

Northwestern University School of Law
Public Law and Legal Theory Papers

Year 2002

Paper 32

Some Ethical Issues Surrounding Mediation

Robert P. Burns*

*Northwestern University School of Law, r-burns@law.northwestern.edu

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/nwwps-plltp/art32>

Copyright ©2002 by the author.

Some Ethical Issues Surrounding Mediation

Robert P. Burns

Abstract

A progressively larger portion of social ordering occurs through mediation. Lawyers are often involved in mediation. From one perspective, mediation is simply facilitated negotiation. Thus the issues that pervade the ethics of negotiation reappear in the context of mediation without much change. Mediation, however, promises much more than facilitated negotiation. “Transformative mediation”, now widely practiced, aims not primarily at maximizing outcomes, but at the moral transformation of the parties. This form of mediation poses much more fundamental questions about legal ethics and the lawyer’s role. These questions implicate the general morality of legal and political discourse and the interrelationships of the moral, legal, and political spheres.

Northwestern University School of Law

Public Law and Legal Theory Research Paper Series
Research Paper No. 02-5

SOME ETHICAL ISSUES SURROUNDING MEDIATION

Robert P. Burns

Fordham Law Review, Vol. LXX, December 2001

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:

http://ssrn.com/abstract_id=308721

SOME ETHICAL ISSUES SURROUNDING MEDIATION

*Robert P. Burns**

INTRODUCTION

A progressively larger portion of the activity of dispute resolution, of social ordering,¹ occurs through mediation. Mediation is now the preferred method of “alternative dispute resolution,” or, as some of its proponents, seeking to dislodge litigation from its position as the default method of social ordering, like to put it, “*appropriate* dispute resolution.”² Large corporations have embraced mediation as a method that offers the promise of cost savings as well as maintaining the quality of the long-term relationships on which many businesses depend.³ It is almost certainly true, however, that in the majority of mediations, at least one of the participants, if not both, is a person of modest means. Mediation through neighborhood justice centers or community justice centers is available to address disputes among neighbors. The largest employer in the United States sponsors an ambitious mediation program to resolve disputes that arise in the work place.⁴ Prosecutors and courts often refer minor, though often potentially dangerous, criminal or juvenile matters to mediation. Many jurisdictions encourage, or even require, mediation in the half of American marriages that end in divorce. It is increasingly likely that individual Americans will participate in mediation and it is thus increasingly important that lawyers who represent individuals consider seriously the ethical issues that such representation raises.

In this Essay, I first describe the two most important issues in the ethics of negotiation and ask whether mediation conceived as facilitated negotiation changes the appropriate resolution of those

* Professor of Law, Northwestern University School of Law.

1. Lon Fuller, *The Principles of Social Order* 27 (1981).

2. Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 Fla. St. U. L. Rev. 153, 162 (1999).

3. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 Colum. L. Rev. 509, 536 (1994) (providing an economic interpretation of the increasing interest of corporations in alternative dispute resolution).

4. Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 Hofstra Labor & Employment L.J. 375 (2001).

issues. Then I shift to a different question, one raised by mediation's most robust claims, to be a mode of social ordering uniquely capable of making participants better people, of occasioning moral growth. Here I must employ a more philosophical idiom, to explore the terrain surrounding the appropriate place of lawyers in "transformative mediation." I suggest that these very practical questions quickly open out to more basic issues concerning what is and what is not possible within the social structure that we have created for ourselves, a structure in which the moral, political, and legal spheres have relative independence from one another.

I. TWO TRADITIONAL ISSUES IN NEGOTIATION ETHICS

A. *The Question of Truthfulness*

The most important ethical issues surrounding the mediations in which lawyers participate relate to: (1) the appropriate level of candor for the dialogue that occurs during the mediations and (2) the appropriate division of authority between lawyer and client before and during the mediations. These are the very same issues that surround negotiation ethics, though the addition of the mediator changes the context within which they arise.

At one extreme, mediation can simply be facilitated share bargaining. Here the underlying premise of a mediation is that there is a relatively fixed pie to divide and that the mediation is a "zero-sum game." One person's gain is the other person's loss and neither party gains in any way from the other party's "success." The process of the mediation, like share-bargaining negotiation, is employed both to determine whether there is a zone of cooperative success, a so-called bargaining range created by the overlap between the parties bottom lines,⁵ and then to settle as close to the other party's bottom line as possible. The ethical issues surrounding this style of negotiation are all intertwined with obligations of candor or truthfulness; and one can easily see why. Both parties to this kind of negotiation perceive themselves better off settling anywhere in the settlement range created by the overlap between bottom lines than not settling.⁶ But, both parties are conceived as solely self-interested and so each is better off settling at the point in the settlement range that represents precisely the "opponent's" bottom line. From a purely self-interested point of view, each party is best served by the opponent's

5. See, e.g., Robert H. Mnookin et al., *Beyond Winning: Negotiating To Create Value In Deals and Disputes* 18-21 (2000).

6. In the jargon, each party's BATNA (best alternative to a negotiated agreement) is perceived as worse than a negotiated settlement anywhere in the settlement range. See Robert Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In* 97-106 (2d ed. 1991).



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 693

misunderstanding the party's own bottom line, believing that it is identical to his own. So if a plaintiff will settle for \$10,000 and a defendant will offer as much as \$20,000 to avoid further litigation, it is in our purely self-interested plaintiff's interest that the defendant perceive that he will accept no less than \$20,000. For it is still in the interest of the defendant that he settle for \$20,000 rather than go to trial. The process of this sort of negotiation involves "information bargaining" to discover the opponent's bottom line, while convincingly sequencing offers and engaging in other behaviors, of which the negotiation literature offers a full panoply, to convince the opponent that the bottom line is other than where it actually is.

The obvious way to avoid this morally distasteful, if sometimes subtle, dance of deception, or at least misdirection, is simply to be utterly candid about the underlying facts of one's own situation as well as one's bottom line. Indeed, full candor would not involve simply answering questions posed by one's negotiating partner honestly. It would involve volunteering all information that each party would like to know. Such candor would suggest the apparently courteous expedient of splitting the difference between the bottom lines, something that would seem to provide "equal respect" to the participants. Of course, splitting the difference is dependent on a high level of candor from each side, candor that is inconsistent with our assumption of the mutual indifference of the parties and cannot practically be guaranteed by the usual means of incentives and penalties.

Even assuming that such candor could be achieved, the *moral* appeal of splitting the difference is largely illusory. What determines each party's bottom line is his aversion to the best alternative to a negotiated settlement. That aversion may stem from a range of particular circumstances *of which my negotiating partner has no moral right to take advantage*. Assume that I will sell my house for \$100,000 today because I need that money today to make a necessary down payment for needed surgery for my child. I normally would not consider a penny under \$130,000. Assume a buyer is willing to pay \$140,000 since all equivalent houses cost \$145,000. Is it morally right for a buyer to learn of my exigencies and then benefit from them, something that splitting the difference and agreeing to the \$120,000 would implicitly do? I would surely believe that my peculiar needs ought not in any way to determine the price I get from the sale.

The ethical and legal rules that control this sort of negotiation try to balance the ideals of "telling the truth" and "preventing the negotiating partner from taking advantage." Because these are incommensurable values, we have a range of different sorts of rules striking slightly different balances in different jurisdictions. The continuum of candor here runs from:

(1) complete candor, including disclosure of the negotiator's bottom line and his analysis of his Best Alternative To a Negotiated Agreement; to

(2) full disclosure of all interests, wants, needs, and negotiating vulnerabilities; to

(3) full disclosure of all the facts of the situation, of which the negotiator is fairly certain his negotiating partner is unaware and of which that partner is likely to be interested; to

(4) disclosure only of those interests and needs where the possibility of collaborative bargaining to achieve a "bigger pie" outweighs the dangers of being "taken advantage of"; to

(5) answering specific questions about issues of fact candidly and fully, but not volunteering information as in (3); to

(6) seeking to avoid answering specific questions of fact, which reveal needs and desires ("blocking"), but refusing to make a false statement of material fact; to

(7) failing to correct the opponent's misunderstandings of fact or law that favor one's position, while remaining scrupulous about not affirming or endorsing the misunderstanding; to

(8) actively misleading the opponent as to one's bottom line and one's eagerness to settle by (a) false statements about such "immaterial" facts and (b) other negotiating behaviors, such as the sequencing and timing of offers; to

(9) active misrepresentations as to fact and law that are likely to result in settling closer to one's opponent's bottom line.

Although there exist in some jurisdictions authority that the line is drawn in a more demanding way in specific contexts,⁷ current norms forbid clearly only the last and do not require any of the more candid behaviors described in numbers (1) to (5).

A good deal of the "technique" of negotiation as it is generally taught in law schools and in professional education programs involves "information bargaining" designed to reveal as much as possible about the opponent's situation and positions. This involves asking direct questions and listening carefully to the answer or for "blocking"⁸ attempts that often reveal that a negotiator feels morally

7. Specifically there are a few cases where lawyers have been disciplined for failing to disclose particularly significant facts in negotiation. *See, e.g.*, Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578 (Ky. 1997) (unethical for lawyer to settle case without disclosing client's death to opponent); ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (same); State *ex rel.* Nebraska State Bar Ass'n v. Addison, 412 N.W. 2d 855 (Neb. 1987) (finding that lawyer negotiating with hospital on client's behalf had an obligation to inform hospital of insurance that was a potential source of payment). It is very difficult to identify the principle that emerges from these cases, though they certainly set the norm for specific factual contexts in the relevant jurisdiction.

8. The relative ineffectiveness of "blocking" that is not supplemented by actively misleading the negotiating partner is one of the reasons that negotiators subjectively



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 695

constrained not to lie but does not want to reveal what the opponent can then assume to be an answer that suggests a more favorable bottom line. Of course, more skeptical negotiators do not assume that their opponents feel constrained even by the minimal norm expressed by number (9), and will be alert to determine whether or not that opponent is willing to lie outright about matters of fact.

The current lawyer codes strike the following balance along this continuum.⁹ There is generally no requirement that a lawyer inform a negotiating partner of any fact,¹⁰ however clear it is that the negotiator would want to know that fact, would profit from knowing it, or suffers from major misunderstanding of that fact. In that sense, they are wholly coherent with the share bargaining style of negotiating described above. Current rules impose some limits on a purely strategic style by prohibiting “false statement[s] of material fact or law”¹¹ to opponents. Practically, that limits strategic misdirection solely to “agenda setting” that avoids whole areas that contain factual material of which the negotiator seeks to avoid discussion and “blocking” of specific inquiries. Both these “techniques” are to some extent learnable, though their effective use seems largely a matter of the force of personality of the negotiator.

The complexity and ambiguity of the authoritative interpretations of the Rule shows the depth of the tensions among the competing moral considerations here. The Comment to Model Rule 4.1 provides some consolation to the hard bargainer: “A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.”¹² The exception to the exception, however, can create situations that call for extraordinarily, if not impossibly, refined judgments: “A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.”¹³ The Comment to the Ethics 2000 Commission version of Comment 1 to Rule 4.1 drops the extremely unhelpful last phrase “failure to act,” but substitutes language that may not be more helpful in resolving individual cases: “Misrepresentations can also occur by . . . partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”¹⁴

feel that it is almost “unfair” to impose the relatively undemanding current standard of truthfulness in arms-length negotiations.

9. The literature on this question is already quite large. For useful analyses, see Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation*, 75 Iowa L. Rev. 1219 (1990) and Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 Ohio St. L.J. 1 (1987).

10. Model Rules of Prof'l Conduct R. 4.1 cmt. 1 (1999) .

11. R. 4.1(a).

12. R. 4.1 cmt. 1.

13. *Id.*

14. ABA Ethics 2000 Comm., Proposed R. 4.1 cmt. 1, at <http://www.abanet.org/>



The Comment to the current version of the Model Rules goes on to incorporate language that has caused a fair degree of consternation:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.¹⁵

Other than the examples provided by the Comment, there seems to be one other major category of statements that would be outside the confines of "material fact," namely the willingness of a client to go to trial rather than reach a settlement. Assume, for example, an observant Christian whose child has been injured in an automobile accident and who believes that actually going to trial is inconsistent with his religious beliefs. Assume on the other side of this dispute a publicly held insurance company with a highly rationalized internal structure which takes a purely instrumental maximizing attitude toward its claims adjustment, justified in their minds by their legally defined first obligation toward their stockholders. I believe that most lawyers would take the view that the client's attitude toward settlement is not a "material fact" as to which the opponent is entitled to truthfulness.

Thus, one of the reasons that the ABA and the states that have enacted versions of Rule 4.1 have been so minimalist in imposing obligations of truthfulness is the moral ambiguity of truthfulness as an ideal in the context of share bargaining. A second reason is the difficulty in enforcing a rigorous rule and the strategic benefit to be derived by all of those likely to be privy to the knowledge that a lawyer has not been candid, namely that "community of two," lawyer and client. Liberal law is limited practically by its ability to actually create the incentives that achieve a high level of conformity. It is true that cloaking a norm with the authority of law will likely increase the level of conformity to that norm. But especially in competitive contexts where information about violations is hard to come by, law may be strictly limited in what it can accomplish. My own experience suggests that lawyers find it extremely difficult to even conform to the limited obligations that the current rules impose. Absent a sea change in lawyers' sensibilities in these matters—one that powerful trends in law practice make less, not more, likely—and even putting aside the moral ambiguity of absolute candor in all negotiation situations,

cpr/e2k-rule41.html.

15. R. 4.1 cmt. 2.



raising the bar on candor may well confirm an additional advantage on those least deserving of it.¹⁶

This extremely strategic attitude toward truth-telling, doling out bits of information often out of context, may get in the way of “problem solving” or “integrative” styles of negotiation and the “broad facilitative” style of mediation that parallel it. Problem solving is normally thought to require a higher level of candor between negotiating partners. This is because a key aspect of the problem-solving enterprise is to separate positions taken for the kinds of strategic reasons just described from the underlying interests or “needs” that animate the parties. Purely positional bargaining may blind both parties to the negotiation of possibilities for collaboration (ways that “enlarge the pie” for distribution). To give an extreme example, one of the classic strategic ploys is “br’er rabbit,” where the negotiator insists that one outcome (that he secretly desires above all) is the most disfavored of all outcomes. If the opponent wants him to submit to *that* outcome, the opponent is going to have to pay a very high price indeed. From a problem-solving point of view, however, the use of such a ploy may well prevent the negotiating partner from proposing alternatives that provide even more of the secretly desired alternative.

Problem-solving negotiation is often a strategic choice. Indeed the fundamental ethical ambiguity of *Getting to Yes* and its considerable progeny is the spirit within which a negotiator chooses the principle that should control the so-called principled negotiation that is thought more appropriate for problem solving. There is no consideration offered in that book that makes the choice of principle anything other than strategic. In the classic negotiation between roommates who are a trumpeter and a flutist about the rules that should control their common life, the trumpeter’s advocacy of “individual freedom to play whenever we want” can be no less self-interested for being fully principled.

B. *The Question of Client Authority*

The other set of ethical issues that surround negotiation have to do with the fostering of client autonomy. Specifically, they involve the

16. The Comment to Rule 4.1 in the Ethics 2000 Commission’s version adds the following sentence: “Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.” ABA Ethics 2000 Comm., *supra* note 14, Proposed R. 4.1 cmt. 2. The last phrase should remind the lawyer that his obligations of truthfulness are not exhausted by the ethical rules that control negotiation, but may be controlled by the laws of tort and fraud. Furthermore, since certain kinds of misrepresentations, or even failures to disclose, may prevent the meeting of the minds required for a binding contract, including the contract embedded in the consensual settlement of a case, a lawyer may be guilty of malpractice by a failure of candor that provides the basis for avoiding the agreement.



interpretation of Model Rule 1.2, which provides that “[a] lawyer shall abide by a client’s decision concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.”¹⁷ The Rule provides explicitly that a lawyer “shall abide by a client’s decision whether to accept an offer of

17. R. 1.2(a). The Ethics 2000 recommendations change the relevant language to read “[A] lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” ABA Ethics 2000 Comm., Proposed R. 1.2(a), *at*, <http://www.abanet.org/cpr/e2k-rule12.html>. The Ethics 2000 recommendations would also somewhat expand Rule 1.4, which mandates reasonable communication with the client, to require that a lawyer “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” ABA Ethics 2000 Comm., Proposed R. 1.4(a)(2), *at* <http://www.abanet.org/cpr/e2k-rule14.html>. Though the change seems insignificant, at least one commentator has worried that moving the provision to a Rule that addresses communication (Rule 1.4), rather than the division of authority (Rule 1.2), may expand the lawyer’s discretion as to the choice of means. Robert F. Cochran, Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 *Fordham Urb. L.J.* 895, 908 (2001). The Comment to the new Rule 1.4 provides as follows:

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client’s objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of action the lawyer has taken on the client’s behalf.

ABA Ethics 2000 Comm., Proposed R. 1.4 cmt. 3, *at* <http://www.abanet.org/cpr/e2k-rule14.html>.

The current Model Rules provide a demanding definition of consultation: “‘Consult’ or ‘consultation’ denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” *Model Rules of Prof’l Responsibility, Terminology*. The Ethics 2000 recommendations do not define consultation. In the new scheme of the Ethics 2000 recommendations, it is significant that a lawyer’s choice of means do not require what is a defined term, “informed consent.” (“‘Informed consent’ denotes the agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” ABA Ethics 2000 Comm., Proposed R. 1.0(e), *at* <http://www.abanet.org/cpr/e2k-rule10.html>). Nor does the Comment to either Rule 1.2 or 1.4 in the recommendations contain the following language now contained in the Comment to Rule 1.2:

A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

R. 1.2 cmt. 1.

The new ALI Law Governing Lawyers is clearer that the client holds ultimate authority with regard to means. Restatement (Third) of the Law Governing Lawyers § 21(2) (2000).



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 699

settlement of a matter.”¹⁸ This provision includes as an obvious corollary a requirement that a lawyer convey to the client any offer concerning which the lawyer does not already have clear authority to accept or reject.

Two sorts of difficulties arise in the application of this rule. The first has to do with the choice in negotiating strategy itself. Is the decision to pursue a hard positional bargaining strategy or an integrative or problem-solving approach a choice of means or a choice of the goals of the representation? It seems that it could be either.¹⁹ If the client’s goals in the representation are solely extrinsic to the process—maximizing recovery in a tort claim—it would seem that choice of negotiating style would be a means. If the client includes maintaining cordial relations with the opposing party as a goal of the representation, it would *still* seem that the choice of negotiating strategy is a means rather than an end, though here the choice of an integrative strategy might be the only competent²⁰ one. One could, however, envision a client who saw it as a *goal* of the representation to communicate with the negotiating party in a candid and non-manipulative manner, even if that surrendered some tactical advantages. Such a client would consider integrative bargaining to be a matter of ethics, not of strategy. In a Kantian idiom, he might say not that honesty is the best policy, but that honesty is better than any policy. For such a client, negotiating in a certain manner could well become a goal of the representation on which, according to the casuistry suggested by Rule 1.2, the client holds ultimate authority.²¹ We will return to this subject when I consider the promise of certain forms of mediation to be intrinsically superior to adversary forms of dispute resolution and the role that a lawyer might have in mediation so conceived.²²

The second set of problems surrounding the application of the rule are practical. In lawyer-to-lawyer negotiation, the attorneys face a shifting set of proposals in an indeterminate relationship to each other. Often one’s opponent²³ is offering trade-offs between possibilities, each precise combination cannot easily be anticipated and the movement from one to the other may be fluid. Withdrawal

18. R. 1.2(a).

19. The Comment to Rule 1.2 notes that the distinction between ends and means is at best provisional and sometimes decidedly unhelpful. R. 1.2 cmt. 1.

20. R. 1.1 (noting that a lawyer shall provide competent representation).

21. Of course, if the lawyer regards such a course of action “repugnant or imprudent,” the lawyer would traditionally have the right to withdraw. R. 1.16(b)(3). I would hope that few lawyers would consider integrative bargaining to be *repugnant*, though I would imagine some would think it imprudent in one or another set of circumstances.

22. *See infra* Part III.

23. I use this term here with full knowledge that it is problematic. For an integrative negotiator, the negotiating partner should not be conceived as an “opponent.”

from the negotiation to consult with the client every time a slight modification is tentatively proposed may be impractical and, from a purely strategic point of view, may reveal aspects of the client's position that ought to be withheld. I do not think there is any easy answer to this practical problem, though its force can be blunted by good initial client interviewing and a firm sense of the priorities among the client's goals.

The second difficulty in the application of the rule requiring client control of the goals of representation in negotiation is more a problem in the lawyer's moral psychology.²⁴ In lawyer-to-lawyer negotiation the attorney largely controls the pattern of offers from the opponent and completely controls the flow of information to the client. The client is dependent on the lawyer's reporting of the opponent's factual assertions and the offers made. More importantly, the client is dependent upon his lawyer's *judgment* about what resolutions are feasible and when the opponent has reached his resistance point. When a lawyer says to his or her client, this point is "non-negotiable" or "they will not budge on this," it is likely that the client will follow his lead. Finally, the ethical rules all but prevent a lawyer from contacting a represented opposing party when he or she believes that offers (and, *a fortiori*, information) are not being conveyed to that party by his or her lawyer.²⁵

The client is thus highly dependent upon the lawyer's honesty—primarily with himself²⁶—about what he is saying to his client and what he is doing in the negotiation. And there are strong motives to be less than candid with oneself. Often a lawyer will honestly believe that his client is not acting in her own best interests, that she is too willing to settle on unfavorable terms in a divorce, perhaps, simply to avoid even the threat of a trial that the lawyer believes is extremely remote. The temptation to resort to the paternalistic manipulation of information here can be great. Second, every fee structure will create some potential conflict of interest²⁷ between client and lawyer. This is true whether the lawyer is charging a flat fee, an hourly fee, or a

24. Several of the essays in *The Good Lawyer: Lawyer's Roles and Lawyers' Ethics* (David Luban ed., 1983), address the importance of considering a lawyer's dispositions and moral psychology.

25. The Model Rules do not absolutely prohibit client-to-client contact under these circumstances but there is a risk here that a lawyer will be accused of orchestrating an improper end-run around the lawyer representing the opposing party. *See, e.g., Trumbull County Bar Ass'n v. Makridis*, 671 N.E.2d 31 (Ohio 1996).

26. On self-deception as a particularly deadly sin, see Hannah Arendt, *Between Past and Future* 227, 254 (1968).

27. The phrase "conflict of interest" is not exactly apposite here. For the lawyer's obligation is not to pursue his or her client's "interests," as the lawyer perceives them, but his client's stated goals in the representation. A good lawyer will surely try to ensure, through the counseling process, that the client's genuine interests are considered, but the client's goals, not his interests, should be the standard of the legal representation.



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 701

contingent fee. In each case, it is a matter of purely contingent fact that the lawyer's financial self-interest will be exactly congruent with his client's goals in the representation. Only the lawyer's sense of professional obligation—his or her “purity of heart”—can assure that it is the client's goals that are being advanced.²⁸

II. THE IRRELEVANCE OF MOST FORMS OF MEDIATION TO THE LAWYER'S OBLIGATIONS

Broadly speaking mediation is the practice through which a third party engages in a conversation seeking resolution of a situation that the parties find problematic. This description has to be so generic because the forms of mediation and the styles of mediation have become so diverse. Though I cannot provide even the barest outline of the varying goals and methods of mediation, some description may be helpful as a background for a discussion of specific ethical issues that arise in this context and for my concluding discussion of the particularly interesting ethical issues surrounding one form of mediation: so-called “transformative mediation.”

The primary organization of dispute resolution professionals in the United States has described alternative dispute resolution's “*conflicting values and goals, including:*

1. increased disputant participation and control of the process and outcome;
2. restoration of relationships;
3. increased efficiency of the judicial system and lowered costs;
4. preservation of social order and stability;
5. maximization of joint gains;
6. fair process;
7. fair and stable outcomes; and
8. social justice.”²⁹

Given that range of possible goals, it should come as no surprise that mediators employ a broad range of methods, some of which are

28. We try to dramatize both threats to the client's autonomy in a simulated negotiation exercise in Robert P. Burns et al., *Exercises and Problems in Professional Responsibility* 35-36 (2d ed. 2001).

29. Ensuring Competence and Quality in Dispute Resolution Practice, Report 2 of the SPIDR Commission on Qualifications 5 [Soc'y of Prof'ls in Dispute Resolution] (1995) (emphasis added), *quoted in* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 17 n.34 (1996).



inconsistent with those possible goals that a particular mediator (1) does not recognize as legitimate or important, (2) does not think appropriate for the particular dispute,³⁰ or (3) must subordinate to other goals placed higher on the mediator's hierarchy of values.

The most prominent divide between mediator styles is between so-called facilitative mediation and evaluative mediation.³¹ In facilitative mediation, the mediator takes a purely maieutic role, striving to be the midwife of solutions that the parties themselves propose.³² In evaluative mediation, a mediator is willing to offer his own solutions, to offer his own judgments about the workability or wisdom of the solutions proposed by the parties, or, at the extreme, to offer what seems to the mediator to be the best resolution of the problematic situation.³³ Facilitative mediators place mediator "neutrality" high on their hierarchy of values and so are more willing to aid in the identification of solutions that are attractive to the parties, but about which they may have serious doubts, especially on fairness grounds.³⁴ Two problems beset facilitative mediators: (1) the problem of power and information imbalances between the parties which may lead to unfair agreements and (2) the practical elusiveness of true or complete neutrality in the conduct of the mediation. By contrast, evaluative mediators struggle with questions about the sources of their authority to "impose" their own values on the participants, especially because the parties usually do not give informed consent for evaluative mediation.³⁵ If the evaluative mediator in a litigated or potentially litigated case offers his judgment of the appropriate terms of the settlement based on his own estimates of the likely outcome at trial, he faces empirical questions about his predictive capacities. The latter is especially problematic in those cases where the parties are

30. The question of the particular kinds of problematic situations appropriate for mediation has been one of the most fundamental questions in the field. The seminal work remains Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305 (1971); see also Robert P. Burns, *The Appropriateness of Mediation: A Case Study and Reflection on Fuller and Fiss*, 4 Ohio St. J. on Disp. Resol. 129 (1989).

31. See, e.g., James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 Fla. St. U. L. Rev. 919 (1997); Riskin, *supra* note 29.

32. Riskin, *supra* note 29, at 24.

33. *Id.* at 23-24.

34. It seems that facilitative mediators have fewer qualms about exploring the workability or practicality of the solutions offered by the parties than they do about addressing its fairness.

35. "'Informed consent' denotes the agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." ABA Ethics 2000 Comm., Proposed R. 1.0(e), at <http://www.abanet.org/cpr/e2k-rule10.html>. The discussions among proponents of mediation can become quite polemic. See, e.g., Kimberlee K. Kovach & Lela P. Love, "Evaluative" *Mediation Is an Oxymoron*, 14 *Alternatives to High Cost Litig.* 31 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. L. Rev. 937 (1997).



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 703

attempting to take full advantage of mediation by resorting to it early in the case before formal discovery is complete.³⁶ The disagreements among mediators as to the appropriate style of mediation can be intense.³⁷

Insofar as mediation is facilitated negotiation, the parties may adopt either of the negotiating styles already described in the course of a mediation. Indeed, some of the strongest proponents of mediation as a method of dispute resolution have recently expressed their dismay at the appearance of all the ploys and methods of distributive bargaining in the context of mediation.³⁸ For there are many reasons why a lawyer who is intent upon engaging in hard bargaining of the chilliest sort may still opt for mediation. A mediator, through the effective use of caucuses (separate meetings with individual parties), may diffuse the interpersonal hostility that may cause one or more parties to act “irrationally,” that is, to refuse to settle even though settlement may be in their interest. Even if the parties have no interest in integrative bargaining, a mediator who speaks to each side separately under protections of confidentiality may notice opportunities for “enlarging the pie” to which the parties were oblivious. Sometimes a lawyer may correctly believe that his opponent overestimates the value of his case, measured by likely outcomes if the case goes to trial, and the likelihood a settlement will be enhanced by the mediator’s “reality testing,” that is, providing his evaluation of the case or even asking probing questions of the opponent. Sometimes a lawyer may believe that the lawyer with whom he may negotiate lacks the credibility with his own client to counsel that client to accept a resolution that really is in the client’s interest. And sometimes a lawyer may admit to lacking a similar credibility with his own client. So it is surely possible that a lawyer convinced of the wisdom of a hard bargaining style will still opt for mediation. Perhaps more significantly, given the prevalence of mandatory mediation in a large number of court systems, a share bargainer by choice or instinct may find himself in a mediation he or she did not choose.

One author, himself an extremely reflective mediator of deep experience, has summarized the essential practices in which a good mediator engages:

36. See James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under The Civil Justice Reform Act 44 (1996)* (describing the problems that arise from referrals to mediation too early in a case).

37. Professor Riskin notes as well that mediators (or mediation programs) may choose to define the problem either “broadly” or “narrowly.” Thus, there are four quadrants on his mediation grid: Evaluative-Narrow, Facilitative-Narrow, Evaluative-Broad, and Facilitative-Broad. Riskin, *supra* note 29, at 25.

38. See *infra* note 50 and accompanying text.



Stated simply, the mediator has three basic strategies that operate in a continuing iterative cycle during the course of a mediation: gathering information, interpretation and diagnosis, and encouraging movement. In carrying out the first two strategies the mediator uses active listening and intuitive and rational thinking skills. For those two strategies to be effective, the parties must share with the mediator as much relevant information as possible regarding the source and status of the dispute and suggested proposals for resolution. In carrying out the third strategy—the movement strategy—the mediator typically uses a variety of tactics that may be categorized under three headings: communication, substantive, and procedural.³⁹

Even without a fuller description of the methods of a good mediator,⁴⁰ one can see how the very same issues of candor that arise in negotiation inevitably arise in mediation. Indeed, Cooley counsels an advocate to listen carefully to what a mediator says about his negotiating partner's beliefs and positions to discern telling verbal clues of those beliefs and positions that his partner would prefer to hide.⁴¹ He counsels as well that an effective advocate in mediation should begin with a high reasonable offer supported by reasons, move off that initial offer only with several supporting reasons, "hold back some information favorable to you or unfavorable to the opposing side until the final caucuses,"⁴² and be careful not to reveal one's bottom line to the mediator early in the mediation.⁴³ In other words, the very same methods of positional bargaining, strategically "principled"⁴⁴ negotiation, and information bargaining that a share bargainer might use with an opponent, can effectively be used with a mediator.

The narrow ethical issue this raises is the level of candor which a lawyer owes to a mediator. The mediator is surely entitled to that degree of candor required by Rule 4.1. But, the latter is heavily qualified in the ways we have discussed above. The remaining question is whether the mediator is entitled to a higher level of candor—specifically, whether a mediator is entitled to the protection of Rule 3.3, which provides in relevant part:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

39. John W. Cooley, *Mediation Advocacy* 114 (1996).

40. *Id.* at 117-19 (discussing strategies for effective mediation).

41. *Id.* at 118.

42. *Id.* at 121.

43. *Id.* at 116-23.

44. "Principled" in the sense advanced by Fisher and Ury: the use of a potentially strategically chosen principle to slow the movement off a position. Fisher et al., *supra* note 6, at 10-14.



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 705

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

...

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.⁴⁵

The Model Rules do not provide a definition of a “tribunal.” The Ethics 2000 recommendations remedy this omission in a way that is, I think, consistent with the current rules:

RULE 1.0: TERMINOLOGY

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.⁴⁶

It is clear that mediation would not fall under this definition of “tribunal.” Indeed, it almost seems that the definition has been written carefully to exclude mediation from its scope.⁴⁷ It appears then, that the same ethical obligations concerning candor that apply when negotiating with an “opposing party” apply to statements to the mediator. Although the case could be made that a party owes a higher level of candor particularly to an “evaluative” mediator than to an opposing party, I know of no authority so holding.

Does positional or integrative negotiation within the context of mediation change the ethical terrain concerning a lawyer’s obligation to defer to the client’s setting of goals for the representation and consulting on means?⁴⁸ I think not, though the participation of the

45. Model Rules of Prof’l Responsibility R. 3.3 (1999).

46. ABA Ethics 2000 Comm., Proposed R. 1.0(m), at <http://www.abanet.org/cpr/e2k-rule10.html>.

47. The Annotated Model Rules of Prof’l Conduct note that:

Although the term ‘tribunal’ is not defined in the Terminology section of the Rules, or in Rule 3.3 or its Comment, the context in which the term is used in the Rules makes clear that ‘tribunal’ refers to a trial-type proceeding in which witnesses are questioned, evidence is presented, the parties and their counsel participate fully, and the decision is rendered by a fact finder. *Cf.* ABA Comm. On Ethics and Professional Responsibility, Op. 93-375 (1993) (noting that disclosure provisions of Rule 3.3 do not apply to nonadjudicative proceedings, such as routine examinations by bank regulatory agency).

Ctr. on Prof’l Responsibility, Annotated Model Rules Of Prof’l Conduct 316 (4th ed. 1999)

48. Shortly, I will argue that a different form of mediation, transformative mediation or mediation as moral dialogue, raises more basic questions of legal ethics.



client in most forms of mediation may well reduce, though not eliminate, the dangers implicit in the lawyer's control of the flow of dialogue in negotiation and in the dependence of the client on the lawyer for information about the settlement process. Otherwise the issues surrounding client authority in the process of mediation remain much the same.⁴⁹

III. BASIC LAWYERING STYLES AND THE PROMISE OF MEDIATION

Many of those writers most dismayed⁵⁰ at the transplantation of the tools of hard bargaining into the world of mediation have urged that the genius of mediation is its ability to enhance integrative or problem-solving approaches to dispute resolution. And much of the proposed attraction of mediation for some of its proponents is the possibility it offers to transform lawyers from hired guns to "problem-solvers" who "add value" to transactions and disputes by integrative methods.⁵¹ This style of mediation is not fundamentally different from

See supra notes 52-56 and accompanying text.

49. There has been some discussion of whether a lawyer is obliged to present the possibility of mediation to a client who would otherwise pursue litigation (or negotiation) and then defer to the client's decision. The most complete treatment concludes that current Rules would have to change in order to impose such an obligation, a change that the author urges. *See Cochran, supra* note 17, at 897; *but see Va. Code Ann. R. pt. 6 § II, R. 1.2 cmt. 1* (Michie 2001). The Virginia Comment adds the following sentence to the Comment in the Model Rules: "In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives." Cochran, *supra* note 17, at 902-03 (quoting Va. Code Ann. R. pt. 6 § II, R. 1.2 cmt. 1).

50. A federal magistrate judge, Wayne Brazil, has described the following range of behaviors among lawyers participating in court-annexed mediation:

[P]ressing arguments known or suspected to specious, concealing significant information, obscuring weaknesses, attempting to divert the attention of other parties away from the main analytical or evidentiary chance, misleading others about the existence or persuasive power of evidence not yet formally presented (e.g., projected testimony from percipient or expert witnesses), resisting well-made suggestions, intentionally injecting hostility or friction into the process, remaining rigidly attached to positions not sincerely held, delaying other parties' access to information, or needlessly protracting the proceedings—simply to gain time, or to wear down the other parties or to increase their cost burdens.

Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts*, 2000 J. Disp. Resol. 11, 29 (2000), quoted in Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 Fordham Urb. L.J. 935, 945 (2001). Judge Brazil has also described the appearance of courses like "How to Win in ADR" and "Successful Advocacy Strategies for Mediations." *Id.* Carrie Menkel-Meadow recounts the story of one lawyer who threatened a potential opponent, "I am filing an ADR *against* you!" 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 n.1 (1997).

51. *See, e.g., Robert H. Mnookin et al., Beyond Winning: Negotiating to Create Value In Deals and Disputes* (2000).

2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 707

integrative bargaining, though it may well profit from the presence of an imaginative and perceptive mediator who knows how to enhance the communication between the parties. Once again, problem-solvers can be strategic and self-interested, though it is an enlightened self-interest to which they appeal.⁵² This is not in any way to denigrate the importance of a fully competent attorney's understanding of the situational advantages of the problem-solving style.

To my mind, however, the most challenging set of ethical questions surrounding lawyers' participation in mediation concerns the possibility and extent of a lawyer's participation in so-called transformative mediation. I have concluded above that the specific ethical issues that surround mediation as facilitated arms-length negotiation are really no different from those that surround such negotiation engaged in without a mediator's intervention. Nor is the ethical terrain surrounding mediation any different when it occurs in the so-called "problem-solving mode" that takes place for the usually assumed self-interested reasons.

It is the existence of so called "transformative mediation" that poses the greatest challenge to the American lawyer's "standard philosophical map."⁵³ I will argue below that such mediation is discontinuous with the ways in which American lawyers generally conceive of their roles and counsel their clients.⁵⁴ By contrast, transformative mediation is strangely coherent with a style of lawyering that Professor Thomas Schaffer has described eloquently and at some length and calls "moral discourse."⁵⁵ That style of lawyering and transformative mediation are both attempts to transcend a kind of instrumental rationality dominant in many spheres of American life. It is that style that proponents of transformational mediation and proponents of lawyering as moral discourse see as preventing the realization of basic human good; they prevent the realization of moral sources.⁵⁶ I will argue that the dominant style of legal counseling makes it very difficult for a client to realize the benefits of transformative mediation. On the other hand, the style of lawyering that Shaffer urges makes it very easy to realize those benefits. The challenge for such a lawyering style is to protect a client against its dangers.

52. See *Blanton v. Womancare, Inc.*, 696 P.2d 645, 656 (Cal. 1985) (Bird, J., concurring) ("An attorney should explain to the client the *strategic* considerations that determine whether a jury trial or some other form of dispute resolution should be utilized." (emphasis added)), *quoted in* Cochran, *supra* note 17, at 912.

53. Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29, 43-48, 57-59 (1982).

54. See *infra* notes 80-84.

55. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 113-34 (1994).

56. On the concept of a moral source, see Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (1989).



Those who speak of the “genius of mediation” or the “magic of mediation” or, in the words of the seminal work on the subject,⁵⁷ “the promise of mediation,” are often speaking of so-called “transformative mediation.” The twin goals of transformative mediation are mutual recognition and empowerment. The authors who use this term are trying to capture something of the experience of moral destiny that occurs during mediation, the felt certainty that the parties are moving beyond their day-to-day selves in the course of the process and realizing aspects of their respective selves that usually remain dormant. Put simply, many mediators and authors are convinced that this kind of mediation regularly makes the participants better people.⁵⁸

There have been different and quite varying attempts to provide a philosophical explanation or justification for this kind of mediation. One can be skeptical about any one explanation while remaining sympathetic to the basic perception that something extraordinary, something substantial,⁵⁹ occurs in the course of some mediations. And, in fact, the limited or partial capacity of any one explanation may well be an indication of the richness of what can occur. One author invokes Girard’s notion of the creation of a sacred space cleared by individuals’ witnessing of the mutual victimization of each party and becoming consciously identified with the universal norms violated in that kind of victimization.⁶⁰ Other authors find this perceived richness in its felt congruence with a kind of post-modern “relational” society toward which we are groping and which is neither an individualist liberal society nor a pre-modern organic society.⁶¹

A simpler and more traditional explanation is that “transformational” mediation is itself a form of distinctively moral discourse. Moral discourse may always have been out of the ordinary, because most people have always related to each other in more primitive or instrumental ways. Or there may be something to Alasdair MacIntyre’s view that modern market societies are so woven with instrumental rationality that we barely remember the moral point of view and the modes of moral conversation.⁶²

57. Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* 81-112 (1994).

58. This is precisely the claim Shaffer makes for the form of client counseling that he endorses. See *supra* note 55 and accompanying text.

59. The word invokes Hegel’s notion of “ethical substance,” the norms that are already realized and embedded in the institutions and practices of a society. See Charles Taylor, *Hegel* 365-88 (1975).

60. See Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 *Fordham Urb. L.J.* 1017, 1022 (2001).

61. Bush & Folger, *supra* note 57, at 244.

62. MacIntyre has described the difference between a characteristically twentieth-century understanding of the moral world and traditional understandings this way:

[E]motivism entails the obliteration of any genuine distinction between manipulative and non-manipulative social relations. Consider the contrast



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 709

The center of gravity of authentically moral discourse is the conversation between an agent and one who is actually or potentially adversely affected by his actions.⁶³ Moral conversation places actions into a traditional moral vocabulary that is enormously rich and which willy-nilly forms an important part of the identity of the speakers.⁶⁴ That vocabulary allows for a range of verbal actions: denials, justifications, and excuses among them. Moral conversation provides a way of

healing tears in the fabric of relationship and of maintaining the self in opposition to itself or others. . . . [I]t provides a door through which someone, alienated or in danger of alienation from another through his action, can return by the offering and the acceptance of explanation, excuses and justifications, or by the respect one human being will show another who sees and can accept the responsibility for a position which he himself would not adopt.⁶⁵

Moral conversation need not actually achieve agreement, though the possibility of agreement animates the enterprise. “The point of moral argument is not agreement on a conclusion, but successful [not strategic] clarification of two people’s positions.”⁶⁶

Its function is to make the positions of the various protagonists clear—to themselves and to the others. Moral discourse is about what was done, how it is to be understood and assessed, what

between, for example, Kantian ethics and emotivism on this point. For Kant—and a parallel point could be made about many earlier moral philosophers—the difference between a human relationship uninformed by morality and one so informed is precisely the difference between one in which each person treats the other primarily as means to his or her ends and one in which each treats the other as an end. To treat someone else as an end is to offer them what I take to be good reasons for acting in one way rather than another, but to leave it to them to evaluate those reasons. It is to be unwilling to influence another except by reasons which that other he or she judges to be good. It is to appeal to impersonal criteria of the validity of which each rational agent must be his or her own judge. By contrast, to treat someone else as a means is to seek to make him or her an instrument of my purposes by adducing whatever influences or consideration will in fact be effective in this or that occasion. The generalisations of the sociology and psychology of persuasion are what I shall need to guide me, not the standards of a normative rationality.

Alasdair Macintyre, *After Virtue* 22-23 (1981).

63. Hanna Pitkin, *Wittgenstein and Justice* 150 (1972).

64. As John Austin put it in a famous essay:

[O]ur common stock of words embodies all the distinctions men have found worth drawing, an all the connexions [sic] they have found worth making, in the life time of many generations: these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any that you or I are likely to think up in our armchairs of an afternoon—the most favored alternative method.

John Austin, *A Plea for Excuses*, 57 *Proc. of the Aristotelian Soc’y* 1, 8 (1956).

65. Pitkin, *supra* note 63, at 151-52.

66. *Id.* at 153.



position each is taking toward it and thereby toward the other, and hence what each is like and what their future relations will be like. The hope, of course, is for reconciliation, but the test of validity in moral discourse will not be reconciliation but truthful revelation of self. . . .

Moral discourse is useful, is necessary, because the truths it can reveal are by no means obvious. Our responsibilities, the extensions of our cares and commitments, and the implications of our conduct, are not obvious . . . the self is not obvious to the self.⁶⁷

We have other important ways of speaking on matters of moment.⁶⁸ Moral conversation has a different tone and characteristics than do other important forms of conversation in which we engage and which are constitutive of important forms of life that we regard as legitimate. Most significantly, it is unlike forms of political dialogue and legal discourse.

There are two competing understandings of what constitutes “political” discourse. I use “political” here in the ordinary language sense in that many different institutions, private and public, have their “politics.”⁶⁹ The perhaps dominant interest group, liberal⁷⁰ understanding of politics, conceives it as “a tale of dominance and power, in which political institutions serve to protect the interests and property of some men against the rest; or a tale of mutual accommodation among essentially separate, private individuals or groups, each with its own needs or interests, its own claims against the others.”⁷¹ Within that understanding, speech in political contexts will tend to be manipulative rhetoric, guided by the psychology of persuasion, much as share bargaining conceives of negotiation. There is a competing republican or deliberative understanding of political speech, where deliberation is “neither just manipulative propaganda, *nor just a moral concern with the cares and commitments of another person*, but something like an addressing of diverse others in terms which relate their separate, plural interests to their common enterprise, to a shared, public interest.”⁷² But, this too, is discontinuous with moral conversation.

Nor, of course, is legal discourse identical with moral conversation in Pitkin’s distinctive sense. Legal discourse is at least in part

67. *Id.* at 153-54.

68. In a previous article, Burns, *supra* note 30, I tried to demonstrate concretely the ways in which the parties to a mediation may move in and out of the different linguistic realms that correspond to different spheres of human interaction, specifically the moral, legal, and political.

69. George Kateb, Hannah Arendt: Politics, Conscience, *Evil* 7 (1984) (arguing that genuine politics exists in many nongovernmental contexts).

70. See Theodore Lowi, *The End of Liberalism* (2d ed. 1979).

71. Pitkin, *supra* note 63, at 211.

72. *Id.* at 216 (emphasis added).



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 711

“formalistic.” Metaphors of “construction” that invoke “craft” are likely to be the most illuminating here. Much of legal discourse, in different ways at different levels, involves the fitting of a particular situation within a structure of authoritative categories while subtly modifying those categories to accommodate new situations. We need this worldly legal structure to maintain our distance from one another—Arendt talks about the importance of the legal system in maintaining the “hedges” between men⁷³—and so to maintain our freedom. (Totalitarian regimes press us up against each other to the point where we cannot speak and act freely.)⁷⁴ Speech within that structure has a kind of generality and impersonality that is discontinuous with moral speech in the sense that I have described. Much of it involves maintaining “positions” that are determined by the operative legal categories. Speakers wear masks and speak from behind them.⁷⁵

All this is a fancy way of saying that people do, and think they should, talk differently in different contexts. “Moral” is an analogous term, and that speech within the political realm, the legal realm, the market, and what we normally call the “moral” sphere (that controlling face-to-face interpersonal relations) can in that analogous sense be “moral.” This is true even though the distinctive languages and spirits of these spheres are, as we have seen, quite different. This is true even if the legal world and the economic world are in one sense “artificial,” even “mechanical.”⁷⁶

Almost everyone accepts some version of this view. Very few persons believe that all political and legal discourse is wrong.⁷⁷ But philosophical questions surrounding the appropriate relationships among these realms abound. One set of questions surround the flexibility of the boundaries within the spheres: whether there is a political dimension to law or a moral dimension to politics, for example, and if so, how should we understand these relationships. There is another set of problems concerning the extent to which the legal and political are always second best, a concession of the darkness of the human heart and so always to be avoided if possible. Further, views exist that there is a single line of “progress” by which one of the spheres “colonizes” or “should colonize” the others. For some, “progress” involves the extension of the market at the expense of the

73. See Hannah Arendt, *The Origins of Totalitarianism* 429-39 (1951).

74. See *id.* at 376-98.

75. See John Noonan, *The Persons and Masks of The Law: Cardozo, Holmes, Jefferson, and Wythe and Makers of the Masks* (1976).

76. John MacMurray, *Persons in Relation* 153 (1961) (noting that the personal world depends on artificial, not organic, structures).

77. The exceptions tend to be radical antinomian forms of Christianity for whom life within the kingdom of God precludes interacting in legal or political contexts. It is not surprising that such forms of Christianity find mediation a peculiarly appropriate form of dispute resolution.



political sphere, or vice-versa, or the gradual withering away or qualification of strict market relations by modes of human interaction controlled by moral norms in the narrower sense, a sense in which there is a relatively lower level of purely instrumental interaction. The reader will recognize the contemporary exponents of each of these views and the visions of the human good that underlie them.

Lawyers' professional identities seem closely wound up with political and legal discourse. After all, if there were no political and legal worlds, there would be no lawyers. What place do lawyers have in moral discourse, and therefore in transformative mediation? I have argued that the distinctive training and, much more importantly, the distinctive experience of a lawyer, *particularly* a litigator,⁷⁸ inclines lawyers to a tone-deafness to the language spoken in distinctively moral conversations.⁷⁹ On the other hand, that same training and experience make lawyers sensitive to the distortions and corruption of those kinds of conversations. The central question concerns what lawyers may contribute to a situation that can be resolved through moral conversation. Is the lawyer's function to stand on the sidelines here and consistently remind his or her client of the dangers of moral conversation, of the dangers of being manipulated, however subtly, by someone who is playing by different rules? Is the lawyer to be a partisan of political and legal discourse over moral discourse?

Of course, there is no one American lawyering style.⁸⁰ It seems to me, though, that the dominant style among lawyers who are self-conscious about their role is first to enhance the client's *autonomy*, the client's effective freedom. This self-understanding is dominant in the most widely used texts in interviewing and counseling.⁸¹ It is shared by lawyers from varied practice backgrounds.⁸² The lawyer's role here

78. See William F. Coyne Jr., *The Case for Settlement Counsel*, 14 Ohio St. J. on Disp. Resol. 367 (1999) (suggesting that litigators should not be involved at the settlement stage); James E. McGuire, *Why Litigators Should Use Settlement Counsel*, 18 Alternatives to the High Cost of Litig. 107 (2000);

79. See Robert P. Burns, *A Lawyer's Truth: Notes for a Moral Philosophy of Litigation Practice*, 3 J. L. & Relig. 229, 252-63 (1985).

80. Thomas Schaffer has identified four approaches to legal representation: lawyer as godfather; lawyer as hired gun; lawyer as guru; and lawyer as friend. The godfather style is dominant among advocates and stresses the lawyer's real power to achieve a stylized view of the client's interest. The guru style is an older, *nobless oblige* of the "gentleman lawyer," who makes moral decisions for the client in a paternalistic manner. The other styles are discussed in the text. Schaffer & Cochran, *supra* note 55, at 5-52.

81. See, Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating: Skills for Effective Representation* (1990); David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* (1991); David A. Binder & Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (1977).

82. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 Yale L.J. 1060 (1976); Steven Wexler, *Practicing Law for Poor People*, 79 Yale L.J. 1049 (1970); see also Stephen L. Pepper, *The Lawyer's*



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 713

is to help the client realize, and in some versions to maximize, his satisfactions through the use, perhaps the manipulation, of a somewhat alien legal system. The counseling function follows a competent fact interview that allows the lawyer to ascertain how the legal system will likely categorize the situation and therefore the probabilities of achieving one or another of the client's possible objectives.⁸³ In counseling, the lawyer seeks to identify the client's goals and then to help the client weigh the advantages and disadvantages, as measured by the client's own goals, of each possible course of action. Although proponents of "client-centered counseling" disagree about the precise place of the lawyer's own moral judgments in the process,⁸⁴ the overwhelming thrust of this lawyering style is to realize the client's preexistent goals through the devices of the legal system. As Edward Dauer and Arthur Leff put it more dramatically:

The client comes to a lawyer to be aided when he feels he is being treated, or wishes to treat someone else, not as a whole other person, but (at least in part) as a threat or hindrance to the client's satisfaction in life. The client has fallen, or wishes to thrust someone else, into the impersonal hands of a just and angry bureaucracy. When one desires help in those processes whereby and wherein people are treated as means and not as ends, then one comes to lawyers, to us.⁸⁵

How would such a lawyer treat the proposal that a client engage in mediation? He would weigh the probability that mediation was more or less likely to achieve the client's satisfactions, as determined in the course of a lawyer-client conversation in which the lawyer was seeking to identify the client's goals, as determined by the client's predetermined values. And, of course, it is possible that facilitative or evaluative mediation in which the lawyer negotiated using positional or problem-solving methods could do just that.

How would a client-centered lawyer consider that option and advise his or her client? Particularly, how would a lawyer understand what he or she is doing if transformative mediation really is equivalent to what we understand to be simply moral discourse? This places the client-centered lawyer in a strange position. His task is to counsel the client as to whether mediation is likely to be the method by which he will best realize his interests or satisfactions. However, transformative mediation, genuine moral dialogue, may well place a client in a

Amoral Ethical Role: A Defense, A Problem, and Some Possibilities, 1986 Am. B. Found. Res. J. 613 (1986) (offering justification for lawyer's amoral ethical role).

83. Of course, this can be done only in a preliminary way in a first interview.

84. See Shaffer & Cochran, *supra* note 55, at 19-27.

85. Edward A. Dauer & Arthur Leff, *Correspondence: The Lawyer as Friend*, 86 Yale L.J. 573, 581 (1977), *quoted in* Shaffer & Cochran, *supra* note 55, at 18.



situation where he is likely to relinquish his ability to achieve his interests. How should we understand this paradox?

A distinctively modern philosophical position is that the moral point of view, with its traditional vocabulary, and its root commitment to non-instrumental speech, is a matter of *choice*. In its classical expression, it is a choice between subjecting oneself to traditional moral norms and to the non-instrumental speech that accompanies those norms, on the one hand, and a way of life that involves the *freedom*, that is to say, “autonomy,” to pursue satisfaction as it appears to the individual, on the other. When the modern lawyer helps the client decide whether he wants to engage in transformative mediation, he is engaged in a kind of distinctively modern conversation. And, some would argue that it is an incoherent conversation, because morality *cannot* be a matter of choice—it imposes its obligations categorically.⁸⁶ The very practices of client-centered counseling are inconsistent with an understanding of mediation as moral discourse. The moral point of view has a kind of absoluteness.⁸⁷ You cannot *weigh* acting morally, speaking morally in this case, against other possible *satisfactions*. *The problem of the relation between client-centered lawyering and transformative mediation is clear: you can't get there from here.*

The situation for Shaffer's understanding of legal counseling seems just the opposite. Transformative mediation is *completely continuous* with client counseling as moral dialogue. And so, the problem is how to avoid or *escape* from transformative mediation in those cases where it is inappropriate, where the situation should be treated “politically” or legally. Shaffer recommends his style of client counseling in the following terms:

The client-centered counselors suggest that after identifying the alternatives, the lawyer and client consider the advantages and disadvantages *to the client* of each alternative. Under their model, effects on others are considered only if they might affect the client. We suggest that the lawyer and the client list the likely effects on others as factors with *independent* significance. This may convey to clients that they should consider the interests of others as well as the interests of clients, but we think that is a good thing to convey. Some might say that the lawyer here is “imposing his or her morals” on the client. But we think that the lawyer is only pointing to reality—and effects on others if a real part of the law office decision.⁸⁸

Shaffer suggests that the conversation between the lawyer and the client itself be a kind of moral conversation. He suggests that the lawyer articulate the reasonable perspectives of others with whom the

86. See Macintyre, *supra* note 62, at 39-45.

87. Burns, *supra* note 79, at 240-43.

88. Shaffer & Cochran, *supra* note 55, at 120 (footnote omitted).



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 715

client has his or her problems and resist the easy instinct to become a single-minded partisan of the client's self-absorbed perspective. He suggests further that the lawyer should "introduce moral judgment as a legitimate objective,"⁸⁹ while being careful not to "make . . . a just resolution of the dispute and then impose it on clients."⁹⁰

If clients are to fully participate in decisions, *and experience the moral development that we feel is an important part of the attorney-client relationship* (or the autonomy that others feel is at the heart of it), lawyers must be careful not to announce and insist on their perception of justice. (Lawyers often have enough power to do that.) The client must be a partner.⁹¹

It can be no surprise that mediation is a natural way to continue, this time with the persons with whom the client has his problem, the very dialogue that the lawyer has initiated with his client. Transformative mediation easily develops out of Shaffer's notion of lawyer-client moral dialogue. In fact, in the extended example Shaffer offers of what that kind of dialogue would look like, he suggests that mediation would be the form of dispute resolution that can continue that very moral dialogue.

What further role does the lawyer committed to moral dialogue have once he or she and the client have decided that they want to resolve their dispute through the further moral dialogue that mediation provides? Transformative mediation seems to require that the client himself participate in the mediation.⁹² It seems to me that a

89. *Id.* at 126.

90. *Id.*

91. *Id.* (emphasis added). This sort of dialogue is consistent with the notion of moral judgment that Shaffer borrows from philosopher Gerald Postema:

Judgment is neither a matter of simply applying general rules to particular cases nor a matter of mere intuition. It is a complex faculty, difficult to characterize, in which general principles or values and the particularities of the case both play important roles. The principles or values provide a framework within which to work and a target at which to aim. But they do not determine decisions. Instead, we rely on our judgment to achieve a coherence among the conflicting values which is sensitive to the particular circumstances. Judgment thus involves the ability to take a comprehensive view of the values and concerns at stake, based on one's experience and knowledge of the world. And this involves awareness of the full range of shared experience, beliefs, relations, and expectations within which these values and concerns have significance.

Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 68 (1980). For a similar notion of the complexity of moral decision-making, see Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* 69 (1986). Shaffer provides a more detailed description of what these kinds of conversations would look like. Shaffer & Cochran, *supra* note 55, at 119-34.

92. John Cooley's advice to advocates involved in mediation seems to suggest that the decision to allow the client to speak extensively in the mediation process is normally a strategic decision. See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317 (1995).



lawyer could be a participant in the kind of moral dialogue that transformative mediation promises, though it surely will require a kind of imagination and dialogue that contrasts sharply with the kind required by litigation. Experience will, of course, be a much better guide than logic here, as to whether lawyer involvement is consistent with the central moral goals of this important form of mediation.

Further, even Bush and Folger recognize that not all problematic situations are appropriate for mediation and it may often be true that a decision about appropriateness cannot really be made until after the mediation has commenced. Indeed their argument for a style of mediation that is sharply distinctive presupposes the existence of other institutions—courts, for example—that function through different languages and with different priorities. Can the lawyer committed to Shaffer’s vision of legal counseling and mediation as moral dialogue act as a kind of bridge between the moral realm and the more public worlds of law and politics?

Historically, American lawyers, even those who were committed to a style of law practice far less strictly instrumental than those currently dominant, have viewed themselves as somewhat world-weary figures standing against the dangers of “enthusiasm,” perhaps especially religious enthusiasm.⁹³ Some clients are naïve. Many poor and working class Americans have their disputes with highly rationalized bureaucracies represented by lawyers who practice in a highly instrumental style.⁹⁴ Many of those lawyers could hardly imagine any other style of resolving disputes. And there may be ranges of disputes where individual moral dialogue is simply an inappropriate mode of social ordering, while others are appropriate, even morally appropriate.

CONCLUSION

Is there a legitimate function for a lawyer committed to the primacy of moral dialogue to provide the escape routes for a client engaged in a moral dialogue in a mediation where that kind of dialogue proves impossible or goes bad? Is it possible for a lawyer to protect his client without constantly whispering in his ear during mediation that his interests are in danger, without undermining exactly what this kind of mediation may accomplish? Even if moral dialogue is *generally* the best path, it is not *always* the best path. Even if it should be given every chance, it is sometimes not available. A lawyer is usually someone who knows the legal, political, and bureaucratic worlds

93. Perry Miller, *The Life of the Mind in America From the Revolution to the Civil War 15-18* (1965).

94. See, e.g., Peter Robinson, *Contending with Wolves in Sheep’s Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 *Baylor L. Rev.* 963 (1998).



2001] *ETHICAL ISSUES SURROUNDING MEDIATION* 717

better than most individual clients of modest means. His task is to put this knowledge to the service of clients without imposing a style of purely instrumental thinking and speaking that may make clients worse. The only real certainty is that the interpersonal and legal skills necessary to fulfill this role are extremely subtle.

