is why lawyer-mediators do not believe that they would be advantaged in the market place if consumers knew they had a strictly enforced code to monitor ethics and standards of practice.
ers might consider how to resolve the difficult confidentiality issues presented here. For what it is worth, my own view of the subject is that lawyer misconduct can and should be reported unless the only way to do so is to reveal information that would otherwise be protected by lawyer-client confidentiality protections or if such disclosures would unnecessarily harm the client, in which cases the disclosure should be excused. These situations provide challenges for drafting black letter rules (though illustrations may be easier here).

In the mediation context, as in the adversary representation context, there are exceptions to the protection of confidentiality. Just as the current version of section 117A allows disclosure of client confidential information to prevent death, serious bodily injury, or substantial financial loss, many state mediation statutes require mediators to disclose party (and therefore lawyer) information when other statutes or policies require it. If the very protected information of client confidences is now subject to exceptions for the prevention, and in some cases rectification, of certain crimes and fraud, an analogous reading of mediation confidentiality where the mediator is a lawyer may need an explicit reference. In the mediation context, where, under a Tarasoff-like claim, parties may allege that mediators had knowledge of information that could have prevented serious bodily harm, injury, or substantial economic loss, it would be especially useful to clarify the lawyer-mediator's responsibilities. In mediation there are many contexts in which such information might become known. In family mediation, for example, mediators often become aware of likely serious bodily harm against partners and children in the domestic context.

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133. On the delicate relation between black letter and illustrations in the Restatement, see Thomas Morgan, Conflicts of Interest in the Restatement: Comments on Professor Nancy Moore's Paper, 10 GEO. J. LEGAL ETHICS 1 (1997).

134. See Draft Ethical Standards for Neutrals Providing ADR Services to State Trial Courts in Massachusetts § III(G)(3)(a) (1995) [hereinafter Draft Ethical Standards] (exempting a neutral from the duty to maintain confidentiality in the case where he or she has "reasonable cause to believe that a minor or other person who the neutral believes is incapable of protecting his/her interests has been subjected to abuse or neglect, or is at substantial risk of such abuse or neglect in the future ."). reprinted in E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS 1199 (1996).

135. As some of the state statutory exceptions to mediation confidentiality and case law make clear, non-lawyer mediators could be subject to much stronger and broader disclosure requirements than lawyers. See Tarasoff v. Regents of Univ. of California, 551 P.2d. 334 (Cal. 1976) (holding that relationship of psychotherapist to either the patient, who confided his intention to kill another, or to the intended victim was sufficient to establish a duty of care that required the therapist to warn the intended victim or take other proper actions). This difference once again raises the question of whether lawyer mediators can be held to different standards than mediators generally.

136. Tarasoff, 551 P.2d. at 334.

137. This is one reason why some feminists deplore the use of mediation in divorce and domestic abuse cases, both because such information should not be privatized, in their view, and also because of the absence of appropriate sanctions in that context. See, e.g., Lisa G. Lerman, Mediation of Wife Abuse Cases: The Adverse Impact on Informal Dispute Resolution on Women, 7 HARV. WOMEN'S L.J. 57, 61 (1984) (arguing that "mediation in abuse cases is based on misconceptions about the nature of wife abuse, and that [it] not only fails to protect women from subsequent violence, but also perpetuates their continued victimization"); Laurie Woods, Mediation: a Backlash to Women's Progress on Family Law Issues, 19 CLEARINGHOUSE REV. 431 (1985)
in commercial, business, and tort matters often learn of confidential financial information that may reveal serious economic fraud, demonstrating that all of the concerns about economic fraud in the traditional lawyer-client relationship have now reared their ugly heads in the mediation context. The Restatement may take the position that mediation is “outside the scope” of its purview, but lawyer-mediators will need guidance on these issues.

7. Client Representation and Counseling

To the extent that the crux of my argument here is the absence of any recognition by the Restatement of the lawyer’s role as a third-party neutral, there is a smaller, ancillary, but easier-to-fix silence on the role or duty of the representative-advocate lawyer to advise clients of means other than litigation to resolve disputes and settle transactions. To the extent that section 151 recognizes the significance of substantive “non-legal aspects of a proposed course of conduct,” it is indeed strange not to acknowledge the counseling function of a lawyer to advise his or her client about “non-legal” (or at least, less legal or less formal) means for dealing with legal problems, the very thing that lawyers are most expert about advising. Virtually all of Chapter Seven presumes — and indeed, the introductory note explicitly provides — that “advocacy is the most familiar and the most ancient of lawyers’ roles,” as if advocacy within litigation was the only or major lawyer role. This description is woefully under-inclusive for several reasons, and here the Restatement bears a remarkable resemblance to older conceptions of lawyering that informed both the Model Code and the Model Rules.

First, even if advocacy were the lawyer’s only or major role, that advocacy itself is now performed in a number of locations beyond or before the courthouse.

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138. See generally Geoffrey C. Hazard, Jr., Rectification of Client Fraud: Death and Revival of a Professional Norm, 33 EMORY L.J. 271 (1984) (exploring the problem of client fraud in transactional representation and concluding that the Model Rules, although reasonably workable, are inadequate according to moral and legal principles with respect to this problem); Geoffrey C. Hazard, Jr., Lawyers and Client Fraud: They Still Don’t Get It, 6 GEO. J. LEGAL ETHICS 701 (1993) (arguing that the lawyers promulgating the Model Rules are primarily concerned with maintaining their own understanding of what a lawyer’s responsibilities are, no matter what the courts say they are, and do not really know what they are doing when they attempt to make rules regarding client fraud).

139. Among mediators, one of the most often discussed ethical dilemmas is whether a mediator who learns of the impending or very likely financial insolvency of one party to a mediation has any duty to reveal, or compel the party to reveal, that information to the other party. Other typical dilemmas include the reverse situation, where misrepresentations of economic security are made to try to secure or assure financing for a settlement that the mediator may be quite certain is likely to fail.

140. RESTATEMENT DRAFT 8 Ch. 7 (“Representing Clients in Litigation”).

141. Id. Ch. 7, Introductory Note.
The lawyer in negotiation, in settlement discussions, in arbitration, and increasingly in court-annexed programs, is asked to be an advocate in a number of different venues. The question remains under the *Restatement* whether the lawyer’s duties and responsibilities as an advocate are the same or should be the same in all of these locales.\(^{142}\) To the extent that section 165 recognizes that lawyers must comply with applicable law, including rules of procedure and evidence, the *Restatement*, whether wittingly or not, incorporates compliance with the now wide-ranging requirements of lawyers to participate in ADR proceedings of various kinds.\(^{143}\)

More important than the noted specific absences or silences of the *Restatement* on particular issues of relevance to the stated black letter and commentary on the rules, is the general silence or absence of recognition of the role of the lawyer as problem-solver, facilitator of human relations, and healer of disputes who may, either through advocacy roles within different kinds of proceedings, or through new roles, such as third-party neutral dispute or transaction facilitators,\(^{144}\) deal with human legal problems in ways other than adversarial advocacy or representational and thus “aligned” counseling.\(^{145}\) To the extent that such work is going on daily in law offices, courthouses, businesses, hospitals, schools, and other institutions in our society, I would prefer that the *Restatement* acknowledge these “legal practices” and at the same time, consider what, if any, regulation or restatement of principles might be necessary to insure that lawyers, when performing these roles, do so in the best possible way, without harm to the parties and to others affected by legal disputes or transactions.\(^{146}\)

So, if the *Restatement* is silent, what do I suggest it should say?

\(^{142}\) For a discussion of whether ADR proceedings qualify as “tribunals” for purposes of calling up the appropriate duty of candor, see *supra* text accompanying note 54. Under the definitions provided in the current draft of the *Restatement*, a tribunal includes any body “hearing a contested matter under rules of procedure or evidence,” such as “contested arbitration and similar trial-type proceedings,” but does not include “a mediation (except mediation in the form of mock trial or similar contested proceeding).” *Restatement Draft 8 Ch.7, Introductory Note.* One wonders whether an evaluative mediation with party presentations would qualify as a “mediation in the form of a mock trial or similar contested proceeding.”

\(^{143}\) Indeed, many courts not only have promulgated their own local rules governing the procedures of ADR, but they also have issued ethics rules for practice in ADR programs. PLAPINGER & STIENSTRA, *supra* note 79, at 59-307. There also have been some case law rulings that bear upon lawyers’ duties in such proceedings. See, e.g., GTE Directories Serv. Corp. v. Pacific Bell Directory, 135 F.R.D. 187, 192-93 (1991) (supporting a narrow construction of waiver of attorney-client privilege in early neutral evaluation cases in order to encourage litigants and lawyers to err on the side of production when confronted with discovery requests).

\(^{144}\) For one of the earliest attempts to specify some ethical standards for these new roles, see Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984).

\(^{145}\) For a recent description of how lawyers need to broaden their conception of roles to fit modern organizational needs, see Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy and the Legal Profession*, 4 DUKE J. GENDER L. & POL’Y 119 (1996).

\(^{146}\) For one study of actual ethical dilemmas in third-party practice, see Robert A. Baruch Bush, *Ethical Dilemmas*, in *GOLANN, supra* note 12, at 385-437.
III. THE POSSIBLE ARCHITECTURE OF SOME RESTATEMENT OF THE LAW GOVERNING LAWYERS ENGAGED IN ADR: THE LAWYER AS THIRD-PARTY NEUTRAL OR PROBLEM SOLVER (OF NON- OR LESS ADVERSARIAL LAWYERING)

In my present capacity as Chair of the CPR-Georgetown Commission on Ethics and Standards in ADR, I have labored to consider some of these issues, as well as others I have not thus far mentioned here, such as what standards, ethics, and responsibilities should govern organizational providers of dispute resolution services 147 and whether lawyer-mediators ought to be accountable in some way for the outcomes or agreements over which they preside. 148 These are difficult and perhaps unmanageable issues; 149 or perhaps it is still too early to attempt regulation of these new practices, especially in a field that seeks to be trans-disciplinary and include non-lawyers and one that seeks to preserve, above all else, flexibility and creativity in problem-solving. Nevertheless, I think it is important for a document as important as the Restatement to acknowledge the important other roles of lawyers and perhaps to see, as I do, that our move from trial by combat to trial by adversarial words may be giving way to new practices, roles, and institutions that also need some clarification and some standards. To that end, I will conclude here by sketching out what such a restatement or series of rules might provide. Where I can I will state my own views, 150 but I will also

147. For an interesting analogy here, see Ted Schneyer, Professional Discipline For Law Firms?, 77 CORNELL L. REV. 1 (1991) in which proposals for law firm responsibility and discipline are set forth that include recognition of corporate criminal liability on top of regulation of law practice through the disciplinary process.

148. Compare Lawrence Susskind, Environmental Mediation and the Accountability Problem, 6 VT. L. REV. 1 (1981) (asserting that mediators of environmental disputes should be held accountable for mediated outcomes) with Joseph B. Stulberg, The Theory and Practice of Mediation: A Reply to Professor Susskind, 6 VT. L. REV. 85, 86 (1981) (arguing that Susskind’s demand for non-neutral mediators is “conceptually and pragmatically incompatible with the goals and purposes of mediation” and that “[i]t is precisely a mediator’s commitment to neutrality which ensures responsible actions on the part of the mediator . . . ”).

149. Massachusetts has attempted to regulate such issues. See Draft Ethical Standards, supra note 134, at § III(E) (“Responsibility to Non-Participating Parties: A neutral should consider, and where appropriate, encourage the parties to consider, the interests of persons affected by actual or potential agreements and not participating or represented in the process”).

150. In my first review of the professional responsibility issues for third-party neutrals, I somewhat naively suggested there were some core issues that were likely to be dealt with by a consensus in the profession. See Carrie Menkel-Meadow, Professional Responsibility for Third-party Neutrals, ALTERNATIVES TO HIGH COST OF LITIG., Sept. 1993, at 129, 130 (labeling as “non-controversial” such ethical issues as informed consent by the parties about type of process to be used, conflicts of interests and subsequent disqualification in same matter, prohibitions on contingency fees, and prohibitions on social, financial, or legal interests in dispute or with parties or counsel to disputes mediated or arbitrated). Other issues that I labeled as more controversial included accountability of third-party neutrals for the outcomes they reach, responsibility for balancing unequal power or resources of the parties, and the ethics of various different ADR practices. See Carrie Menkel-Meadow, Ex Parte Talks with Neutrals: ADR Hazards, ALTERNATIVES TO HIGH COST OF LITIG., Sept. 1994, at 109 (1994) (discussing the ethical hazards of private caucuses, evaluative versus facilitating mediation, and ex parte communications with parties); Carrie Menkel-Meadow, Public Access to Private Settlements: Conflicting Legal Policies, ALTERNATIVES TO HIGH COST OF LITIG., June 1993, at 85 (discussing the public policy implications of secrecy and confidentiality in some mediated settlements). Very soon after I offered this simple division of
present choices that are currently available for dealing with some of the more difficult issues. The major difficulty with such an attempt to specify standards for lawyers in the use of ADR is that ADR practice can easily be assimilated to, absorbed by, and analogized to conventional lawyer practices and behaviors, while at the same time it wants to be different from such conventional practices, offering other repertoires of behavior and human problem-solving. Thus, there is an inevitable tension in attempting to cabin, by regulation and restatement, what is still a creative and fledgling enterprise. At the same time, with potential and actual abuses being reported each day and a growing number of legal challenges to various practices within the field, I think it timely and worthwhile to attempt to state some standards that should govern our profession when it engages in this work. Though the Reporters of the Restatement may demur by claiming that it is too early to attempt a "restatement" without more of those legal challenges and cases already decided, it is significant to note here that many states and several federal courts have already drafted, and in some cases fully adopted, ethical rules, standards, and regulations with respect to the various practices that are included under the ADR umbrella.

Drafting choices for the Restatement include: 1) modification of existing sections; 2) use of illustrations, comments, and reporter's notes to demonstrate where ADR practices may be analogized to already existing legal and ethical standards and to report on modifications or exceptions to those sections by currently existing relevant case law; or 3) drafting of a separate chapter or topic, to formally recognize these practices of lawyers.

The CPR-Georgetown Commission has begun drafting some proposed rules for possible adoption in the Model Rules of Professional Conduct.

issues, it became clear to me that all were controversial. The area of conflicts of interests has emerged as the major contentious issue among would-be regulators. See supra text accompanying notes 55-83 for further discussion of conflicts. It has also become clear that some mediators do take stakes or contingent fees in the settlements they broker, particularly in the mass tort context. Kenneth Feinberg, Speech delivered at the Forbes-AAA Superconference, Washington, D.C. (Apr. 29, 1997).


151. See Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or The Law of ADR, 19 FLA. ST. U. L. REV. 1 (1991) (arguing that ADR already has been co-opted by the adversary system).


153. In the last year I have noted the presence of ADR practitioners and issues at virtually all meetings of lawyers, including the ABA, the Litigation Section of the ABA, the American College of Trial Lawyers, and the Association of American Corporate Counsel. The Restatement ignores this important subject of practice and concern to all practicing lawyers at the risk of becoming outmoded and inadequate from the moment of its adoption.

154. This commission is funded, in part, by the Hewlett Foundation. This is my disclosure.

155. There have been several earlier efforts and suggestions for rules in the ADR area to be added to the Model Rules. See, e.g., Judith L. Maute, Public Values and Private Justice: A Case For Mediator Accountability, 4 GEO. J. LEGAL ETHICS 503 (1991) (arguing for the adoption of a proposed Model Rule 2.4, stating general standards for mediation by lawyers and suggesting a higher standard of accountability when the parties are not
offerhere a possible framework or architecture of some rules for consideration by the Reporters for possible adoption as sections in the current *Restatement of the Law Governing Lawyers*:

A. PROPOSED CHAPTER SEVEN A OR (NEW) CHAPTER NINE: 157 THE LAWYER AS NEUTRAL 158

Introductory Note: This topic deals with the role of a lawyer, acting in a non-representational capacity, such as mediator, arbitrator, conciliator, or evaluator, who may act to assist parties, which may include clients represented by lawyers and parties who do not have legal representation, in resolving their disputes or arranging their transactions with each other. In such situations, lawyers, acting in non-representative capacities, may have different duties and obligations than those of lawyers acting in a representative capacity. This chapter recognizes that it is an important function of the lawyer to use the best means possible to assist the client in achieving the client’s lawful objectives. Included in such service is the means employed to achieve the client’s objectives. In many separately represented. Our latest efforts reflect, for some of us, the inadequacies of current formulations in the attempt at trans-disciplinary ethical code drafting in the *Joint Standards for Mediators*, supra note 13, adopted by the Section of Dispute Resolution, but not by the whole ABA, in 1994. Several of the members of the Commission have served in these earlier drafting efforts.

156. I will indicate which views are those of the committee in its current deliberations and which are my own. The small sub-committee of the Commission that is currently actively drafting rules is the Conflicts sub-committee of the Working Group on Mediation as the Practice of Law. Sub-committee members include the Honorable Jerome Simandle, The Honorable Edmund Spaeath, John Bickerman, Esq., Lawrence Fox, Esq., Duane Krohnke, Esq., Bruce Meyerson, Esq., Professor Nancy Rogers, Michael Young, Esq., Elizabeth Plapinger, CPR, and myself. Professor Geoffrey C. Hazard, Jr., has served as a consultant and commentator for the group.

157. See *Restatement (Third) of the Law Governing Lawyers* Ch. 9 (Am. Law Inst. Preliminary Draft No. 13, 1997), for proposed Chapter Nine (“Delivery of Legal Services”). If this proposal is drafted, this topic could be included therein or become Chapter Nine with the proposed Chapter Nine becoming Chapter Ten. I leave all of these choices to the Reporters and the Advisers to consider.

158. This rule attempts to regulate solely the ethical responsibilities of lawyers serving as neutrals, and does not deal with other issues I have raised here, such as the potentially different duties of lawyers within ADR settings, including mediation or early neutral evaluation. These points can be dealt with either by comments or illustrations in the present text of Chapters Six and Seven, dealing with representation of clients. However, I would not fault the Reporters for not confronting these issues yet, as here I think there probably is inadequate law to derive the content of such duties. I simply appeal to the more aspirational aspects of the profession and the educative function of the *Restatement* to remind lawyers of Lincoln’s, and his more modern counterparts’, exhortations to consider the lawyer’s role as “peacemaker,” which may require different behaviors within representation, counseling, and litigation. I want to distinguish here the argument for the lawyer’s role as problem-solver and peacemaker from general desires for more regulation and better behavior for the “civility” problem. See, e.g., Marvin E. Aspen, *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s: The Search for Renewed Civility in Litigation*, 28 Val. U. L. Rev. 513 (1994) (reviewing recent developments in the practice of law that threaten the civil and orderly function of the legal profession). For more on this subject, see D.C. Bar Assoc. Standards for Civility in Profess. Conduct, as amended, March 11, 1997.
cases, clients may choose means that seek to cause the least harm to all participants in a dispute or transaction, that are least costly or time consuming, that offer the promise of solving the problem in ways that might not be possible through litigation and court orders, or that attend to non-legal interests such as business, personal, social, moral, religious, or other concerns. Lawyers acting in a representative or adviser capacity should advise their clients of the availability of processes that may be designed to accomplish these ends. This chapter is intended to be applied to the duties and responsibilities of lawyers who act as third-party neutrals in the following processes:

**ADJUDICATIVE**

*Arbitration* — A forum in which each party (and its counsel) presents its position and evidence before a neutral third-party, or a panel of arbitrators, some of whom may have been chosen by the parties (and may therefore be “partisan” arbitrators) who render(s) a specific award. If the parties agree in advance, or any applicable statute provides, the award is binding and is enforceable in the same manner as any contractual obligation or under the applicable statute (such as the Federal Arbitration Act or state equivalents). Applicable statutes or agreements by the parties may provide rules for whether the award must be in writing and what recourse the parties may have when the arbitration is not binding.

**EVALUATIVE**

*Neutral Evaluation* — A forum in which lawyers and/or parties present summaries of the facts, evidence, and legal principles applicable to their cases to a single neutral or a panel of neutral evaluators who provide(s) an assessment of the strength, weaknesses, and potential value of the case to all sides. By agreement of the parties or by applicable court rule, such evaluations are usually non-binding and offered to facilitate settlement. By agreement of the parties or by applicable court rule or practice, if the matter does not settle, the neutral evaluator may also provide other services such as case planning guidance, other settlement

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159. If the Reporters decide to accept any of the analysis and argument of this Article, they may want to add this sentence as a requirement or comment to the duties of lawyers in representative and counseling capacities, such as in section 151(3). See Restatement Draft 8 § 151(3) (stating that a lawyer may address non-legal aspects of a proposed course of conduct when counseling a client).

160. Most of the text of these descriptions of ADR processes is derived from a variety of other sources. *E.g.*, Minn. Gen. Prac. R. 114.02 (1997) (defining various terms relating to ADR); The ABCs of ADR: A Dispute Resolution Glossary, Alternatives to High Cost of Litig., Nov. 1996, at 147 (providing a glossary of ADR terms with definitions derived from prior publications of the CPR Institute for Dispute Resolution); National ADR Institute for Federal Judges, Judge’s Deskbook on Court ADR (1993). Many other definitional sources are available, but these three are relatively succinct, clear, and up to date.
assistance and discovery scheduling. By agreement of the parties, or by applicable court rule, the neutral evaluator(s) may issue fact-finding, discovery, and other reports or recommendations.

FACILITATIVE

Mediation — A forum in which a neutral third-party facilitates communication and negotiation among the parties to seek resolution of issues between the parties. Mediation is non-binding and does not, unless otherwise agreed to by the parties, authorize the third-party neutral to evaluate, decide, or otherwise offer a judgment on the issues between the parties. If the mediation concludes in an agreement, that agreement, if it meets otherwise applicable law concerning the enforceability of contracts, is as enforceable as a contractual agreement. Where authorized by court rules and applicable law, mediation agreements achieved during pending litigation may be entered as court judgments.

HYBRID PROCESSES

Mini-trial — A forum in which parties and their counsel present their matter, which may include evidence, legal arguments, documents, and other summaries of their case, before a neutral third-party and representatives of all parties for the purpose of defining issues, pursuing settlement negotiations, or otherwise sharing information. A neutral third-party, usually at the parties’ request, may issue an advisory opinion that is non-binding, unless the parties agree otherwise.

Med-Arb — A forum in which the parties initially seek mediation of their dispute before a third-party neutral; if they reach impasse, the mediation may convert into an arbitration in which the third-party neutral renders an award. This process may also occur in reverse in which, during a contested arbitration proceeding, the parties may agree to seek facilitation of a settlement (mediation) from the third-party neutral. In some cases, these third-party neutral functions may be divided between two separate individuals or panels of individuals.

Other — Parties by agreement, or pursuant to court rules and regulations, may create and utilize other dispute resolution processes before third-party neutral(s) in order to facilitate settlement, manage or plan discovery and other case issues, seek fact-finding or conciliation services, improve communication, simplify or settle parts of cases, or for other reasons. Such processes may be decisional (adjudicative), facilitative, or a hybrid of the two, and they may be binding or non-binding, as party agreements, court rules, or statutes provide.

Lawyers who provide neutral services as described above shall be subject to the duties and obligations as specified below.
PROPOSED SECTION 1: IMPARTIALITY

A lawyer who serves as a third-party neutral should:

(1) Assure that the lawyer is impartial with respect to the issues and the parties in the matter by:

(A) Disclosing to the parties all reasons why the lawyer might reasonably not be perceived to be impartial. These reasons include: (i) any direct or indirect financial or personal interest in the outcome, or with the parties, their counsel, or witnesses in the proceeding; (ii) any existing or past financial, business, professional, family, or social relationship with any of the parties, their counsel, or witnesses; and (iii) any other source of bias or prejudice concerning a person, institution, or issue that is likely to affect impartiality or that might reasonably create an appearance of partiality or bias;

(B) Conducting a reasonable inquiry and effort to determine if any interests or biases described in section (A) exist and maintaining a continuing obligation to disclose any such interests or potential biases that may arise during the proceedings;

(C) Declining to participate as a third-party neutral unless all parties choose to retain the neutral, following all such disclosures, unless applicable court rules require participation, after weighing the parties’ objections. If all parties agree to proceed after being informed of these matters or the court requires participation, following application of whatever applicable rules the court imposes, the lawyer shall proceed as a neutral. If, however, the lawyer believes that the matters disclosed would inhibit the lawyer’s impartiality, the lawyer should decline to proceed;

(D) Extending all disclosures of interests to those of the lawyer, members of his or her family, and his or her current employer, partners, or business associates;

(E) After accepting appointment and while serving as a neutral, refraining from entering into any financial, business, professional, family, or social relationship or acquiring any financial or personal interest that is likely to affect impartiality or that might reasonably create the appearance of partiality or bias, without disclosure and consent of all parties.

(2) Conduct all proceedings in an impartial and evenhanded manner, treating all parties with fairness and respect and acting at all times without bias or prejudice. If at any time the lawyer is unable to conduct the process in an impartial manner, the lawyer shall withdraw, unless prohibited from doing so by applicable law or court rules.

161. I have numbered the sections proposed in simple numerical order. When the final numbers are assigned in the Restatement, these proposed sections, if adopted, would be renumbered depending on their placement. Where possible, I have used language, definitions, standards, and formulations consistent with other sections of the Restatement.
(A) A lawyer serving in a third-party neutral capacity should not allow other matters to interfere with the lawyer's impartiality.
(B) A lawyer serving in a third-party neutral capacity should conduct all proceedings in a manner that promotes the integrity and impartiality of the lawyer's role as neutral.
(C) When serving in an adjudicative capacity, the lawyer shall decide all matters fairly, with impartiality, exercising independent judgment and without any improper outside influence.

PROPOSED SECTION 2: COMPETENCE AND DILIGENCE

(1) A lawyer serving as a third-party neutral should act diligently, efficiently, and promptly, subject to the standard of care owed the parties as required by applicable law and standards applied to third-party neutrals in similar circumstances, unless the lawyer represents, or applicable court rules require, that the lawyer exercise greater competence or diligence.

(2) A lawyer should decline to serve in those matters in which the lawyer is not competent to serve.

PROPOSED SECTION 3: CONFIDENTIALITY

(1) A lawyer serving as a third-party neutral shall maintain confidentiality of all information acquired in the context of serving as a third-party neutral by the parties and their counsel, unless the third-party neutral is required or permitted by law or agreement of the parties to disclose or use any otherwise confidential information.

(A) As between the parties, the third-party neutral shall maintain in confidence all information disclosed to the third-party neutral in confidence from either side, unless a party agrees otherwise.

(B) A third-party neutral should discuss confidentiality rules and requirements with the parties at the beginning of any proceeding and obtain party consent with respect to any ex parte communication or practice.

(C) A lawyer who has served as a third-party neutral shall not thereafter use information acquired in the ADR proceeding to the disadvantage of any party to the ADR proceeding, except when the information has become publicly known or the parties have agreed otherwise.

(2) A third-party neutral may use or disclose confidential information obtained during a proceeding when and to the extent the third-party believes necessary to prevent:

162. This section is intended to track Restatement section 117A and is likely to lead to similar controversies among third-party neutrals as among lawyers. However I believe, as I stated supra text accompanying note 134, that third-party neutrals already are under an obligation to reveal such information under separate statutory requirements or case law such as Tarasoff. See Tarasoff v. Regents of Univ. of California, 551 P.2d. 334 (Cal. 1976) (placing an affirmative duty on psychologist to inform patient's intended victim of danger).
(A) death or serious bodily injury from occurring as the result of a crime that a party has committed or intends to commit; or

(B) substantial financial loss from occurring as the result of a crime or fraud that the party has committed or intends to commit.

(3) Before using or disclosing information pursuant to section (2), if not otherwise required to be disclosed, the third-party neutral must, if feasible, make a good faith effort to persuade the party's counsel or the party, if the party is unrepresented, either not to act, or to warn those who might be harmed by the party's action.

PROPOSED SECTION 4: CONFLICTS OF INTEREST

(1) A lawyer who is serving as a third-party neutral shall not, during the course of an ADR proceeding, seek to establish any financial, business, representational, neutral, or personal relationship with, or acquire an interest in, any party, entity, or counsel who is involved in the matter in which the lawyer is participating as a neutral.

(2) Individual Third-party Neutral Disqualifications

(A) Without disclosure and consent by all the parties, a lawyer who has served as a third-party neutral shall not subsequently represent any party to the ADR proceeding (in which the third-party neutral served as neutral) in the same or a substantially related matter.

(B) In addition, a lawyer who has served as a third-party neutral shall not subsequently represent, in a substantially unrelated matter, for a reasonable period of time under the circumstances, a party to the ADR proceed-

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163. In this section I will offer some alternatives for different resolutions of some of the difficult issues implicated in conflicts of interest in this area. One of the key issues here, as in all conflicts, is whether the rules are directed at the parties' own concern about, and actual harm suffered from, conflicts which, can often be consented to or dealt with by one set of rules, or whether the rules should be directed at broader concerns about the appearance of propriety or impropriety to the more general public or possible consumers of lawyers' services when certain changes of role occur. An example of such a change of role would be when a former neutral, like the judge in Cho v. Superior Ct., 45 Cal. Rptr. 2d 863 (Ct. App. 1995), joins forces with an advocate in the same or a substantially related case.

Individual harms may have to be considered separately from the "appearance" or "public" harms. The latter can lead to more draconian disqualification and imputation rules that trouble today's more diverse — in terms of practice roles — and mobile practitioners.

164. This section is intended to prevent a third-party neutral from using the ADR process to obtain additional employment or a financial interest in achieving a particular result. Some third-party neutrals might argue for an exception for the situation where there are "repeat" disputes or transactions, and one party, or even both parties, might want to employ the neutral for many disputes. They also might argue for an exception where one party decides during the course of a mediation that the mediator could handle other matters for the party. This section is designed to bar the problem of repeat play business affecting the interests of the third-party neutral. As expressed in the text, the current draft appears "non-consentable." Consent by all the parties could be required as one way of at least ensuring that full knowledge of the mediator's possible interests will be imparted to the "victims" of repeat play third-party neutrals — those who are usually one-shot disputants who do not know that their mediator often works for the other side in other matters. Under the draft impartiality (and disclosure) rule proposed here, section 1(1)(A)(ii), such a "one-shot" party would be informed of the mediator's past, present, and continuing relationship with the other party in other matters.
ing where the circumstances might reasonably create the appearance that the neutral had been influenced in the ADR process by the anticipation or expectation of a subsequent relationship or interest.165

(3) Imputation of Conflicts to Affiliated Lawyers and Removing Imputation

(A) Unless all affected parties consent after disclosure, in any matter where a lawyer would be disqualified under section (2), the restrictions imposed therein also restrict all other lawyers who are affiliated with that lawyer under section 203.166

An alternative to this section, which would permit screening in this context and which accepts the arguments of some167 that third-party neutrals, when they promise confidentiality, cannot share information with even their law partners and thus are particularly well suited for screening, would provide:

(3) (alternative) If a lawyer is disqualified by section (2), no lawyer who is affiliated with that lawyer may knowingly undertake or continue representation in any substantially related or unrelated matter168 unless the personally prohibited lawyer is adequately screened from any participation in the matter, is apportioned no fee from the matter, and timely and adequate notice of the screening has been provided to all affected parties and tribunals, pursuant to the requirements of [proposed] section 204, provided that no material confidential information about any of the parties to the ADR proceeding has been communicated by the personally prohibited lawyer to the affiliated lawyer or that lawyer’s firm.169

165. The purpose of this section is to prevent the third-party neutral from having an interest in the outcome of a mediation turn on the possibility of future business with a party who would be satisfied by the outcome. The language is derived from the Arbitrators in Commercial Disputes, supra note 13. Some have argued for a presumptive period of disqualification, such as one year, that would allow representation in substantially unrelated matters after that time period. Because the Restatement prefers general, not time-based, rules, I have not suggested such a time period here, though such a provision might be added to any such similar provision in another ethics code, such as a proposed new Model Rule for Third-party Neutrals.

166. This is the equivalent of the current imputation rule under Model Rule 1.10, yet it also applies the non-screen, imputation rulings of Cho v. Superior Ct., 45 Cal. Rptr. 2d 863 (Ct. App. 1995), and Poly Software Int’l, Inc. v. Yu Su, 880 F. Supp. 1487 (D. Utah 1995).

167. Maguire, supra note 64, at 4.

168. This formulation continues to impute disqualification to the whole firm for the same matter, but allows screens for substantially related matters, and unrelated matters not governed by section 2(B).

169. In the event this formulation were to be adopted, it should explicitly cross-reference section 3(C), prohibiting the use of any confidential information learned during an ADR process. Yet another possible formulation would provide for no imputation to affiliated lawyers at all, and thus allow subsequent representation in substantially related matters if there has been no caucusing (or separately learned information) in the ADR process. The rationale here is that if both parties are present in the ADR process, they both know what the third-party neutral knows and there is no inter-party confidentiality, and therefore, no assumed proprietary or secret information that could be used in a subsequent representation. This approach makes the conflicts issue turn on the specifics of the conduct of particular ADR sessions and is likely to be too specific for Restatement purposes. It also fails to deal with the important concern that, even if the parties are not harmed in any way, it looks bad to the public when the same law firm employing a third-party neutral who sought to promote settlement in a particular case, later acts as the advocate for one of those parties. This is the same concern that the court expressed in Cho, 45 Cal. Rptr. 2d at 870.
(4) A lawyer selected as a partisan arbitrator of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party, nor are any affiliated lawyers.

PROPOSED SECTION 5: FEES

(1) Before or within a reasonable time after being retained as a third-party neutral, a lawyer should communicate to the parties, in writing, the basis or rate and allocation of the fee for service, unless the third-party neutral is serving in a no-fee or pro bono capacity.

(2) A third-party neutral who withdraws from a case should return any unearned fee to the parties.

(3) A third-party neutral who charges a fee contingent on the settlement or other specific resolution of the matter should explain to the parties that such an arrangement gives the third-party neutral a direct financial interest in settlement that may conflict with the parties' possible interest in terminating the proceedings without reaching settlement. The third-party neutral should consider whether such a fee arrangement creates an appearance or actuality of partiality, inconsistent with the requirements of [proposed] section one.170

PROPOSED SECTION 6: FAIRNESS AND INTEGRITY OF THE PROCESS171

(1) The lawyer serving as neutral should ensure that the ADR proceedings utilized should be clearly explained to, and understood by, the parties and their counsel and that where appropriate, the parties should knowingly consent to the process being used (unless applicable law or court rules require use of a particular process).

(2) The third-party neutral should not engage in any process or procedure not consented to by the parties (unless required by applicable law or court rule).172

170. The preferred ethical standard in most existing codes is to prohibit contingent fees in the mediation and arbitration area. Standards of Practice for Lawyer Mediators in Family Disputes Standard I § F (Am. Bar Ass'n 1984). That would be a viable alternative here. The current formulation is drafted to reflect known actual practices of very successful mediators who charge contingent fees as an "incentive" to cooperate in settlement and ADR proceedings. The proposed standard would simply require attention to possible conflicts and to disclose to the parties.

171. I offer this section because it is important and because most existing ethical codes for mediators and third-party neutrals have an equivalent section. I expect this section will not be popular with the Reporters because of the vagueness of the terms used and the fact that it expresses a concern about a particular process, instead of imposing duties on a particular lawyer. See Letter from Geoffrey C. Hazard, Jr., Trustee Professor of Law, University of Pennsylvania Law School, Director, American Law Institute, to Elizabeth Plapinger, Vice President and Director, Judicial Project and Ethics Commission, CPR Institute for Dispute Resolution 3 (Apr. 2, 1997) (on file with the author) (expressing concern that "[o]ne should be wary of rules cast in terms of quality of process . . ."). However I urge them to consider this section anyway.

172. In commentary that should accompany such a rule, it should be made clear that what is intended here is to provide the parties to an ADR session with choices. Such choices would include whether mediation is to be facilitative or evaluative, whether caucuses are to be used or not, and what processes the parties want to use in the first place. This may not be possible in situations where processes are mandated, either by contract (through
The third-party neutral should insure that the process is conducted with fairness for all parties and should accord every person who has a legal interest a right to be heard. The third-party neutral should be especially diligent to ensure that parties who are not represented have adequate opportunities to be heard and involved in any ADR proceedings.

Where a settlement or agreement is reached in an ADR proceeding, the third-party neutral should assure that the parties have reached agreement of their own volition and knowingly consent to any settlement. A third-party neutral should not preside over a coerced, non-voluntary agreement. A third-party neutral cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but a third-party neutral should make unrepresented parties aware of the importance of consulting with professionals, where appropriate, to help them make informed decisions.

IV. CONCLUSION

Should these or some amended version of these suggested black letter formulations find support among the Reporters, Advisers, or Members of the American Law Institute, commentary, illustrations, and notes would need to be supplied. I am postponing (would some say "punting or shirking?") such additional drafting at the present time because of my expectation (fear? cynicism? concern?) that the whole subject of the lawyer as neutral, the lawyer-counselor's role as adviser about ADR, and the representative-lawyer's changing adhesion or unrestricted negotiation) or by court rules and requirements. The questions implicated in the fairness and integrity of the process are very controversial at the present time. Legal challenges to court-mandated programs and contractual compulsory arbitration clauses demonstrate this problem. See, e.g., Kimbrough v. Holiday Inn, 478 F. Supp. 566 (E.D. Pa. 1979) (holding that the application of local experimental court rule providing for compulsory non-binding arbitration as a prerequisite to jury trial in certain civil suits for recovery of money damages of $50,000 or less does not violate right to trial by jury guaranteed by Seventh Amendment, equal protection clause, or any federal statutes or the Federal Rules of Civil Procedure); Engalla v. Permanente Medical Group, Inc., 938 P.2d 903, 908 (Cal. 1997) (concluding that there was sufficient evidence to support trial court's finding that operators of health care plan engaged in fraudulent conduct justifying a denial of their petition to enforce mandatory arbitration clause in subscriber contract). Thus the Reporters might conclude that such a matter is too "substantive" or too unsettled for this Restatement. The question of whether there should be separate rules for voluntary and mandatory ADR roles, whether contractual or court-annexed, remains an open one that I do not attempt to address in these proposals.

This language is taken from the Model Code of Judicial Conduct, Model Code of Judicial Conduct Canon 3 § 7 (1990).

The question of what ethical or other obligations third-party neutrals have to unrepresented parties remains a controversial one and is not "legislated" here. Some think that ADR is never appropriate when one party is unrepresented or there are serious power imbalances between the parties. See, e.g., Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545, 1609 (1991) (arguing that California's "legislative choice to make mediation mandatory [in child custody disputes] has been a mistake" because it is even more disempowering to women than the adversary system).

This formulation is derived from MINN. GEN. PRAC. R. 114. The purpose behind such rules is to provide some guidelines and standards of behavior that will inspire public confidence in the integrity of ADR processes and the third-party neutral's role in ensuring these values are realized, especially when some parties are unrepresented.
role as an "advocate" in ADR is too unfamiliar, too new, too unconventional, or too vague to receive serious consideration for this version of the Restatement of the Law Governing Lawyers.

Yet one last time, let me close by suggesting that the Restatement ignores these subjects at its peril. The phenomenal growth of ADR activity among lawyers makes it clear that Appropriate/Alternative Dispute Resolution is here to stay, and its practice by lawyers implicates many ethical and legal duties and responsibilities. I would prefer to see a Restatement of the Law Governing Lawyers that recognized this most satisfying and important role of lawyers — to discourage litigation (or to resolve it) where possible, to help people keep the peace when adversarial battle is not necessary or desirable, and to remind both lawyers and the consumers of their services that lawyers can productively solve problems. Whether as an educative tool for lawyers, judges, law students, or clients, or as a guide for deciding difficult ethical questions, it seems to me the Restatement must say something about the less adversarial role of lawyers. Those roles are currently being practiced, and if the Restatement remains silent, it will be outmoded from the moment it is finally enacted.

176. At the time of this writing, an ADR Superconference, sponsored by the AAA and Forbes, brought hundreds of business lawyers to Washington, D.C., to discuss the uses and strategies of the ADR process in banking, mass torts, construction, employment, commercial, securities, lawyer-lawyer, and other kinds of disputes and transactions. The Supreme Court continues to sustain contractual and statutory arbitration every year against a multiplicity of legal challenges. See, e.g., Doctors Assocs., Inc. v. Casarotto, 116 S. Ct. 1652, 1656-57 (1996) (holding that courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions because Congress preempted such laws when it passed the Federal Arbitration Act); Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 281 (1995) (holding that the language of the Federal Arbitration Act precludes states from enforcing anti-arbitration laws that strike arbitration clauses from contracts with basic terms that otherwise would be deemed fair). Many believe that mediation is fast outstripping arbitration as the ADR method of choice, as it provides greater control over process, choice of decision maker, and flexibility of outcome.