

# INFORMED CONSENT IN MEDIATION: PROMOTING PRO SE PARTIES' INFORMED SETTLEMENT CHOICE WHILE HONORING THE MEDIATOR'S ETHICAL DUTIES

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## I. INTRODUCTION

An issue of increasing importance to both mediation policy and practice is the extent of a mediator's responsibility to ensure that mediation participants who are not represented by legal counsel make informed settlement choices.<sup>1</sup> Mediators have certain duties to promote informed decision making throughout the mediation process, but the nature of these duties and how they should be discharged is a topic of debate.<sup>2</sup> Mediator ethical codes provide minimal guidance on the issue, leaving unacceptable ambiguity as to the role the mediator plays in a participant's informed consent. "Informed consent" is the legal term that describes the circumstances under which a person knowingly and voluntarily

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<sup>1</sup> Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999); Beverly W. Snukals & Glen H. Sturtevant, Jr., *Pro Se Litigation: Best Practices from a Judge's Perspective*, 42 U. RICH L. REV. 93, 94 (2007); Russell Engler, *Revising the Role of the Court-Connected Mediator To Achieve Fairness for Unrepresented Litigants*, 11 NE-ACR NEWSLETTER 1 (2005).

<sup>2</sup> Cynthia E. Nance, *Unrepresented Parties in Mediation*, 15 PRAC. LITIGATOR 47-48 n.3 (2004); Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, *Guide to Judicial Management of Cases in ADR*, FED. JUDICIAL CTR. 24 (2001), [http://www.fjc.gov/public/pdf.nsf/lookup/ADRGuide.pdf/\\$file/ADRGuide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ADRGuide.pdf/$file/ADRGuide.pdf).

agrees to a course of action recommended by a professional, like a physician or lawyer.<sup>3</sup> This Article addresses whether and to what degree the doctrine of informed consent should impose a duty on the mediator to ensure that an unrepresented party to a mediation “truly understands” the terms, benefits and risks of a contemplated settlement.

Participant informed consent in mediation is a timely and important issue despite that surprisingly little has been written on the topic.<sup>4</sup> Increasingly, people are voluntarily turning to mediation to resolve their disputes and are consequently impacted by mediation policy.<sup>5</sup> Many others are finding themselves forced involuntarily into mediation, either by court order or economic constraints that make litigation impractical or cost prohibitive.<sup>6</sup> Studies show that as high as 80% of parties in family disputes and as high as 90% of tenants in landlord-tenant disputes are *pro se*.<sup>7</sup> One study of federal courts showed that *pro se* cases constituted 37% of all cases filed.<sup>8</sup> The glut of *pro se* litigants is a relatively new and growing problem. For example, in California, in 1971, only 1% of divorce

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<sup>3</sup> Douglas Andrew Grimm, *Informed Consent For All! No Exceptions*, 37 N.M. L. REV. 39, 41 (2007).

<sup>4</sup> ELLEN WALDMAN, *MEDIATION ETHICS* 113–54 (2011) (addressing the “tension between the disputants autonomy and substantive fairness”); Engler, *supra* note 1, at 1 (advocating that the mediator make *pro se* parties aware of rights waived by settlement); Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45 (2005) (advocating that a mediator must warn parties of the risks and benefits of evaluation); Nolan-Haley, *supra* note 1, at 775 (advocating for a robust duty of informed consent for mediators); Niemic et al., *supra* note 2.

<sup>5</sup> Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103 (2001); Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2372 (2012).

<sup>6</sup> Jaqueline Nolan-Haley, *Mediation: The “New Arbitration”*, 17 HARV. NEGOT. L. REV. 61, 70 (2012) (stating that “mediation is the most frequently used process in both State and Federal Courts.”); Joshua M. Frank, *Stacked Deck: A Statistical Analysis of Forced Arbitration*, CENTER FOR RESPONSIBLE LENDING 1–2 (May 31, 2009), [http://www.responsiblelending.org/credit-cards/research-analysis/stacked\\_deck.pdf](http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf).

<sup>7</sup> Russell Engler, *And Justice for All—Including The Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, And Clerks*, 67 FORDHAM L. REV. 1987, 2048 (1999) (Stating that “[t]he numbers of unrepresented litigants in family law cases have surged nationwide, with some reports indicating eight percent or more of family law cases involve at least one *pro se* litigant.”); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79 (1997) (Tenants in landlord-tenant court typically fare no better, with reports in New York and Boston courts showing as high as 90% of cases having at least one *pro se* litigant.); Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 LAW LIBR. J. 129, 132 (1998) (eighty-eight percent (88%) of litigants in Washington, D.C. family court represent themselves).

<sup>8</sup> Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT’L L. 103, 112 (2002).

litigants were *pro se*.<sup>9</sup> By 1985, that number grew to 47%, and today, it approaches 80%.<sup>10</sup> Moreover, both mediators and participants would benefit from greater clarity concerning the mediator's informed consent responsibilities because it will minimize the likelihood of a mediator committing an unwitting ethical violation. Greater clarity concerning a mediator's informed consent responsibilities will also reduce incidents of participant dissatisfaction arising out of mismanaged expectations of the mediator's role.

In arriving at a clearer understanding of the mediator's role regarding informed consent, it is important to explain at the outset that the mediation scholarship distinguishes between two kinds of informed consent: "participation" consent and "outcome" consent.<sup>11</sup> A party's decision to take part in mediation is participation consent.<sup>12</sup> Participation consent encourages "a conscious, knowledgeable decision to enter into the mediation process."<sup>13</sup> "Outcome consent" addresses the degree to which a party understands the agreement reached during the mediation process.<sup>14</sup> Informed outcome consent in this context means, not only, that the party understands the settlement agreement's terms and consequences, but also what rights he or she will waive by settlement.<sup>15</sup> Although this Article's main focus is on outcome consent, participation consent is a vital component to enhancing outcome consent and will be explored as well.

This Article concludes that the law should impose a duty on mediators of informed *participation* consent, but not informed *outcome* consent. Requiring informed participation consent is consistent with the mediator's established role of educating parties about the mediation process and empowering them to fully and knowingly engage in that process. As we will see, participation consent is also consistent with the mediator's ethical obligations. Imposing the duty of informed outcome consent on the mediator would create a significant conflict with the mediator's ethical obligation of impartiality. It would also undermine the quality of the mediation

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<sup>9</sup> Bonnie Rose Hough, *Description of California Court's Programs for Self-Represented Litigants* (2003), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1051&context=clrcircuit> (data on the number of *pro se* litigants in California's family law courts showing that they have dramatically increased in the last twenty-five years).

<sup>10</sup> *Id.*

<sup>11</sup> Love et al., *supra* note 4 (explaining the different consent types and their effects).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 54.

<sup>14</sup> *Id.*

<sup>15</sup> Nolan-Haley, *supra* note 1, at 775.

process to such an extent that the process could no longer be aptly labeled “mediation.” These concerns notwithstanding, some mediation scholars argue that when a *pro se* participant is ordered by the court to attend mediation, the mediator must obtain informed outcome consent—even if this means acting impartially, as that concept is presently defined by most mediator ethical standards. These scholars would require the mediator to explain legal rights, raise unasserted legal claims, and assess the participant’s chance of succeeding on those legal claims in court.<sup>16</sup> In rejecting this view, this Article will show that although mediators cannot guarantee informed outcome consent, they nevertheless have the ability to substantially enhance informed outcome consent within their appropriate and existing ethical duties. Finally, it should also be stated at the outset that this Article does not address the important issue regarding whether *pro se* litigants should be required to mediate their legal claims at all. This Article addresses only the scope of the mediator’s duty to promote informed decision-making when *pro se* litigants participant in mediation voluntarily or involuntarily.

In explaining the proper role of informed consent in mediation, this Article will proceed as follows: Part II will examine mediation’s core ethical values of self-determination, impartiality and promoting a quality process. Part III will explore the meaning and origins of the informed consent doctrine; and, in Part IV, analyze the application of informed consent policies and principles to mediation in the light of mediation’s core ethical values. Part V will explore ways that mediators can promote informed outcome consent within the existing ethical framework and recommend legislative reform that will help clarify the mediator’s proper role of promoting fair and informed agreements while honoring their ethics and the integrity of the mediation process. Finally, Part VI will summarize the Articles’ important conclusions.

## II. MEDIATION’S CORE VALUES AND MEDIATOR ETHICAL DUTIES

To evaluate the proper role informed consent plays in the mediation process, it is essential to understand what mediation is and the ethical context in which mediators function. Although the

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<sup>16</sup> *Id.*

practice of mediation has thus far resisted definition upon which all can agree, most mediators would concur, as a general definition, that mediation is a dispute resolution process where an impartial person, the mediator, assists parties to a dispute to make better decisions about the future of their dispute by conducting a fair and balanced discussion focused on problem solving.<sup>17</sup> Most mediators would also agree that any reasonable definition of mediation, as does the definition above, contemplates three immutable characteristics: party self-determination, mediator impartiality and quality process.<sup>18</sup> These characteristics are so central to the mediation process that they have been codified in the Model Standard of Conduct for Mediators (the “Model Standards”), which is the most authoritative mediator ethical code in the United States.<sup>19</sup>

The Model Standards, the first mediator ethical code of national significance, was issued in 1994 by a joint committee of the American Arbitration Association, the American Bar Association Section of Dispute Resolution and the Association of Conflict Resolution.<sup>20</sup> These Model Standards have no official status, like other model codes, but are nevertheless highly influential and serve as a guide for most states’ mediation ethical rules.<sup>21</sup> These ethical standards, which were revised and updated in 2005, still serve as the most influential mediation ethical rules, even though, as will be discussed below, they have several significant shortcomings.<sup>22</sup> These

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<sup>17</sup> See LAURENCE J. BOULLE, MICHAEL T. COLATRELLA JR. & ANTHONY P. PICCHIONI, *MEDIATION- SKILLS AND TECHNIQUES* 1 (2008); JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE* 5 (2d ed. 2013); Susan Nauss Exon, *The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577, 580 (2008) (explaining that most definitions of mediation “include key provisions, such as the mediator’s ability to be neutral and impartial and the parties’ ability to negotiate a resolution of their own choosing—party self determination”); Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 70, 92 (2005) (describing the difficulty in arriving at a commonly accepted definition of mediation).

<sup>18</sup> DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 83 (2008) (stating that self-determination, impartiality and neutrality are three fundamental norms); MODEL STANDARDS (2005).

<sup>19</sup> MODEL STANDARDS (2005).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; Robert Rubinson, *The New Maryland Rules of Professional Conduct and Mediation: Perplexing Questions Answered and Perplexing Questions That Remain*, 36 U. BALT. L.F. 1, 23 (2005).

<sup>22</sup> Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 113 (1997) (with attorneys and other professionals); Andrea C. Yang, *Ethics Codes for Mediator Conduct: Necessary but Still Insufficient*, 22 GEO. J. LEGAL ETHICS 1229, 1239 (2009) (since no state yet licenses mediators, mediator ethical rules have not been a priority for most states, despite that all states employ mediation both in and out of their courts); Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Media-*

shortcomings notwithstanding, the thoughtful, credible effort that resulted in the Model Standards take on particular significance regarding informed consent, and it is with the Model Standards that this Article will place its emphasis. The Model Standards is a relatively short document as ethical codes go, consisting of nine ethical standards.<sup>23</sup> Only three of these standards are relevant to our discussion of the role of informed consent in mediation, and, not surprisingly, they parallel mediation's core characteristics listed above. These ethical standards are self-determination, impartiality, and quality of the process. Each of these standards is explained in turn below.<sup>24</sup>

### A. Self-Determination

It is no accident that “self-determination” is the first ethical principle listed in the Model Standards, as it is a “foundational principle” of mediation.<sup>25</sup> The Model Standards explain that a “mediator shall conduct a mediation based on the principle of

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*tive Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 928 (1997) (In a survey done in 2006, only twenty-seven states had state-adopted mediation ethical codes, thirteen states had ethical codes passed by private mediation organizations and fourteen states had no state-wide mediator ethical code at all.); Susan Nauss Exon, *How Can A Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387, 395 (2006) (As might be imagined, there is significant variety across state codes); *Id.* (There are also differences within states where professional organizations have passed competing visions of mediator ethics in the same jurisdiction.); ROBERT C. PRATHER, SR. & JOE L. COPE, TEX. PRAC. GUIDE ADR § 12:22 (2012) (Even in states that have passed mediation ethical rules, through court rules or state statute, no state presently has an administrative enforcement mechanism for addressing alleged ethical breaches by mediators.); Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 936 (1997) (Except for civil courts, where mediators have been sued by participants under a theory of negligence or breach of contract, there is little policing of mediator professional behavior.); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003) (Civil suits that occasionally result in published decisions, provide what little guidance there is on how the broad principles espoused by the law and ethical codes apply in specific circumstances.); Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479 (2000); Fiona Furlan et al., *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting As Mediators?*, 14 J. AM. ACAD. MATRIM. L. 267 (1997).

<sup>23</sup> MODEL STANDARDS (2005); Laura E. Weidner, *Model Standards of Conduct for Mediators* (2005), 21 OHIO ST. J. ON DISP. RESOL. 547, 550 (2006).

<sup>24</sup> MODEL STANDARDS (2005) (The other Model Standards are conflicts of interest, competence, confidentiality, advertising and solicitation, fees and other charges and advancement of mediation practice.).

<sup>25</sup> FRENKEL ET AL., *supra* note 18, at 83.

party self-determination.”<sup>26</sup> The Model Standards defines self-determination “as the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to the process and outcome.”<sup>27</sup> It is of note that the Model Standards value a participant’s self-determination regarding both the mediation process as well as its outcome.<sup>28</sup> Yet, the standard imposes no affirmative duty on mediators to obtain informed consent in either a participant’s decision to participate or in his decision to settle. In fact, the code explicitly states, later in the standard, that “[a] mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.”<sup>29</sup> The term “informed choices” speaks directly to the question of whether a mediator has a duty to ensure that a party’s decision to accept a settlement is an informed one, and answers that question with a “no.” While the use of the term “informed consent” might make a more resounding statement, the language that a mediator has no obligation to “ensure that each party has made a free and informed choices to reach particular decisions” is clear enough.<sup>30</sup>

### B. *Impartiality*

Mediator impartiality is the second immutable characteristic of mediation and is defined as “freedom from favoritism, bias or prejudice.”<sup>31</sup> The re-drafters of the Model Standards in 2005 reaf-

<sup>26</sup> MODEL STANDARDS Standard I (2005).

<sup>27</sup> *Id.*

<sup>28</sup> Laura E. Weidner, *Model Standards of Conduct for Mediators* (2005), 21 OHIO ST. J. ON DISP. RESOL. 547, 556 (2006).

<sup>29</sup> MODEL STANDARDS Standard IA(2) (2005) (some scholars note that term “informed choices” as used in the code “does not have the force or clarity of a more explicit duty to obtain informed consent”); Love et al., *supra* note 4, at n.18.

<sup>30</sup> MODEL STANDARDS (the Model Standards temper unfettered party self-determination even further with the mediator’s duty to maintain quality process.); *Id.* at I(A)(1) (The code says that a mediator can “balance such party self determination with a mediator’s duty to conduct a quality process . . . .”); *Id.* (What this means in practice, as we will see more fully below, is that a mediator cannot permit party behavior to damage the efficacy of the mediation by undermining “party participation, procedural fairness, party competency and mutual respect among all participants”); *Id.* at VI(A) (Thus, the mediator must balance a party’s desire to control the course of the mediation with the need for a fair and effective process.).

<sup>31</sup> Susan Nauss Exon, *The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577, 583 (2008).

firmed “the central role of the need for a mediator to be impartial.”<sup>32</sup> In defining mediator impartiality the Model Standards state, in relevant part, that a “mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.”<sup>33</sup> Most relevant to our discussion, the Model Standards explain that a “mediator should not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or *performance at a mediation*, or for any other reason.”<sup>34</sup> States that have mediator ethical standards, even though they can vary greatly on other ethical considerations, all contain some form of impartiality.<sup>35</sup> Some states define impartiality with great care, while others merely denote that the mediator must be “impartial,” without further clarification.<sup>36</sup>

A particularly important definitional issue to address is the distinction between mediator impartiality and mediator neutrality. These terms are often used interchangeably, but they have distinct meanings within the mediation scholarship.<sup>37</sup> As has been discussed, impartiality embodies even-handedness.<sup>38</sup> Montana’s state mediation standard nicely captures the spirit of impartiality when it states that impartiality is “freedom from favoritism or bias either by word or action, a commitment to serve all parties as opposed to a single party.”<sup>39</sup> Under this conception of impartiality, a mediator, many scholars agree, would be able to provide a legal opinion to a participant as an evaluative technique to resolve the dispute as long as she provided it in an objective manner.<sup>40</sup> For instance, the mediator might say to a tenant in a landlord-tenant dispute that she has no legal basis to withhold rent given the particular circumstances of the dispute. The mediator is being impartial because even though she evaluated the merits of the dispute and has taken a legal position that favors one party over another, she has applied the relevant legal principles in an objective and unbiased way.<sup>41</sup> This kind of evaluation, however, would not meet the requirements

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<sup>32</sup> MODEL STANDARDS Drafter’s Notes at 11.

<sup>33</sup> MODEL STANDARDS Standard II (2005).

<sup>34</sup> *Id.* (emphasis added).

<sup>35</sup> Exon, *supra* note 22, at 397.

<sup>36</sup> *Id.* at 387.

<sup>37</sup> *Id.* at 388.

<sup>38</sup> *Id.* at 398.

<sup>39</sup> MONT. MEDIATION ASS’N STANDARD PRACTICES (2003).

<sup>40</sup> Susan Nauss Exon, *How Can A Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387, 419 (2006).

<sup>41</sup> STULBERG ET AL., *supra* note 17, at 835.



of neutrality.<sup>42</sup> Neutrality is characterized by not taking sides, not just evenhandedness.<sup>43</sup> To be neutral, the mediator cannot take positions, however objective or impartial, against one party's interests or try to persuade a participant to "relinquish her proposals on some or all matters."<sup>44</sup> The functions of a neutral mediator are to help the parties to "shape a rich dialogue among them and prod them to explore and take responsibility for developing acceptable ways to create a stable, functioning relationship."<sup>45</sup>

While many mediators practice neutrality, most mediator ethical codes, including the Model Standards, only impose the less exacting standard of impartiality on mediators.<sup>46</sup> And it is impartiality on which this Article will focus, not only because it is the common standard found in mediation ethical codes, but also because proposals to require informed outcome consent would not even meet this lesser standard protecting mediation participants from mediator bias.

### C. *Quality Process*

Mediators also have an unwavering ethical obligation to conduct a quality process.<sup>47</sup> The Model Standards define the mediator's ethical duty to conduct a quality process, in pertinent part, as one that "promotes . . . party participation, procedural fairness, party competency and mutual respect among all participants."<sup>48</sup> This clause explicitly adopts a strategy to promote a quality process by promoting "procedural fairness."<sup>49</sup> The theme of procedural fairness is one that runs through this standard and there is no mention of promoting a substantive fairness directly, as a few mediator codes do.<sup>50</sup> For example, the Georgia mediator ethical code provides that a mediator should refuse to sign a mediated agreement

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<sup>42</sup> Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81, 90 (2003).

<sup>43</sup> Susan Nauss Exon, *How Can A Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387, 406 (2006).

<sup>44</sup> STULBERG ET AL., *supra* note 17, at 834.

<sup>45</sup> *Id.* at 833.

<sup>46</sup> MODEL STANDARDS Standard II (2005); Exon, *supra* note 40, at 387.

<sup>47</sup> MODEL STANDARDS Standard VI(A) (2005).

<sup>48</sup> *Id.* at Standard VI(A).

<sup>49</sup> *See id.* at Standard VI(A).

<sup>50</sup> *See id.* at Standard VI(A).

that she feels is “fundamentally unfair to one party.”<sup>51</sup> This places the mediator in the position of judging the fairness of the result. The drafters of the Model Code rejected this approach, as do most jurisdictions.<sup>52</sup> The drafters were particularly cognizant of the temptation for mediators to assume other professional roles during the mediation and tried to guide mediators in the appropriate use of the knowledge and skill that they might possess from other areas, such as law or counseling.<sup>53</sup> In this regard, the Model Standard states that “[t]he role of mediator differs substantially from other professional roles . . . [and] [m]ixing the role of a mediator and the role of another profession is problematic . . . .”<sup>54</sup> Yet, the Model Standards recognizes that the knowledge that mediators possess from other spheres of their professional life can help parties to resolve their differences. The Model Standards state that “the insights the mediator draws upon to assist parties in mediation might simultaneously constitute an important element of enabling a mediator to be competent and effective to serve the parties in that setting and be drawn from the mediator’s training and experience in those other professional roles.”<sup>55</sup> Consequently, the Model Standards continue, a “mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.”<sup>56</sup> The drafters’ comments in particular stress that mediators must honor the standards of party self-determination and mediator impartiality when information is provided.<sup>57</sup>

#### D. *Promoting Fairness in Mediation*

A central goal of mediation is to produce fair agreements.<sup>58</sup> The characteristics of a fair mediated agreement and how best to

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<sup>51</sup> GA ETHICAL STANDARDS FOR NEUTRALS IV.A, available at [http://www.godr.org/index.php?option=com\\_content&view=article&id=58&Itemid=57](http://www.godr.org/index.php?option=com_content&view=article&id=58&Itemid=57) (last visited Feb. 12, 2014).

<sup>52</sup> Exon, *supra* note 31, at 586.

<sup>53</sup> MODEL STANDARDS Standard VI(A)(5) (2005) (stating that a “mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these standards”).

<sup>54</sup> *Id.* at Standard VI(A)(5).

<sup>55</sup> *Id.* at Drafters’ Comments 18.

<sup>56</sup> *Id.* at Standard VI (2005).

<sup>57</sup> *Id.* at Drafters’ Comments 18 (2005).

<sup>58</sup> Joseph B. Stulberg, *Must a Mediator be Neutral? You Better Believe It!*, 95 MARQ. L. REV. 829, 830 (2012); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47, 49 (1996).

consistently achieve fair agreements, however, are topics of considerable debate among mediators and mediation scholars.<sup>59</sup> One basic lesson that the Model Standards teach, and from which this Article proceeds, is that a substantively “fair” mediated result has only two criteria. First, it is “fair” if the participants deem it acceptable.<sup>60</sup> The idea that the appropriateness of a mediated agreement is evaluated from the parties’ perspective has been called “justice from below.”<sup>61</sup> In mediation, “disputants shape the outcome they find acceptable.”<sup>62</sup> In shaping these mediated outcomes, participants may embrace norms, “legal, moral, religious or practical,” regardless of whether the norms used have been “adopted by a legislature or articulated by the courts.”<sup>63</sup> Disputants have the ability to seek “justice from above” if they wish by having their dispute heard by a court or an arbitrator who will impose a norm to decide the merits of a dispute.<sup>64</sup> Indeed, of the many benefits mediation offers disputants, the ability to craft and control the outcome is among the most prized.<sup>65</sup>

As far as the mediator is concerned, if the process was fair, the agreement should be deemed sufficiently and substantively fair too.<sup>66</sup> The kind of fairness that mediators should have utmost in their minds and for which they have the greatest responsibility is procedural fairness.<sup>67</sup> “Good process,” it has been said, “almost always yields a good outcome.”<sup>68</sup> Thus, as outlined above, if the party made a settlement decision uncoerced, assisted by an impartial mediator who empowered the participant to participate as fully as their resources allowed, then the agreement should be deemed fair. This criterion is not met if the agreement was obtained by duress, fraud, incompetence or through one of the other legal im-

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<sup>59</sup> Nolan-Haley, *supra* note 1, at 885; See Engler, *supra* note 1.

<sup>60</sup> Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation-Tension Between the Aspirations of A Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 563 (2004).

<sup>61</sup> Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 216 (2005); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 160–61 (2002).

<sup>62</sup> Stulberg, *supra* note 61, at 216.

<sup>63</sup> Hyman et al., *supra* note 61, at 160; Stulberg, *supra* note 61, at 216.

<sup>64</sup> Hyman et al., *supra* note 61, at 160–61; Stulberg, *supra* note 61, at 216.

<sup>65</sup> Stulberg, *supra* note 61, at 238.

<sup>66</sup> Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got To Do With It*, 79 WASH. U. L. Q. 781, 818 (2001).

<sup>67</sup> Susanne Terry & Christine Packard, *Achieving Lasting Settlements for Vermont Families: Justice, Equity, and Self-Determination*, 36 VT. BUS. J. 18 (2010).

<sup>68</sup> Panel Discussion, *Core Values of Dispute Resolution: Is Neutrality Necessary?*, 95 MARO. L. REV. 805, 819 (2011).

pediments to binding agreements.<sup>69</sup> The fact that agreement is a product of “unequal” bargaining power, however, is not enough for the agreement to fail this test.<sup>70</sup> Few negotiations match equally powerful participants.<sup>71</sup> To fail to meet a procedural fairness requirement, an agreement must be so one-sided to be considered unconscionable under the law of the relevant jurisdiction.<sup>72</sup> This construction of mediation fairness is akin to the legal philosopher John Rawl’s concept of pure justice in which the “standard for determining a fair or desired outcome is embedded in the process itself.”<sup>73</sup>

### III. A BRIEF HISTORY OF THE LAW OF INFORMED CONSENT AND THE RISE OF SELF-DETERMINATION

To determine the extent to which the law should impose the doctrine of informed consent on mediators, it is important to revisit the origins of the doctrine in American jurisprudence to uncover the circumstances in which the doctrine arose and the policies it is intended to promote. The concept of informed consent has its origins in the physician-patient relationship. The extent to which the circumstances of physician-patient relationship and mediator-participant relationship are analogous is a useful guide in deciding the degree to which, if at all, informed consent should be incorporated as one of a mediator’s standard duties. As we will see, the evidence on this score is mixed and leads to the conclusion that informed consent should not be incorporated into mediation policy on a wholesale basis. Yet, the informed consent precedent does support the extension of informed consent to mediators on a limited basis because mediators and physicians do play similar roles as treatment experts in their respective disciplines. To understand the contours of how the physician-patient relationship is similar to the

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<sup>69</sup> *Id.*

<sup>70</sup> Jennifer M. Ralph, *Unconscionable Mediation Clauses: Garrett v. Hooters-Toledo*, 10 *HARV. NEGOT. L. REV.* 383, 396 (2005).

<sup>71</sup> *Id.* at 384.

<sup>72</sup> 17 C.J.S. *CONTRACTS* § 2; 3 *CAL. AFFIRMATIVE DEF.* § 55:1 (2013); *CAL. CIV. CODE*, § 1670.5 (2013).

<sup>73</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 136 (1971) (David Miller, another legal philosopher, like Rawls, sees justice as process and not an outcome. Miller argues that a fair system of justice has four characteristics: 1) it treats participants equally, 2) it considers relevant information, 3) participants know the rules, and 4) it treats participants with respect.).

mediator-participant relationship and how it is not, let us now examine the evolution of the informed consent doctrine.

A. *Overview of the Doctrine of Informed Consent and Medicine's Beneficence Model*

It likely will come as a surprise to those unfamiliar with the history of informed consent that it is a modern legal convention and not, as one might suppose, an ancient birthright enshrined in an old yellowing document attesting to human enlightenment, like the Magna Carta. The legal theory of informed consent as we know it today is just over fifty years old and its origins can be found only slightly further back in time in the early 1900's, a little more than one hundred years ago, making it a relative newcomer to the legal lexicon.<sup>74</sup> The legal theory of informed consent springs out of the medical treatment context, but has branched out into human experiments and research, as well as other professions, such as law and financial management.<sup>75</sup> Informed consent in the medical context, and in its most basic form, is an affirmation by the patient that she "truly understands the parameters of the proposed treatment and agrees to accept treatment."<sup>76</sup> Informed consent changed the practice of medicine in the United States arguably more than any other modern legal doctrine.<sup>77</sup> Physicians interact with their patients in profoundly different ways and now provide far greater medical information than in any other time in history.

Up until roughly fifty years ago, American physicians practiced medicine and dispersed information to their patients under

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<sup>74</sup> See *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92 (N.Y. 1914) (the first Supreme Court case to discuss the general concept of informed consent); see also *Salgo v. Leland Standford Jr. Univ. Bd. of Trustees*, 317 P.2d 170, 181 (Cal. Dist. Ct. App. 1957) (first court to reference "informed consent"); see also *Natanson v. Kline*, 350 P.2d 1093, 1106 (Kan. 1960) (one of the first cases to require disclosure).

<sup>75</sup> John H. Krause, *Reconceptualizing Informed Consent in an Era of Health Care Cost Containment*, 85 IOWA L. REV. 261, 275 (1999).

<sup>76</sup> Grimm, *supra* note 3, at 41.

<sup>77</sup> *Id.* at 39 (The informed consent "doctrine and its exceptions continue to have a broad impact on the practice of medicine and the evolution of society."). Informed consent is continuously evolving in many areas of medicine. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (analyzing informed consent requirements in state abortion laws, specifically the ability of a minor to consent); see also Suzanne K. Keller, *The Rebirth of Informed Consent: A Cultural Analysis of the Informed Consent Doctrine After Schreiber v. Physicians Insurance Co. of Wisconsin*, 95 Nw. U. L. REV. 1029, 1039 (2001) (discussing informed consent with regard to childbirth, stating that there is a "current trend towards greater patient autonomy and control during labor and childbirth.").

the guiding principles of the “beneficence” model.<sup>78</sup> The physician’s paramount duty under this model was to “maximize the patient’s medical benefits.”<sup>79</sup> The beneficence model of medicine has its origins, not surprisingly, in the Hippocratic Oaths, which not only tolerate physicians not communicating medical details to patients, but in fact advocates proactive deception if the physician deems it for medical benefit. One of the Hippocratic Oaths advises physicians to “conceal[ ] most things from the patient, while you are attending to him . . . turning his attention away from what is being done to him; . . . revealing nothing of the patient’s future or present condition.”<sup>80</sup> The beneficence model also supported outright lying to patients as long as it was calculated for his or her medical benefit.<sup>81</sup> Only during the last century did the medical profession begin to debate the strict tenants of the beneficence model.<sup>82</sup> Even then, it was case law, not the medical community, that imposed upon physicians the duty of informed consent.<sup>83</sup>

Validly obtained informed consent is comprised of three conditions. First, the patient must have the mental capacity to give consent.<sup>84</sup> A patient has sufficient mental capacity to provide informed consent if she can “appreciate the reasonable foreseeable consequences of her decision.”<sup>85</sup> Second, the physician must make adequate disclosures to the patient.<sup>86</sup> These disclosures must be relevant and understandable to the patient.<sup>87</sup> Third, the patient’s treatment decisions must be voluntary.<sup>88</sup> A voluntary decision means deciding “without force, coercion, or manipulation.”<sup>89</sup> This Article is primarily concerned with the second condition, the adequacy of information that a physician discloses to his patient. The story of how and why the courts imposed the doctrine of informed consent on the medical field is worth exploring because it is rele-

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<sup>78</sup> RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 59, 128 (1986).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 61.

<sup>81</sup> *Id.* at 63.

<sup>82</sup> *Id.* at 86.

<sup>83</sup> *Id.* at 93.

<sup>84</sup> Edward Etchells, *Informed Consent in Surgical Trials*, 23 WORLD J. SURGERY 1215, 1215 (1999).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

vant to the question of whether it should be imposed on the mediation field.

B. *The Origins of Informed Consent In American Jurisprudence*

Informed consent's evolution as a legal theory is a story consisting of three acts. In act one, at the turn of the last century between the years 1905-14, four cases from different states planted the seeds from which the modern doctrine of informed consent sprung.<sup>90</sup> These cases identified self-determination as the underlying policy animating the doctrine of informed consent, and introduced the idea, without fully forming it, that a certain degree of knowledge about the risks and benefits of a particular course of medical treatment was part of proper consent.<sup>91</sup> Act two began more than forty years later in 1957 with the courts embracing the policy of self-determination and coining the term "informed consent."<sup>92</sup> The courts further created the first professional practice legal standard for deciding whether the information physicians shared in advance of treatment was of the appropriate type and degree to which a patient was entitled before consent could be deemed "informed."<sup>93</sup> Act three, still unfolding, commenced in 1972 with the abandonment of the professional practice standard of care in some jurisdictions, which looked to physicians' common practice as the standard for the required level of information disclosed to the patient, in favor of a new standard.<sup>94</sup> This new standard looks at what a reasonably prudent patient would want to know before treatment, creating the "patient-centered standard" of care for deciding informed consent issues.<sup>95</sup> Although it remains a minority view, the patient-centered standard of care for deciding informed consent issues in medical care is slowly gaining ground.<sup>96</sup>

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<sup>90</sup> *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92 (N.Y. 1914); *Mohr v. Williams*, 104 N.W. 12, 15 (1905); *Rolater v. Strain*, 137 P. 96 (Okla. 1913); *Pratt v. Davis*, 118 Ill. App. 161 (Ill. App. Ct. 1905).

<sup>91</sup> See *Schloendorff*, 105 N.E. at 93 ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body.").

<sup>92</sup> See *Salgo*, 317 P.2d at 181 (first court to reference "informed consent").

<sup>93</sup> *Id.*

<sup>94</sup> See *Canterbury v. Spence*, 464 F. 2d 772, 780 (D.C. Cir. 1972).

<sup>95</sup> *Id.* (developed the "patient-centered" standard for informed consent instead of the previously used "physician-centered" standard).

<sup>96</sup> Anna Karpman, *Informed Consent: Does the First Amendment Protect a Patient's Right to Choose Alternative Treatment?*, 16 N.Y.L. SCH. J. HUM. RTS. 933, 937-38 (2000) ("The majority

## 1. Act One: The Formation of Modern Consent

Justice Benjamin Cardozo, who had the skill of reducing complex and often novel, legal theory to accessible and memorable language, aptly captured the meaning of consent in the opinion that he wrote for *Schloendorff v. Society of New York Hospitals*; one of the four cases to establish the foundation of modern informed consent theory.<sup>97</sup> Justice Cardozo, in his now famous dicta, proclaimed that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable in damages.”<sup>98</sup> In this section, we will explore the meaning of these words through a more detailed review of just one of the four early consent cases, *Mohr v. Williams*, which, more than the others, provides a rationale for the necessity of a robust theory of consent to medical treatment.<sup>99</sup>

Modern theory of informed consent was born in Minnesota in 1905 in the case of *Mohr v. Williams*.<sup>100</sup> The *Mohr* case, unlike its predecessors, firmly anchored consent to medical treatment in the patient’s right to self-determination and autonomy.<sup>101</sup> It accomplished this, in part, by recognizing that consent was not merely a technical act of affirmation, but one in which the patient assents to treatment with sufficient knowledge to act rationally, giving rise to true autonomy.<sup>102</sup> In *Mohr*, the patient, Anna Mohr, successfully sued her physician, Cornelius Williams, in a cause of action for battery. Cornelius Williams performed surgery on her left ear without her consent when she had only given permission to operate on her right ear.<sup>103</sup> Mohr went to her physician because of a hearing problem in her right ear.<sup>104</sup> She recounted no problems with her left ear.<sup>105</sup> Upon an initial examination, her physician discovered perforation of the eardrum and a polyp in her right ear and recom-

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of jurisdictions adhere to the professional standard, making the patient’s ‘right to know’ depend upon the medical custom in a particular community.”).

<sup>97</sup> *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92 (N.Y. 1914).

<sup>98</sup> *Id.* at 93.

<sup>99</sup> *Mohr v. Williams*, 104 N.W. 12, 15 (1905).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* (“A surgical operation by a physician upon the body of his patient is wrongful and unlawful when performed without the express or implied consent of the patient.”).

<sup>102</sup> *Id.* at 12.

<sup>103</sup> *Id.* at 13.

<sup>104</sup> *Id.*

<sup>105</sup> *Mohr*, 104 N.W. at 13.



mended surgery.<sup>106</sup> After consulting with her personal physician, Mohr agreed to the procedure.<sup>107</sup> Shortly after being sedated in preparation for the operation on her right ear, and while she was unconscious, a more thorough examination uncovered disease in the left ear that her physician deemed even more serious than that in the right ear.<sup>108</sup> The physician operated on Mohr's left ear instead without obtaining her consent, removing the diseased portions of her eardrum and inner wall of the ear, which she later claimed impaired her hearing greatly.<sup>109</sup> Although the operation was "in every way successful and skillfully performed," the trial court awarded the plaintiff \$14,322.50 in damages, a considerable sum in 1905, because it determined the operation to be unlawful because Mohr did not give the physician her consent to surgery on her left ear.<sup>110</sup>

The physician appealed the verdict on the grounds that the patient's consent to operate on the left ear was unnecessary because her express consent to operate on the right ear implied consent to operate on the left ear as well.<sup>111</sup> The court roundly rejected the physician's argument and found that for him to lawfully operate on Mohr's left ear he must have her express consent.<sup>112</sup> In supporting its ruling, the *Mohr* appellate court first relied on established battery precedent by stating, "the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person . . . and the right necessarily forbids a physician or surgeon . . . to violate, without permission, the bodily integrity of his patient by a major capital operation."<sup>113</sup> The court, however, went beyond established precedent, and beyond simple "inviolability of person" to establish the idea that consent must also involve some level of rationale choice.<sup>114</sup> The court explained that when "the physician advises his patient to submit to

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (The defendant brought his discovery to the attention of the plaintiff's personal physician, "who attended the operation at [plaintiff's] request—who also examined the [left] ear, and confirmed defendant in his diagnosis.").

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 13.

<sup>111</sup> *Mohr*, 104 N.W. at 14.

<sup>112</sup> *Id.* at 15 ("If the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further.").

<sup>113</sup> *Id.* at 14 (quoting *Pratt v. Davis*, 118 Ill. App. 161, 166 (Ill. App. Ct. 1905)).

<sup>114</sup> *Id.* at 15.

a particular operation, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further.”<sup>115</sup>

The court further clarified the relationship between physician and patient and the roles that each plays in a patient’s care by acknowledging that a physician agrees that he will “exercise reasonable care and exert his best judgment to bring about favorable results . . . and [although] the methods of treatment are committed almost exclusively to his judgment . . . [there is] no rule or principle of law which would extend to him free license respecting surgical operations.”<sup>116</sup> To clearly define the new role that self determination would play in the law of consent, and establishing consent as a legal right, the court emphasized that “[t]he patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it.”<sup>117</sup> This established informed consent as a more deliberative process and not merely assent. In act two of the informed consent story, to which we will now turn, the court clarified the role of the physician in helping patients make better-informed treatment decisions.

## 2. Act Two: Consent Becomes “Informed”

The second half of the Twentieth Century brought with it, beginning with the 1957 decision in *Salgo v. Stanford University*, a consensus in the courts that a physician must reasonably “inform” his patient of the potential benefits and risks of a proposed course of medical treatment for consent to be valid.<sup>118</sup> In assessing the validity of consent a brace of court decisions in the same dispute, *Natanson v. Kline*, established that an action for failing to inform was more properly styled in negligence than in battery, as had been the trend in previous decisions.<sup>119</sup> In establishing negligence as the proper cause of action in disputes alleging that physicians failed to

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<sup>115</sup> *Id.* (The court acknowledged that emergency situations negated the requirement of express consent, but found no such circumstances here. It also explained that if “in the course of an operation to which the patient has consented,” the physician discovered unanticipated disease, which if not treated, could endanger the patient’s health, the physician may expand the scope of the operation without the patient’s express consent. Again, however, the court found that operating on the left ear, when given the patient’s consent to operate on the right ear did not fall within this circumstance.)

<sup>116</sup> *Id.* at 12, 15.

<sup>117</sup> *Mohr*, 104 N.W. at 14–15 (quoting KINKEAD, 1 COMMENTARIES ON THE LAW OF TORTS § 375 [1903 ed.]).

<sup>118</sup> *Salgo*, 317 P.2d at 181.

<sup>119</sup> *Natanson v. Kline*, 350 P.2d 1093, 1106 (Kan. 1960).

properly inform their patients before embarking on a course of medical treatment, *Natanson* articulated the professional practice standard for informed consent that prevails today in most jurisdictions.<sup>120</sup>

In *Salgo*, the California appellate court coined the term “informed consent” and, in a precedent setting decision, explicitly required physicians to share sufficient information with their patients so that they could make intelligent choices about their medical care.<sup>121</sup> The plaintiff, Martin Salgo, sued his physicians and the treating hospital for negligence in administering an aortography procedure that left his lower extremities permanently paralyzed.<sup>122</sup> Part of the plaintiff’s negligence claim asserted that his primary physician should have warned him about the dangers of the aortography procedure.<sup>123</sup> The plaintiff had been suffering circulatory problems in his legs that made walking both difficult and painful.<sup>124</sup> Plaintiff’s physician prescribed the aortography procedure to confirm and locate blood circulation blockages suspected of causing the patient’s health problems.<sup>125</sup> The patient was under anesthesia during the procedure, which involved inserting a large needle into the aorta, which lies in front of the spinal column.<sup>126</sup> Although paralysis is a known risk of this procedure, the plaintiff’s primary physician admitted that “the details of the procedure and the possible dangers therefrom were not explained [to the patient].”<sup>127</sup>

In remanding the case to the lower court for failing to properly instruct the jury on the issue of consent, the *Salgo* court explained that “[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment.”<sup>128</sup> The court further warned that a physician

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<sup>120</sup> *Id.* (“The duty of the physician to disclose . . . is limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances.”).

<sup>121</sup> *Salgo*, 317 P.2d at 181 (“A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment.”).

<sup>122</sup> *Id.* at 173–75.

<sup>123</sup> *Id.* at 181.

<sup>124</sup> *Id.* at 172–73 (Plaintiff’s “chief complaint was cramping pains in his legs, mostly in the calves, causing intermittent limping. This condition had started gradually, becoming increasingly more severe.”).

<sup>125</sup> *Id.*

<sup>126</sup> *Salgo*, 317 P.2d at 174.

<sup>127</sup> *Id.* at 181.

<sup>128</sup> *Id.*

“may not minimize the known dangers of a procedure or operation in order to induce his patient’s consent.”<sup>129</sup>

In an effort to balance a patient’s right to know the risks and benefits of a contemplated medical treatment against a physician’s duty to not undermine the overall health of the patient by causing undue alarm and stress by communicating risks of treatment that might be possible, but remote, the court took action. The *Salgo* Court granted physicians a degree of discretion in deciding how much information was appropriate to share with the patient.<sup>130</sup> It is helpful to quote the *Salgo* court at length on this issue, as it sets the stage for the development of the first legal standard in defining the extent of a physician’s duty of informed consent.<sup>131</sup> The court explained:

At the same time, the physician must place the welfare of his patient above all else and this very fact places him in a position in which he sometimes must choose between two alternative courses of action. One is to explain to the patient every risk attendant upon any surgical procedure or operation, no matter how remote; this may well result in alarming a patient who is already unduly apprehensive and who may as a result refuse to undertake surgery in which there is in fact minimal risk; it may also result in actually increasing the risks by reason of the physiological results of the apprehension itself. The other is to recognize that each patient presents a separate problem, that the patient’s mental and emotional condition is important and in certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an *informed consent*.<sup>132</sup>

Here, the court articulates the tension between patient autonomy and the physician’s responsibility for overall quality of care that persists today, a tension that will inform the first true legal standard in informed consent theory articulated in the *Natanson* dispute.<sup>133</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (“[T]he physician has such discretion consistent . . . with the full disclosure of facts necessary to an informed consent.”).

<sup>131</sup> *Id.*

<sup>132</sup> *Salgo*, 317 P.2d at 181 (emphasis added).

<sup>133</sup> See *Natanson v. Kline*, 350 P.2d 1093, 1106 (Kan. 1960) (“The duty of the physician to disclose . . . is limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances.”). The issue regarding the circumstances under which a physician should withhold medical information from a patient—or even lie to a patient—for

Helping to reconcile this tension, two decisions issued by the Kansas Supreme Court in the *Natanson v. Kline* case provided the first negligence legal standard for informed consent.<sup>134</sup> Before *Natanson*, claims for failure to obtain informed consent were most often styled as battery claims.<sup>135</sup> After *Natanson*, the informed consent disclosure requirements, whether styled as battery or negligence claims, were “virtually identical.”<sup>136</sup> The plaintiff, Irma Natanson, sued her attending physician for, among other things, failing to warn her of the inherent dangers of undergoing cobalt radiation therapy.<sup>137</sup> The plaintiff underwent cobalt radiation therapy after a mastectomy of her left breast because of cancer and suffered severe radiation burns as a result of the treatment.<sup>138</sup> The weight of evidence suggested that the plaintiff’s physician failed to inform her of the risks of the cobalt radiation, which was a relatively new treatment at the time.<sup>139</sup> In reversing the lower court’s judgment in favor of the defendants and granting a new trial because of inadequate jury instructions on the nature of the negligence, the court explained the proper legal standard for informed consent.<sup>140</sup> Citing *Salgo*, the *Natanson* court first reaffirmed the physician’s obligation to assure that the patient “has given an intelligent consent to a proposed form of treatment.”<sup>141</sup> The *Natanson* court further clarified the proper rule for assessing the adequacy of informed consent.<sup>142</sup> The court explained that the physician’s duty to disclose “is limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances.”<sup>143</sup> Emphasizing that the appropriateness of the information explained to the patient is a medical judgment, the court further explained that:

[s]o long as the disclosure is sufficient to assure an informed consent, the physician’s choice of plausible courses should not be called into question if it appears, all circumstances consid-

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the patient’s benefit is one with which physicians still struggle. Sandeep Jauhar, *When Doctors Need to Lie*, N.Y. TIMES, Feb 22, 2014.

<sup>134</sup> *Natanson*, 350 P.2d at 1106.

<sup>135</sup> FADEN ET AL., *supra* note 78, at 130.

<sup>136</sup> *Id.* at 131.

<sup>137</sup> *Natanson*, 350 P.2d at 1100–01 (plaintiff “consented to the treatment, but alleges . . . that the nature and consequences of the risks of the treatment were not properly explained to her”).

<sup>138</sup> *Id.* at 1095.

<sup>139</sup> *Id.* at 1906–07.

<sup>140</sup> *Id.* at 1106, 1009.

<sup>141</sup> *Id.* at 1106.

<sup>142</sup> *Id.*

<sup>143</sup> *Natanson*, 350 P.2d at 1106.

ered, that the physician was motivated only by the patient's best therapeutic interests and he proceeded as competent medical men would have done in a similar situation.<sup>144</sup>

The professional practice standard for informed consent continued unchallenged for more than twenty-five years until the case of *Canterbury vs. Spence*, which began act three of the story of informed consent to which we will now turn.

### 3. Act Three: The Patient-Centered Standard of Care

In act three of the history of informed consent, the court further refined the doctrine by shifting the standard of care inquiry to what a *reasonable patient* would want to know and away from what a reasonable physician should explain, creating a significant minority view that prevails in an increasing number of jurisdictions.<sup>145</sup> The new patient-centered standard of care is best explained in *Canterbury v. Spence*, one of three 1972 court decisions to establish this new trend.<sup>146</sup> In *Canterbury*, the patient, Jerry Canterbury, sued his physician, William Spence, for, among other things, failure to warn of the risks of paralysis associated with a laminectomy, which involves the surgical removal of bone on the spinal vertebrae.<sup>147</sup> In reversing a directed judgment in favor of the physician and hospital, the *Canterbury* court remanded the case to the lower court with instructions to submit the issue to the jury regarding the physician's negligent failure to reasonably inform the patient of the procedure's known risks. In doing so, it created the patient-centered reasonable person standard, a new legal standard for assessing the adequacy of patient consent.<sup>148</sup>

Mr. Canterbury sought the care of his physician for back pain.<sup>149</sup> After an examination and several diagnostic tests, the defendant-physician determined that a ruptured disk for which a laminectomy was recommended likely caused the back pain.<sup>150</sup> Ev-

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<sup>144</sup> *Id.*

<sup>145</sup> FADEN ET AL., *supra* note 78, at 133 (Two other important court decisions, all decided in 1972, helped to make the shift from a physician-centered standard of care to a patient centered-standard of care. They are *Cobbs v. Grant*, 8 Cal.3d 229 (1972) and *Wilkinson v. Vesey*, 295 A.2d 676 (R. I. 1972)).

<sup>146</sup> *Canterbury v. Spence*, 464 F. 2d 772, 772 (D.C. Cir. 1972).

<sup>147</sup> *Id.* at 778 ("Against Dr. Spence [plaintiff] alleged, among other things, negligence in performance of the laminectomy and failure to inform him beforehand of the risk involved.").

<sup>148</sup> *Id.* at 794 (The court held that the "jury, not Dr. Spence, was the final arbiter of whether nondisclosure was reasonable under the circumstances.").

<sup>149</sup> *Id.* at 776.

<sup>150</sup> *Id.* at 776-77.

idence showed that the physician failed to warn the patient that the procedure carried with it a one percent chance of paralysis.<sup>151</sup> The only indication that the physician gave of the operation's risks was in response to the patient's mother's question whether the operation was serious. To this question, the physician replied, "not more than any other operation."<sup>152</sup> The physician performed the operation, during which he treated the ruptured disk.<sup>153</sup> During the first day, the patient seemed to be recovering normally.<sup>154</sup> However, the patient fell while trying to make his way to the bathroom and within hours he became paralyzed from the waist down.<sup>155</sup>

Like prior court decisions, the *Canterbury* court emphasized that self-determination was a bedrock principle upon which the doctrine of informed consent rested.<sup>156</sup> "True consent," the court explained, can only occur with "informed exercise of a choice and that entails an opportunity to evaluate knowingly the options available and the risks attendant upon each."<sup>157</sup> Because the "average patient has little or no understanding of the medical arts," the court further explained, it is the duty of physicians "to warn of the dangers lurking in the proposed treatment."<sup>158</sup> Although the *Canterbury* court invoked precedent to reaffirm the "fiducial qualities" of the physician-patient relationship, it abandoned the professional practice standard of disclosure and adopted the patient-centered standard for determining the adequacy of disclosures of the risks and benefits of a proposed course of treatment.<sup>159</sup> The new patient-centered standard measures the appropriateness of disclosure by what a "reasonably prudent" patient "has every right to expect."<sup>160</sup> The professional practice standard, on the other hand, measures appropriateness of disclosure from the perspective of what a reasonable physician would disclose.<sup>161</sup> In rejecting the pro-

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<sup>151</sup> *Id.* at 778 ("Dr. Spence . . . testified that even without trauma paralysis can be anticipated 'somewhere in the nature of one percent' of the laminectomies performed, a risk he termed 'a very slight possibility.'").

<sup>152</sup> *Canterbury*, 464 F.2d at 777.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* (There was "some conflict as to precisely when or why [plaintiff] fell." Plaintiff "testified that during the [process of voiding] he slipped off the side of his bed, and that there was no one to assist him, or side rail to prevent the fall.").

<sup>156</sup> *Id.* at 780.

<sup>157</sup> *Id.*

<sup>158</sup> *Canterbury*, 464 F.2d at 780, 782.

<sup>159</sup> *Id.* at 782.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

fessional practice standard, the court found it troubling that under this standard a discloser violation could be found only if “it was the custom of physicians practicing in the community to make a particular disclosure to a patient.”<sup>162</sup> To rely exclusively on physicians’ disclosure practices, the court explained, “is to arrogate the decision on revelation to the physician alone.”<sup>163</sup> It further reasoned that “[r]espect for the patient’s right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose on themselves.”<sup>164</sup> Summarizing the difference between the physician-centered standard and the patient-centered standard, a New Jersey court said, “the sufficiency of disclosure under the prudent patient standard requires that the disclosure be viewed through the mind of the patient, not the physician.”<sup>165</sup> Implicit in this shift of emphasis is the recognition that expert testimony is no longer required in order to establish the medical community’s standard for disclosure and whether a physician failed to meet that standard.<sup>166</sup>

The patient-centered standard of care is still a minority view, but a growing trend in American informed consent jurisprudence.<sup>167</sup> An important practical consequence of adopting a patient-centered standard of disclosure is that lay testimony will often, although not always, be sufficient to establish a valid claim for breach of informed consent.<sup>168</sup> Under the professional practice rule, by definition, expert testimony was almost always required to establish a violation of reasonable physician care.<sup>169</sup>

The *Canterbury* court also clarified the role of proximate cause and how to establish it in informed consent disputes.<sup>170</sup> Proximate cause is a necessary element in all negligence actions.<sup>171</sup> In this context proximate cause requires that a “causal relationship” between the physician’s failure to inform and harm to the

<sup>162</sup> *Id.* at 783.

<sup>163</sup> *Id.* at 784.

<sup>164</sup> *Canterbury*, 464 F.2d at 784.

<sup>165</sup> *Febus v. Barot*, 616 A.2d 933, 936 (N.J. Super. Ct. App. Div. 1992).

<sup>166</sup> *See id.*

<sup>167</sup> Karpman, *supra* note 96, at 937–38.

<sup>168</sup> *Febus*, 616 A.2d at 935–36 (holding that while “no medical expert is required to prove that an undisclosed risk would have been material to the patient’s consent, it must first be shown that the risk was one of which the physician should have been aware, and that it was recognized within the medical community.”).

<sup>169</sup> *See id.* at 935 (discussing the burden of proving a violation under the professional practice rule).

<sup>170</sup> *Canterbury*, 464 F. 2d at 790–91.

<sup>171</sup> *Id.* at 790 (“[N]egligence unrelated to [an] injury is nonactionable.”).



patient.<sup>172</sup> The court explained “[a]n unrevealed risk that should have been made known must materialize, for otherwise the omission, however, unpardonable, is legally without consequence.”<sup>173</sup> In an additional flight from precedent, the court adopted an objective proximate cause standard.<sup>174</sup> Under this standard, the proper inquiry in deciding the “causality issue . . . is what a prudent person in the patient’s position would have decided if suitably informed of all the perils bearing significance.”<sup>175</sup> The inquiry is not what this patient says he would have done.<sup>176</sup> The court preferred an objective proximate cause standard more than a subjective standard for several reasons. The court reasoned that assessing what a person might have done “if” certain information were known is always, at best, “purely hypothetical.” The inquiry “would the patient have decided differently had he known something he did not know . . . hardly represents more than a guess, perhaps tinged by the circumstance that the uncommunicated hazard has in fact materialized.”<sup>177</sup> Finally, the court felt that leaving such an important inquiry to *only* the patient’s credibility was problematic.<sup>178</sup>

#### 4. The Modern Informed Consent Doctrine

The modern doctrine of informed consent continues to evolve largely in the common law although many states have passed informed consent statutory law.<sup>179</sup> These statutes have generally been attempts to codify common law rather than substantially change the doctrine.<sup>180</sup> Below is the modern understanding of what it means to obtain informed consent in medical practice:

- (1) A description of the recommended treatment or procedure;
- (2) [a] description of the risks and benefits of the recommended procedure, with special emphasis on risks of death or serious bodily disability;
- (3) [a] description of the alternatives, including

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 790–91 (The court recognized that the usual “method of dealing with the issue on causation comes in second-best. It places a physician in jeopardy of the patient’s hindsight and bitterness.”).

<sup>175</sup> *Id.* at 791.

<sup>176</sup> *Canterbury*, 464 F.2d at 772.

<sup>177</sup> *Id.* at 790.

<sup>178</sup> *Id.* at 790–91 (“It places the factfinder in the position of deciding whether a speculative answer to a hypothetical question is to be credited.”).

<sup>179</sup> Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the Uma*, 2003 J. DISP. RESOL. 99, 120 (2003) (rather than trying to establish new laws, the laws attempt to create uniformity).

<sup>180</sup> *Id.*; Nolan-Haley, *supra* note 1, at 836.

other treatments or procedures, together with the risks and benefits of these alternatives; (4) [t]he likely results of no treatment; (5) [t]he probability of success, and what the physician means by success; (6) [t]he major problems anticipated in recuperation, and the time period during which the patient will not be able to resume his or her normal activities; and (7) [a]ny other information generally provided to patients in this situation by other qualified physicians.<sup>181</sup>

If modern informed consent in the medical field embraces one overarching principle, that principle is patient understanding. Patient understanding comes with the recognition that informed consent is not a single “event,” but rather a “process involving a series of questions and answers.”<sup>182</sup> The physician must ensure that the patient has understood the information the physician communicates, which often means simplifying complex medical and statistical information so it is intellectually digestible to a lay person.<sup>183</sup>

The doctrine of informed consent has been imported to other spheres of human relations and decision-making, beyond medical treatment. These include medical research involving human experimentation, financial and legal practice.<sup>184</sup> Legal practice, for example, is replete with circumstances where a lawyer must obtain informed consent from his client to proceed with a course of action. In this context, informed consent “denotes the agreement by a person 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.”<sup>185</sup> The questions to which we now turn are whether and to what extent informed consent should govern mediator practice.

#### IV. A MEDIATOR SHOULD NOT BE REQUIRED TO OBTAIN INFORMED OUTCOME CONSENT, BUT SHOULD BE REQUIRED TO OBTAIN INFORMED PARTICIPATION CONSENT

Requiring mediators to obtain informed outcome consent is unethical and imprudent because it violates a mediator’s duty of

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<sup>181</sup> GEORGE J. ANNAS, *THE RIGHTS OF PATIENTS* 8 (3d ed. 2004).

<sup>182</sup> Grimm, *supra* note 3, at 43.

<sup>183</sup> *Id.*

<sup>184</sup> FADEN ET AL., *supra* note 78, at 30, 51.

<sup>185</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0 (e) (2013).

impartiality. Mediators cannot unduly assist one party to the detriment of another, no matter how well intended that assistance may be. Mediators must promote participants' informed settlement choices, whether represented by counsel or not, within established ethical boundaries. Information gathering and assessment techniques in the hands of a skilled mediator, as will be discussed more fully below, promotes informed outcome consent by maximizing the information available to an unrepresented party. In short, mediation promotes fairness, even without requiring informed outcome consent. Requiring mediators to obtain informed outcome consent would impose on the mediator, in some circumstances, the duty to give legal advice and counsel to *pro se* parties. This may require that a mediator inform the *pro se* party about the existence of claims and defenses of which they were unaware and explain to them the likelihood of success on those claims and defenses if the dispute were adjudicated. This theory would require the mediator to be an advocate for the *pro se* party, which is presently unethical and inconsistent with the mediator's role.

Mediators should be required, however, to obtain informed participation consent because it is ethical, it is consistent with the mediator's role, and it enhances informed outcome consent. Parties should enter the mediation with a full appreciation of the nature of that process and an understanding of the benefits and risks of the model of mediation that the mediator practices. This is so even in circumstances where litigants have been court-ordered to participate in mediation. When fully informed of the risks and benefits of the mediation process, participants can make better settlement choices or decide not to settle at all. Prohibiting the requirement of informed outcome consent but requiring informed participation consent strikes the appropriate balance of a mediator's sometimes conflicting duties by maximizing party self-determination while honoring the mediator's other fundamental ethical duties of promoting a quality process and remaining impartial.

A. *Mediators Cannot Ethically Be Required to Provide  
Informed Outcome Consent Because it Violates Their  
Duty of Impartiality*

To understand the full extent of the ethical and practical difficulties in applying informed outcome consent to mediation, it is necessary first to understand how proponents of it envision in-

formed outcome consent working in practice. Although several scholars have advocated for mediators taking more directive approaches to assisting parties in making informed settlement choices, Professor Jacqueline Nolan-Haley provides the most articulate and well-developed analysis of the argument.<sup>186</sup> In her seminal article on the topic, Professor Nolan-Haley, a thoughtful mediation scholar, argues for a “robust” doctrine of informed consent in mediation.<sup>187</sup> Her article correctly highlights the importance of helping unrepresented mediation participants to make informed decisions about the acceptability of settlement terms because uninformed choice can lead to “harmful results.”<sup>188</sup> The need for addressing this potential is becoming ever more acute, she correctly explains, as parties and courts increasingly rely upon ADR, especially mediation, to address disputes.<sup>189</sup> She argues that mediators should be charged with the duty of obtaining informed consent from unrepresented parties because only with “fully informed consent” can parties exercise self-determination.<sup>190</sup> Her model of informed consent envisions a “sliding scale” where mediator responsibility varies depending on three variables: whether the mediation was ordered or voluntary, whether the mediation occurs in a court or another location—such as a private law office—and whether the party is represented by counsel.<sup>191</sup> The workability of a sliding scale, the degree to which voluntariness can be reasonably discerned and whether the location of the mediation is relevant to the doctrine of informed consent are not topics that this Article intends to address. The main interest of this Article is addressing the propriety of Professor Nolan-Haley’s conclusion, as well as the conclusion of other scholars, that under the most protective point of her sliding scale, where the participant has no counsel and is ordered to mediate by the court, mediators should have a duty to obtain informed outcome consent. Imposing such a duty, she avers, will “insure that the parties have a minimum level of understanding of the outcomes to which they agree.”<sup>192</sup> As we will explore more fully below, Professor Nolan-Haley’s vision of insuring that *pro se* litigants “minimally understand” their settlement choice, goes beyond explaining their rights and responsibilities

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<sup>186</sup> Nolan-Haley, *supra* note 1, at 836–37.

<sup>187</sup> *Id.* at 812.

<sup>188</sup> *Id.* at 776.

<sup>189</sup> *Id.* at 777.

<sup>190</sup> Nolan-Haley, *supra* note 1, at 840.

<sup>191</sup> *Id.* at 827.

<sup>192</sup> *Id.* at 827.

under the terms of the settlement. In her view, mediators must also advise the *pro se* party of the rights they are waiving, even unasserted rights, by settlement and assess for them how likely it would have been for them to vindicate these rights in court.

In her article on informed consent in mediation, Professor Nolan-Haley refers to her solution for providing greater self-determination for *pro se* participants as the “informative decision-making model” and recommends that mediators act as a “conduit of legal information.”<sup>193</sup> She explains that mediators must provide sufficient information about legal claims so that unrepresented participants can make “informed choices,” as that concept is typically understood under traditional informed consent law. Here, an extended quote from Professor Nolan-Haley’s article will be helpful:

I do not advocate that court mediation sessions replicate the adversarial model or that mediation outcomes approximate what is available in court. I do argue, however, that when courts require unrepresented parties to mediate, that their mediation outcomes be informed by law. This is not to suggest that, once informed of their legal entitlements, parties will automatically seek legal remedies in the mediation process. Other nonlegal values may matter more. But if the principle of informed consent means anything in court mediation, it means that parties should be able to decide for themselves what values do matter. They should know what legal entitlements they are waiving in the name of autonomy and self-determination. By understanding their legal and nonlegal interest, they can make tradeoffs among these interests that are at least reasonably educated.<sup>194</sup>

In this quote, Professor Nolan-Haley distinguishes herself from scholars that evaluate the fairness of a mediated agreement by the degree to which the mediated outcome approximates an outcome the party might have obtained had a court adjudicated his or her claim.<sup>195</sup> Here, she explains, it is acceptable for mediation participants to trade the chance at fully vindicating legal rights for other practical benefits.<sup>196</sup> For example, a litigant in a divorce proceeding might forgo the chance of a more favorable financial trial award for a more modest settlement with the goal of having better relations with a soon to be ex-spouse. This choice in Professor Nolan-Haley’s view is acceptable as long as the spouse knows what he

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<sup>193</sup> *Id.* at 836.

<sup>194</sup> Nolan-Haley, *supra* note 1, at 836–37.

<sup>195</sup> Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 *GEO. J. LEGAL ETHICS* 503, 505 (1991).

<sup>196</sup> Nolan-Haley, *supra* note 1, at 836.

or she is giving up by not pursuing his or her rights in court. To be able to make these tradeoffs and decide what values matter more, however, Professor Nolan-Haley argues that mediators must provide enough “information” so that participants can make reasonable assessments of competing values.<sup>197</sup> But she does not explain what she means by “information.”

For a mediation participant to make these kinds of assessments in any meaningful way, Professor Nolan-Haley must use the term “information” as is understood in the medical informed consent context. She must be arguing for the mediator to adopt a role similar to that of a physician. In the informed consent medical context, “information” means all information that the participant needs to make a fully informed decision about the choice of settlement.<sup>198</sup> Under this “informative decision-making model,” as she labels it, “the mediator acts as a conduit of legal information to promote the parties’ understanding.”<sup>199</sup> This legal information, she further explains, “may include a general overview of the range of legal entitlements that might be available.” As a concrete example of this duty in action, Professor Nolan-Haley explains that “[i]f a statute of limitations or treble damages award were relevant to a claimant’s case,” the mediator has a duty to make the participant “aware of their existence and their possible impact on recovery.”<sup>200</sup>

To explain properly to a *pro se* litigant the “possible impact on recovery,” although Professor Nolan-Haley never states so explicitly, it would not be enough in many circumstances that mediators merely explain that he or she *may* have a particular claim or defense if the goal is to obtain informed consent. The mediator would need to provide the likelihood of success of that claim or defense, and its probable effect on the outcome of the adjudication for the participant to be fully informed. As was stated in the *Mohr* decision more than a hundred years ago, “[t]he patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it.”<sup>201</sup> So, too, a mediation participant, if we require informed outcome consent, must be the “final arbiter” of whether he will take his chances with the settlement or at adjudication.<sup>202</sup> To make a fully informed de-

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<sup>197</sup> *Id.*

<sup>198</sup> *Canterbury v. Spence*, 464 F. 2d 772, 780 (D.C. Cir. 1972).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Mohr v. Williams*, 104 N.W. 12, 14–15 (1905) (quoting KINKNEAD, 1 COMMENTARIES ON THE LAW OF TORTS, AT § 375 (1903 ed.)).

<sup>202</sup> *See id.*

cision, the *pro se* litigant must understand the chances of success.<sup>203</sup> Under Professor Nolan-Haley's informative decision-making model, where a *pro se* litigant has been compelled to mediation, it is the mediator's duty to explain those chances of success to the party.<sup>204</sup>

Of course, this makes perfect sense under Professor Nolan-Haley's theory of mediation that requires "intelligent choice."<sup>205</sup> As we have seen, informed consent, even in its earliest stages of development, required physicians to explain the risks of a procedure. Again, as early as 1905, in the *Mohr* decision, the court recognized that informed consent was at its heart a weighing of risks.<sup>206</sup> In *Mohr*, the court stated "the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further."<sup>207</sup> Similarly, in 1957, the *Salgo* court, finding a physician failed to warn his patient of the risks of a diagnostic procedure, explained "[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment."<sup>208</sup> The modern formulation of informed consent explicitly requires that the physician explain "the probability of success, and what the physician means by success."<sup>209</sup>

Mediators will not be able to obtain informed consent by the simply listing possible claims or defenses the participant might be waiving by settlement. To simply provide a list of every possible claim or affirmative defense that a party might possess in litigation without any information about the relative merits of those claims and an estimate of the likelihood of success would be irresponsible in the extreme. It would do more harm than good in many circumstances. This would be analogous to a physician explaining that a particular course of cancer treatment carries with it a risk of death or paralysis without any information as to how great those risks are. How in such a circumstance can a patient make an informed choice without knowing the extent of the risk? Indeed, it would be

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<sup>203</sup> See *id.*

<sup>204</sup> See Nolan-Haley, *supra* note 1, at 835–36.

<sup>205</sup> See *id.*

<sup>206</sup> *Mohr*, 104 N.W. at 15.

<sup>207</sup> *Id.*

<sup>208</sup> *Salgo*, 317 P.2d at 181 (Cal. Dist. Ct. App. 1957).

<sup>209</sup> ANNAS, *supra* note 181.

negligent, as we have seen in the physician-patient context, if the physician did not explain the full extent of the risks to the patient.<sup>210</sup> Similarly, for unrepresented parties in mediation to make “robustly” informed decisions about the “tradeoffs” of settlement, they must be provided some understanding of what the likelihood of succeeding on the claims if the matter proceeded to trial.<sup>211</sup> This is the view of “information” that is demanded by modern informed consent theory.<sup>212</sup>

Mediators would be providing legal advice if a state adopts an informative mediation model.<sup>213</sup> This knowing evaluation must include information about “the risks and benefits of these alternatives.”<sup>214</sup> Certainly, such an interpretation of Professor Nolan-Haley’s is consistent with her version of a “robust” informed consent in which unrepresented participants “have a minimum level of understanding of the outcomes to which they agree.”<sup>215</sup> Such a version of informed consent, however, is tantamount to providing legal counsel and advice in violation of the Model Standards.

Providing legal counsel and advice to any party, even a *pro se* party, is unethical under the Model Standards and most state mediator ethical codes. The Model Standards define impartiality as a mediator’s being free from “favoritism, bias or prejudice.”<sup>216</sup> The Model Standards require a mediator to treat the participants impartially regardless of his or her “personal characteristics . . . or performance at the mediation.”<sup>217</sup> If mediators are required to obtain informed outcome consent from unrepresented mediation participants by explaining “the range of possible outcomes and the laws that may affect those outcomes,” it is inevitable that they will be aiding one party to the detriment of another. This amounts to the mediator taking on the legal representation of one of the participants and is a violation of their ethical duties of impartiality.<sup>218</sup> Mediators and mediation scholars nearly universally agree: “medi-

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<sup>210</sup> *Natanson v. Kline*, 350 P.2d 1093, 1106 (Kan. 1960).

<sup>211</sup> *Canterbury v. Spence*, 464 F. 2d 772, 780 (D.C. Cir. 1972).

<sup>212</sup> ANNAS, *supra* note 181.

<sup>213</sup> See *Canterbury*, 464 F. 2d at 780 (Informed consent in the medical context, as the court explained in the *Canterbury* decision, “can only occur with informed exercise of a choice, and that entails an opportunity to evaluate knowingly the options available and the risks attendant upon each.”).

<sup>214</sup> Grimm, *supra* note 3, at 41.

<sup>215</sup> Nolan-Haley, *supra* note 1, at 828.

<sup>216</sup> MODEL STANDARDS Standard II (2005).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*



ator impartiality is central to the mediation process.”<sup>219</sup> Impartiality is sometimes explained as “multipartial,” in that “mediators are involved with and concerned about how to help achieve satisfaction of all parties.”<sup>220</sup> The salient point here is that mediators should not behave in ways that favors one party over another. Indeed, participants seek impartial mediators because “[t]hey do not want an intervener who will initiate actions that are potentially detrimental to their interests.”<sup>221</sup> The role of an advocate is inconsistent with the role of a mediator and, more particularly, in direct violation of the mediator’s ethical duties of impartiality.

Supporting the idea that mediators cannot be advocates for mediation participants, the Florida Mediator Qualifications Advisory Panel ruled that mediator may not advise *pro se* litigants of the existence of claims of which they may not be aware.<sup>222</sup> In that case, the mediator specifically asked “[i]s a mediator who becomes aware that a plaintiff in a wrongful death action is making no claim for loss of consortium, which claim would appear to the mediator to be appropriate under the circumstances, bound to inform that party of the matter?”<sup>223</sup> The Florida panel explained that not only was a mediator not bound to make the participant aware of the unasserted consortium claim, but that ethical rules prohibited the mediator from advising of the existence of the claim.<sup>224</sup> The panel stated:

No mediator, even one who is a member of the Florida Bar and theoretically is ‘qualified by training or experience,’ may not inform a plaintiff, regardless of whether the plaintiff is represented or not, of a right to make a claim for loss of consortium because that would be in the nature of providing legal advice, not merely providing information (citations omitted). A lawyer mediator is specifically precluded from representing either party during the mediation.<sup>225</sup>

The Florida mediator ethics panel decision is consistent with the Model Standards and the proper role of mediators. Mediators cannot be advocates for any party in the mediation. As we will explore later in this Article, mediators in some circumstances may ethically provide legal information and raise legal issues as long as

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<sup>219</sup> WALDMAN, *supra* note 4, at 141.

<sup>220</sup> CHRISTOPHER MOORE, *THE MEDIATION PROCESS* 53 (3rd rev. ed. 2003).

<sup>221</sup> *Id.*

<sup>222</sup> Florida Mediator Qualifications Advisory Panel, MQAP 96-003 (1997).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*; *see also* Florida Mediator Qualifications Advisory Panel, MQAP 95-005(c) (1997).

they do so in the service of all participants. Now that we have addressed that requiring informed outcome consent is presently unethical under the Model Standards, we will turn to why changing mediator ethical codes to impose a duty on mediators to obtain informed outcome consent of *pro se* participants is undesirable.

B. *Mediator Ethical Codes Should Not Require Informed Outcome Consent Because It Is Inconsistent with the Proper Role of the Mediator and Would Create Significant Practical Concerns*

1. *Mediator Codes Should Not Require Informed Consent Because it Undermines the Mediation Process*

A system of mediation that requires, or even permits, mediators to provide legal advice that aids one party to the detriment of another eviscerates impartiality. By eviscerating impartiality, the process can no longer be properly called mediation because, as we have seen, impartiality is a defining characteristic of the mediation process. Professor Nolan-Haley argues for a “modified approach to mediator neutrality” when courts require unrepresented parties to participate in mediation.<sup>226</sup> Courts, legislatures and mediator associations should reject this “modified approach to neutrality” because it is a euphemism for impartiality and is inconsistent with the proper role of mediators. Professor Nolan-Haley acknowledges as much when she says that her proposed model “poses a threat to neutrality, a primary value of mediation.”<sup>227</sup> She justifies this threat to a traditional view of impartiality by arguing that as a fiduciary to the disputing parties, a mediator has minimum responsibilities to parties to help make their decisions informed ones.<sup>228</sup> These minimum responsibilities, she argues, sometime require a “modified approach to neutrality.”<sup>229</sup> Under such an approach, she explains, “informed decision-making should not be understood as a competing value, but rather as a prerequisite for the exercise of self-determination.”<sup>230</sup>

Professor Nolan-Haley’s argument that mediators, when necessary, should provide legal advice fails to convince, in part, be-

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<sup>226</sup> Nolan-Haley, *supra* note 1, at 837.

<sup>227</sup> *Id.* at 837; Engler, *supra* note 1, at 2.

<sup>228</sup> Nolan-Haley, *supra* note 1, at 825–26.

<sup>229</sup> *Id.* at 837.

<sup>230</sup> *Id.* at 813.

cause mediators are not fiduciaries. Thus, the kind of informed consent obligation for which she and others argue is not the mediator's proper function. A "fiduciary," it is explained, "acts on the client's behalf and in service of the client's welfare in the relevant domain."<sup>231</sup> As general definition, a "fiduciary is a person entrusted with power . . . to be used for the benefit of another and legally held to the highest standard of conduct."<sup>232</sup> Supporting Professor Nolan-Haley's view, one scholar has argued that courts should impose fiduciary status on mediators because of the confidences and trust that parties typically place in the mediator.<sup>233</sup> This scholar reasons that the fiduciary status should attach because the mediator has a "powerful political position between the two parties [and] . . . because the "mediator actively seeks to gain the trust of the parties of the parties in order to maximize effectiveness."<sup>234</sup>

As of this writing, however, no court has deemed mediators as fiduciaries, and it should remain so because the role of mediator is inconsistent with the role of a traditional fiduciary.<sup>235</sup> In the legal use of the term, mediators are not fiduciaries at all because by the very nature of their role they cannot have individualized loyalty, as might a doctor or a lawyer.<sup>236</sup> A mediator's loyalty is to all of the parties to a dispute, not just one party.<sup>237</sup> Mediators serve the parties by serving the process.<sup>238</sup> John Paul Lederach, acclaimed conflict resolution scholar, correctly observed that "[a]dvocacy chooses to stand by one side for justice's sake. Mediation chooses to stand in connection to all sides for justice's sake."<sup>239</sup> As a supporter of all sides in mediation, the mediator cannot provide legal counsel to one side to the detriment of another side, however noble the motivation. The role that physicians play in promoting their patients'

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<sup>231</sup> Steven Joffe & Robert D. Truog, *Consent to Medical Care: The Importance of the Fiduciary Context*, in *THE ETHICS OF CONSENT* 353 (Franklin G. Miller and Alan Wertheimer eds., 2010).

<sup>232</sup> *Id.*

<sup>233</sup> See Arthur A. Chaykin, *Mediator Liability: A New Role of Fiduciary Duties*, 53 U. CIN. L. REV 731, 744-45 (1984).

<sup>234</sup> *Id.*

<sup>235</sup> See Chaykin, *supra* note 233, at 744-45.

<sup>236</sup> See MODEL STANDARDS Standard II (2005).

<sup>237</sup> MOORE, *supra* note 220, at 81 (stating that a mediation is "'omnipartial,' in that mediators are involved with and concerned about how to help achieve satisfaction of all parties' issues and interests.'").

<sup>238</sup> STULBERG ET AL., *supra* note 17, at 30.

<sup>239</sup> JOHN PAUL LEDERACH, *PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES* 14 (1995).

health is different from the role that mediators play in resolving their participants' disputes. Physicians are caretakers, advisers and advocates for the patients. Their relationship to the patient is "fiduciary in character."<sup>240</sup> Mediators, on the other hand, do not serve an individual.<sup>241</sup> They are guides, facilitators and educators for two or more participants in a single conflict.<sup>242</sup> Thus, a mediator assists a group of individuals with a joint problem and cannot aid one member of the group to the detriment of any other member.<sup>243</sup> Unlike a physician, individualized loyalty is not possible, or desirable, for a mediator because it creates a conflict of loyalties.

Dean Michael Moffitt, another noted ADR Scholar, explains the inherent conflict if mediators are treated as traditional fiduciaries.<sup>244</sup> Dean Moffitt says that in establishing a claim that a mediator is a fiduciary, a "[p]rospective plaintiff would need to overcome the structural difficulty of asserting that the mediator owes simultaneous fiduciary obligations to parties with opposing interests in the same matter at hand."<sup>245</sup> "Fiduciary obligations," he continues, "cannot be structured responsibly in a way that would damn the mediator no matter what she did, yet holding a fiduciary obligation simultaneously to opposing parties risks exactly that."<sup>246</sup> In other words, if traditional fiduciary obligations applied to mediators, and mediators were bound to obtain participants' informed outcome consent, they could be "damned" by one client for not informing him of his legal rights before accepting a settlement and be damned by the other client if he did because he breached his obligation of impartiality.<sup>247</sup>

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<sup>240</sup> FADEN ET AL., *supra* note 78, at 128; Canterbury, 464 F. 2d at 782.

<sup>241</sup> MOORE, *supra* note 220, at 53.

<sup>242</sup> STULBERG ET AL., *supra* note 17, at 25–28.

<sup>243</sup> MODEL STANDARDS Standard II (2005).

<sup>244</sup> Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 168 (2003).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> See MODEL STANDARDS Standard II (2005). Even lawyers, one of the most traditional of fiduciaries, have limits to their fiduciary obligations to one client if it would undermine their obligations to current or even past clients. For example, under the American Bar Associations, Model Rule of Professional Conduct, Rule 1.7, a lawyer under no circumstances can take on a representation that involves "the assertion of a claim by one client against another client represented by the lawyer in the same litigation." MODEL RULES OF PROF'L CONDUCT R. 1.7 (b)(3) (2013). The rules even protect former clients. Rule 1.9 of the Model Rules states that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." MODEL RULES OF PROF'L CONDUCT R. 1.9. (2013). The Model Rules are replete with examples of the ways fiduciary obligations are balanced against one another and

Mediation is a set of characteristics, not just one characteristic, the same way water is composed of hydrogen and oxygen, not one element or the other element. As much as one may want to, one cannot ignore that in some respects, mediation assistance is one side of the coin and mediator impartiality is the other side. If one decides that informed choice is paramount, then impartiality in mediation means very little or nothing at all. It would be like deciding that a lawyer's loyalty to the client is paramount in representation, rendering meaningless the ethical duties of candor to the court and truthfulness to non-clients.<sup>248</sup> Competing ethical duties should not obliterate one another; they should balance with one another.

## 2. Requiring Informed Outcome Consent Would Create Practical Concerns

Imposing a duty on mediators to obtain informed outcome consent from *pro se* participants would raise at least two significant practical concerns that would negatively impact the practice of mediation. The first concern is that it would reduce mediation's effectiveness because the mediator's role in advising *pro se* participant would cause the other party or parties to lose trust in the mediator. The second practical concern is that if mediators were required to provide legal advice, it would prevent non-attorney mediators and facilitative mediators from mediating disputes in which, at least, one party was *pro se*.

Requiring mediators to provide *pro se* litigants legal advice in order to obtain informed outcome consent would seriously undermine the efficiency of mediation by allowing mediators to treat participants unequally, potentially damaging the participant's trust in the mediator. A mediator's currency is trust.<sup>249</sup> The extent to which the parties trust the mediator is the extent to which he or she will be able to productively guide the process and encourage col-

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limited. Similarly, any fiduciary status that mediators might attain in the future cannot ignore some key obligations to the exclusions of others. Even if a court or legislature deemed mediators fiduciaries, it could not require informed consent as one of the mediator's fiduciary obligations because no single obligation should shape mediators duties. Instead they should be shaped by all ethical obligations. Mediators would be able to aid one party in participating in the mediation process as long as it did not undermine the other party.

<sup>248</sup> See MODEL RULES OF PROF'L CONDUCT (2013) at Rule 3.3 (stating that a lawyer shall not knowingly "[m]ake a false statement of fact to a tribunal or fail to correct the false statement of material fact or law previously made to the tribunal by the lawyer") and Rule 4.1 (stating that "in the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person").

<sup>249</sup> Susan Nauss Exon, *Maximizing Technology to Establish Trust in an Online, Non-Visual Mediation Setting*, 33 U. LA VERNE L. REV. 27, 41 (2011).

laborative behavior and flexibility from the participants. Uncovering information, generating options, and managing the negotiation process are all reliant on the parties trust in the mediator. Thus, maintaining a high degree of rapport and trust with parties is essential to an effective mediation.<sup>250</sup> A survey conducted of labor and commercial mediators ranked rapport building as the most important ingredient of their success.<sup>251</sup> Rapport building, in part, contemplates trust.<sup>252</sup> A high degree of trust is impossible to maintain if a mediator appears impartial.<sup>253</sup> Internationally recognized mediation scholars Laurence Boulle and Miryanna Nestic say that impartiality is so integral to the mediation process “[i]t is inconceivable that parties could waive the requirement that the mediator act fairly.”<sup>254</sup> As a practical matter, waiving mediator impartiality is precisely what parties will need to do if the duty of informed outcome consent is required.

If a state required informed outcome consent in *pro se* mediations, mediators would be obligated to explain this duty, as part of informed participation consent, to all the participants at the beginning of the mediation. He would have to explain, therefore, that he might be required to provide legal advice and counsel to the *pro se* party, but not the represented party. Such an explanation, as part of the mediator’s opening statement, might go something like this: *I am also obligated to explain to you that before we finalize any agreement here today, I will need to make certain that you understand the consequences of the proposed agreement. This means that I will need to be satisfied not only that you understand your obligations and benefits under the agreement, but also the legal rights you may be giving up by entering into it. In the case of Ms. Smith, who is representing herself, I may find it necessary to help her understand the law and how it applies to her case. This means helping her to assess the strengths and weaknesses of her claims, as well as bringing to her attention claims or defenses of which she might not be aware, but which I think are nevertheless valid.* Many mediation participants would not agree to this condition, recognizing its obvious bias.<sup>255</sup> Even in circumstances that an opposing counsel and party

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<sup>250</sup> *Id.*

<sup>251</sup> FRENKEL ET AL., *supra* note 18, at 223.

<sup>252</sup> *Id.* (stating that rapport building involves “a relationship of understanding, empathy and trust.”).

<sup>253</sup> BOULLE ET AL., *supra* note 17, at 51.

<sup>254</sup> LAURENCE BOULLE & MIRYANA NESIC, *MEDIATION: PRINCIPLES, PROCESS, PRACTICE* 18 (2001).

<sup>255</sup> *Id.*

are required to submit to such a condition because the mediation is court-ordered, they will see the impartial treatment and bias in such a condition, and it will negatively affect their relationship with the mediator and undermine the mediation process.

A second negative impact of requiring informed outcome consent will be the marginalization of mediators with professional backgrounds in areas other than law, as well as those mediators who practice in a facilitative style. Professor Nolan-Haley hints at this issue in her article, although does not resolve it. She states: “Depending upon the court program in which mediation takes place, a wide range of legal knowledge may be required and mediators, whether or not they are lawyers, will not always know the relevant legal information that should be disclosed to parties.”<sup>256</sup> “This is a complex problem,” she continues, “that raises questions about who should be permitted to mediate in court mediation programs.”<sup>257</sup> This problem is not complex, but rather it is quite simple: If states require informed outcome consent, only attorneys will be able to mediate disputes involving *pro se* parties because only attorneys can provide legal advice and evaluation.

Mediation is generally not considered the practice of law and it should remain so.<sup>258</sup> Facilitating discussions and problem solving, discussing “legal issues generally” and even memorializing parties’ settlement terms in writing constitute acts of mediation, not the practice of law.<sup>259</sup> The acts of providing legal advice or evaluating the strength and weakness of legal claims are the practices of law, even if provided by a mediator in a mediation.<sup>260</sup> Many excellent mediators who are not lawyers successfully practice mediation without practicing law.<sup>261</sup> Psychologists, social workers, businesspeople, clergy are all common backgrounds for skilled professional mediators. A requirement that mediators be able to provide legal advice to *pro se* participants would effectively preclude these highly skilled professionals from mediating legal disputes when one or more of the participants represent themselves.

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<sup>256</sup> Nolan-Haley, *supra* note 1, at 837.

<sup>257</sup> *Id.*

<sup>258</sup> See *Resolution on Mediation and the Unauthorized Practice of Law*, A.B.A. SEC. DISP. RESOL. (2002), available at <http://www.abanet.org/dispute/resolution2002.pdf>.

<sup>259</sup> *Id.*

<sup>260</sup> 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, 428 (1997).

<sup>261</sup> Carole J. Brown, *Facilitative Mediation: The Classic Approach Retains Its Appeal*, 4 PEPP. DISP. RESOL. L.J. 279, 290 (2004).

Facilitative attorney-mediators would be similarly excluded from mediating legal disputes involving *pro se* participants if a state imposed informed outcome consent. They would be excluded not because they are legally precluded from giving legal advice, as is the case with non-lawyers, but because they believe that mediation is best practiced through less directive methods. This would be a terrific blow to the mediation profession. While it is reasonable to debate the efficacy of various mediation models, the credibility of the facilitative model cannot be reasonably questioned, nor should it be marginalized in the service of transforming mediators into legal practitioners.<sup>262</sup>

C. “*Informed Participation Consent*” Should be a Mediator Duty & the Model Standards Should Codify This Duty

1. Mediators Should Have a Duty of Informed Participation Consent

Although this Article concludes that we should not impose a duty of informed *outcome* consent on mediators, we should impose a duty of informed *participation* consent because it is consistent with a mediator’s ethical duties and enhances the quality of the mediation process. As explained earlier in this Article, participation consent encourages “a conscious, knowledgeable decision to enter into the mediation process.”<sup>263</sup> Participation consent is an important concept in mediation because, as we will examine below, mediation is practiced in so many different styles and forms that if the mediator does not explain her style of mediation, mediation participants, including lawyers, could agree to participate in a process that is very different from the one they expected.<sup>264</sup> Yet, the Model Standards refers only obtusely to informed process consent and most state mediation ethics codes do not refer to it at all.<sup>265</sup> Moreover, informed process consent is more analogous to the origins of informed consent in the physician–patient context and is consistent with the mediator’s role as an impartial neutral.

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<sup>262</sup> *Id.*

<sup>263</sup> Love et al., *supra* note 4, at 54.

<sup>264</sup> Kimberlee Kovach & Lela Love, “*Evaluative*” *Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG., 31, 32 (1996).

<sup>265</sup> Susan Nauss Essex, *How can a Mediator be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, J. DISP. RESOL., 387, 405 (2006).



People use the term “mediation” to describe a great number of different strategies and techniques that an impartial third party uses in resolving disputes.<sup>266</sup> However, the term “mediation” more accurately refers to not one process, but in fact to many different dispute resolution processes that loosely fall under the broader term “mediation.”<sup>267</sup> In the medical context, this is akin to a physician using the term “appendectomy” to refer to the removal of a person’s appendix, but it does not denote the method of removal. A physician could remove an appendix laparoscopically, a minimally invasive procedure, or through an open operation that is more invasive and typically comes with a longer recovery period and different risks.<sup>268</sup> The term “mediation” is even broader in what processes to which it could refer. Three commonly used mediation models are facilitative, evaluative and transformative.<sup>269</sup> There are even more models of mediation, albeit lesser known, such as “narrative” and “through understanding.”<sup>270</sup> Although there is considerable overlap in the techniques used among models, and mediators are often eclectic in their style, drawing from more than one model, distinct mediation styles have their attendant risks and benefits.<sup>271</sup> Good mediation practice dictates that parties to mediation should knowingly assume these risks and benefits in the same way that person a about to have his appendix removed should know whether he or she will be in the hospital a week or only two days, and whether he will have a six inch scar on his side or a half inch scar.<sup>272</sup> Because of the great scope of activities, strategies, and techniques contemplated in the term “mediation,” mediators must explain details about the process to participants

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<sup>266</sup> Henikoff et al., *supra* note 22, at 93.

<sup>267</sup> *Id.*

<sup>268</sup> M. Khoursheed, W. Sobhi, K. Al-Sharaf, S. Aman, A. Behbehani, & H. Dashti, *The Introduction of Laparoscopic Appendectomy in a Teaching Hospital*, MEDICAL PRINCIPLES AND PRACTICE (1999), <https://www.karger.com/Article/Pdf/26084>; BOULLE ET AL., *supra* note 17, at 12–13.

<sup>269</sup> BOULLE ET AL., *supra* note 17, at 12–13.

<sup>270</sup> JOHN WINSLADE & GERALD MONK, PRACTICING NARRATIVE MEDIATION 3 (2008) (Narrative mediation emphasizes the importance of decoding the stories that participants tell as a way to identify problems giving rise to the dispute.); Gary Friedman and Jack Himmelstein, *Resolving Conflict Together: The Understanding-Based Model of Mediation* 2006 J. DISP. RESOL. 523, 524–25 (2006) (As the name of the model suggests, this style of mediation emphasizes the importance of fully understanding the complexity of the dispute which includes the parties’ personal and business issues, as well as the legal issue. Parties have the responsibility for their own decisions and the mediation is conducted without private meetings with the mediators.).

<sup>271</sup> See Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 287 (2001).

<sup>272</sup> Henikoff et al., *supra* note 22, at 9.

before the mediation so that participants can make educated decisions about their willingness to participate in it.<sup>273</sup>

An examination of the basic differences between the two most prevalent mediation models, facilitative and evaluative, will demonstrate why participation consent is essential. The term “mediation” could refer to both an evaluative mediator who will assist the parties with their dispute by assessing strengths and weaknesses of the merits of their arguments.<sup>274</sup> The term “mediation” also includes a facilitative mediator who assists the parties with their dispute by structuring parties’ communication to best promote dialogue and a better understanding of the dispute.<sup>275</sup> Despite debate among mediators and mediator scholars over the appropriateness of using evaluation as a tool in mediation, the Model Standards allow the use of evaluation. The clause that “a mediator may provide information that the mediator is qualified by training or experience to provide” was a way the drafters avoided deciding the issue of the appropriateness of evaluation in mediation.<sup>276</sup> Yet, facilitative mediation and evaluative mediation are very different processes, despite being called by the same name and each has its strengths, weakness, and associated risks.

A facilitative mediator strives to comprehensively and jointly define problems while helping the parties to better understand their needs and concerns and to avoid the common pitfalls of problem solving.<sup>277</sup> “The central quality of mediation,” says Professor Lon Fuller in his classic statement on the topic, “[is] its capacity to reorient the parts to each other . . . by helping them to achieve a new shared perception of their relationship, a perception that will redirect attitudes and dispositions toward one another.”<sup>278</sup> Facilitative mediators “do not provide opinions about the quality of settlement options, although they may through questioning, and other techniques, assist the parties in evaluating the settlement options for themselves.”<sup>279</sup> For example, to help a plaintiff in an employment discrimination suit look more realistically at a damage

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<sup>273</sup> *Id.*

<sup>274</sup> Dwight Golann & Marjorie Corman Aaron, *Using Evaluation in Mediation*, 52 DISP. RESOL. J. 26, 27 (1997).

<sup>275</sup> BOULLE ET AL., *supra* note 17, at 12–13.

<sup>276</sup> Paula M. Young, *Rejoice! Rejoice! Rejoice!, Give Thanks, and Sing*, ABA, ACR and AAA *Adopt Revised Model Standards of Conduct for Mediators*, 5 APPALACHIAN J. L. 195, 217–18 (1997).

<sup>277</sup> BOULLE ET AL., *supra* note 17, at 12–13.

<sup>278</sup> Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL L. REV 305, 325 (1971).

<sup>279</sup> BOULLE ET AL., *supra* note 17, at 13.

request, a more facilitative mediator might ask the plaintiff to break down the damage request into its constituent categories and discuss the evidence he has for each, such as back pay, front pay, and pain and suffering. Asking a plaintiff to support each component of damage request with facts, even without evaluating those facts, frequently reveals weakness and gaps in the plaintiff's demands, making them more flexible in the settlement figure.<sup>280</sup>

The evaluative mediator, on the other hand, is more directive in his approach to resolving the dispute. He or she will "express[ ] an opinion as to the likely outcome or value of a legal claim or defense were it to be adjudicated."<sup>281</sup> If a plaintiff makes a damage request that the mediator finds unsupportable, an evaluative mediator will explain why it is unsupportable and unlikely to be obtained in adjudication.<sup>282</sup>

Facilitative and evaluative mediation also have their benefits and risks, as do any other dispute resolution processes. Facilitative mediation puts a premium on the value of parties arriving at their own solution to their mutual problem.<sup>283</sup> With the aid of the facilitative mediator as a process expert, parties are empowered to fully participate in the process of mediation and the mediated agreement.<sup>284</sup> This type of mediation "values the parties' sense of fairness in the mediation context over fairness embodied in public norms."<sup>285</sup> One risk of facilitative mediation is that the solution might not be optimal.<sup>286</sup> Parties may simply not choose the best solution because of their inexperience with these types of disputes. Another risk of this process is that a mediator will not explain the law to unrepresented parties or ill-prepared lawyers.<sup>287</sup> Conversely, the evaluative process will provide the parties with at least one perspective of the likely adjudicated outcome.<sup>288</sup> This could make them more informed and consequently more powerful in the negotiation with their mediation counterpart. However, there are many potential downsides to using evaluative techniques. The mediator may lose his effectiveness because his evaluation favored

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<sup>280</sup> See FRENKEL ET AL., *supra* note 18, at 236–37.

<sup>281</sup> Golann et al., *supra* note 274, at 27.

<sup>282</sup> See *id.*

<sup>283</sup> FRENKEL ET AL., *supra* note 18, at 73–74.

<sup>284</sup> *Id.*

<sup>285</sup> WALDMAN, *supra* note 4, at 145 (comments by Lela Love, contributor).

<sup>286</sup> See FRENKEL ET AL., *supra* note 18, at 73–74.

<sup>287</sup> See Golann et al., *supra* note 274, at 27.

<sup>288</sup> *Id.*

one side over another, thereby alienating one party.<sup>289</sup> The evaluation may unduly affect the assessment by one party, especially an unrepresented party, influencing them to make a decision that might be best under the law, but not best for the party overall. This undermines party self-determination. Finally, the mediator might be wrong in their evaluation.<sup>290</sup>

Informed participation consent is exactly the type of educated decision-making mediators can ethically promote for all parties and is most analogous to traditional informed consent law in the physician-patient context. Like a patient about to undergo a recommended medical procedure, a litigant about to enter a dispute resolution procedure—mediation—has the right to know risks and benefits of that process as that mediator practices it. Physicians and mediators are “skilled helpers,” assisting people in solving problems.<sup>291</sup> Physicians help people solve medical problems; mediators help people solve legal, social and business problems, sometimes in the same dispute. Physicians and mediators alike give the desires, concerns and goals of the people in their care the utmost consideration and respect. They also strive to promote, and are bound to honor, the decisions of their patients and clients in an environment that empowers them to make these decisions voluntarily, uncoerced, and as informed as possible.<sup>292</sup> To that end, both physicians and mediators provide process information as part of their service.

In the physician-patient context, the courts imposed on physicians a requirement to explain to patients the benefits, detriments and risks associated with medical procedure and mediators should be similarly bound. When the *Mohr* court faulted a physician for operating on the patient’s left ear when she had given consent only to operate on her right ear, it established two pillars of informed consent policy: self-determination and the right to understand the risks and benefits before consenting to undergo a procedure.<sup>293</sup> The *Salgo* court further advanced this particular form of consent, when a patient became paralyzed after undergoing a spine operation in circumstances where the risk of paralysis was not adequately communicated.<sup>294</sup> The *Salgo* court stressed that the patient

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<sup>289</sup> Love et al., *supra* note 4, at 58.

<sup>290</sup> *Id.*

<sup>291</sup> See GERARD EGAN, *THE SKILLED HELPER* 3 (8th ed. 2007).

<sup>292</sup> MODEL STANDARDS Standard I (2005).

<sup>293</sup> *Mohr v. Williams*, 104 N.W. 12, 13 (1905).

<sup>294</sup> *Salgo v. Leland Standford Jr. Univ. Bd. of Trustees*, 317 P.2d 170, 181 (Cal. Dist. Ct. App. 1957).

needed to know that “nature, consequences, harms, benefits, risks, and alternatives to a proffered treatment . . . in order to know what they are choosing.”<sup>295</sup> The *Canterbury* court further emphasized the role self-determination plays in informed consent. The *Canterbury* court stated that it is “the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie. To enable the patient to chart his course understandably,” the court continued, “some familiarity with the therapeutic alternatives and their hazards becomes essential.”<sup>296</sup> In all of these instances, the court was concerned with the patient’s understanding of the procedure, not the actual outcome of the procedure. As discussed above, different forms of mediation have different concrete benefits and risks associated with them, even though they are called by the same name—mediation. Simply put, parties should understand these risks and benefits before entering the mediation process. To not inform parties of the process in which they are about to engage is not only unfair to the party, but also undermines public confidence in mediation.<sup>297</sup>

## 2. The Model Standards Should Incorporate the Mediator’s Duty of Participation Consent

The Model Standards provide insufficient guidance as to the role of informed consent in mediation and should be amended to require mediators to obtain informed participation consent. The Model Standards contain two provisions that allude to informed consent, although it uses the more ambiguous term “informed choices.” In the first provision, requiring that the mediator conduct the process “based on the principle of self-determination,” it states that “[s]elf determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”<sup>298</sup> The second allusion to informed consent states that a “mediator cannot personally ensure that each party has made a free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.”<sup>299</sup> It seems that what the

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<sup>295</sup> FADEN ET AL., *supra* note 78, at 126.

<sup>296</sup> *Canterbury v. Spence*, 464 F. 2d 772, 781 (D.C. Cir. 1972).

<sup>297</sup> Kovach & Love, *supra* note 264, at 31.

<sup>298</sup> MODEL STANDARDS Standard I A (2005).

<sup>299</sup> *Id.* at Standard I A 2 (2005).

first clause gives, the second clause takes away, leaving mediators confused as to the proper role of informed consent in mediation.

Although the Model Standards state that the mediator should encourage self-determination, which in part it defines as including the participants' process consent, it imposes no clear duty on mediators to explain the mediation process. This has been a problem in the Model Standards since its first iteration in 1994. Criticizing the code not long after its original publication, and recognizing that mediators' styles can differ dramatically, two scholars commented "[i]nstead of helping the parties to understand the differences between mediators and the costs and benefits of using different types of mediators, the Model Standards imply that all mediators perform essentially the same functions."<sup>300</sup> These scholars go on rightly to explain that "with this information, the parties could make an informed decision as to the various services that different mediators provide."<sup>301</sup>

It would be neither difficult nor revolutionary for the Model Standards to require mediators explicitly to obtain informed participation consent before the mediation process. It is common for mediator training courses to teach their students to explain to participants the nature of the particular mediation process that they are about to enter.<sup>302</sup> For example, one standard mediation text explains that, during the mediator's opening statement, the mediator should "describe the key elements of the mediation process and explain their purpose in understandable terms, so that the participants, if they have not already done so, can make an informed decision whether to participate."<sup>303</sup> Moreover, other mediation ethical codes impose such a requirement. For example, the Massachusetts Mediator Code states that "the neutral shall make every reasonable effort to ensure that each party to the dispute resolution process . . . understands the nature and character of the process . . . ."<sup>304</sup> While the Massachusetts code is a vast improvement over the Model Standards, an even more desirable clause would also include a requirement that the mediator explain the benefits, detriments and risks associated with his own mediation style. Some scholars have argued that explaining the risks and benefits of

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<sup>300</sup> Henikoff et al., *supra* note 22, at 9.

<sup>301</sup> *Id.*

<sup>302</sup> BOULLE ET AL., *supra* note 17, at 66–67 ("The mediator's opening should also explain to the parties the particular process that will be followed.")

<sup>303</sup> FRENKEL ET AL., *supra* note 18, at 129.

<sup>304</sup> MASS. SUP. JUD. CT. R. 1:18, sec 9(c) (2006).

one's mediator style is particularly appropriate when a mediator might offer "an evaluation or opinion on the merits of a legal questions," because of the particular risks associated with that style of mediation.<sup>305</sup> This is, of course, good policy, but it should be even broader in scope.

All mediation styles have associated benefits, costs and risks and this information should be explained to participants by all mediators, regardless of style, not just when the mediator is using an evaluative mediation style. Thus, an informed participation consent clause might read as follows: *Mediators shall make reasonable efforts to ensure that participants understand the nature and character of the mediation process, including the benefits, costs and risks associated with the particular model or models of mediation to be employed.* This will allow the participant to enter the processes in a truly informed way but will also provide guidance on how they can most productively participate in the process into which they are about to engage.

Informed participation consent enhances informed outcome consent. Mediation participants should be considered to have given informed outcome consent as long as they understand the nature of the process and the attendant benefits, detriments and risks of resolving the dispute through whatever mediation process that they have agreed to enter. "Once adequately warned, parties are deemed to have assumed the risk voluntarily if they consent and hence the responsibility for the consequences of their choice."<sup>306</sup>

In determining "adequate warning," the Model Standards should adopt a participant-centered standard of care to determine whether the mediator has fulfilled this obligation. In borrowing from the patient-centered approach first articulated by the *Canterbury* court, the legal adequacy of the mediator's information imparted as part of participation consent should be judged by what a "reasonably prudent" mediation participant "has every right to expect."<sup>307</sup> As explained by the *Canterbury* court, a patient-centered approach to informed consent provides real oversight of professional conduct. A professional practice approach, conversely, allows professionals to establish customs for themselves that can remain inviolate by courts simply because the practice is common

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<sup>305</sup> Love et al., *supra* note 4, at 45–46, 66.

<sup>306</sup> *Id.* at 55.

<sup>307</sup> *Canterbury v. Spence*, 464 F. 2d 772, 782 (D.C. Cir. 1972).

among professional, not because it is adequate.<sup>308</sup> If this argument was sufficient to adopt a participant-centered approach in the medical context, assessing the adequacy of participation consent from the participant's perspective is even more appropriate in mediation. Professional mediation is still a developing field. Most mediators possess little formal training, guidance, or supervision.<sup>309</sup> Thus, unlike the medical profession, mediator practice is still too diverse and often too uninformed for "custom" to provide adequate protection to mediation participants.

The history of informed consent is about consent to a process not an outcome. Mediators can explain the form of mediation they practice, the same way a physician can explain the form of appendectomy they believe is appropriate under the present circumstances. Most importantly, mediators can explain their particular process to participants while also maintaining impartiality. Therefore, mediator legislative and ethical codes should codify and clarify scope of informed consent duties to require participation consent.

#### V. PRESERVING MEDIATOR IMPARTIALITY WHILE PROMOTING INFORMED CONSENT

*Pro se* litigants face significant obstacles when embroiled in legal disputes either as plaintiffs or defendants that often diminish their chances of obtaining justice in our legal system.<sup>310</sup> This problem is one of the most significant issues our legal system today confronts and worsens each year.<sup>311</sup> *Pro se* litigants face these obstacles not only when advocating in the courts and when negotiating claims on their own behalf, but also when participating in me-

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<sup>308</sup> *Id.* at 784.

<sup>309</sup> Geetha Ravindra, *Is Mediation a Profession*, 15 DISP. RESOL. MAG. 7 (2009) ("Only a few states (such as Virginia, Florida, Georgia, and North Carolina) have specific qualifications required for one to identify oneself as a court-referred mediator. These state qualifications vary widely. There is great variation in the content and quality of the mediation training programs that are offered. Often, oversight of mediation trainers is limited. Several colleges, universities, and law schools offer mediation-related courses, but very few mediation practitioners hold a graduate degree in conflict resolution.").

<sup>310</sup> Laura K. Abel, *The Role of Speech Regarding Constraints on Attorney Performance: An Institutional Design Analysis*, 19 GEO. J. ON POVERTY L. & POL'Y 181, 207 (2012).

<sup>311</sup> James Podgers, *Sustaining Justice 10 Experts Tell How Courts Can Do More with Less*, A.B.A. J., June 2011, at 34, 57 (As the economic situation worsens, the number of *pro se* litigants increases, creating extra fees for the represented party).



diation without the benefit of professional legal advice.<sup>312</sup> Maximizing fairness in the mediation process, especially for *pro se* participants, should be a universal objective of all mediation scholars and practitioners.<sup>313</sup>

As we have seen above, some scholars propose that the best way to promote fairly mediated outcomes for *pro se* participants is to impose greater accountability on mediators for the substance of the agreements that they help to facilitate.<sup>314</sup> In particular, some scholars encourage courts and legislatures to impose a duty of informed outcome consent on mediators to “insure that agreements do not result in the unknowing waiver of rights by unrepresented parties.”<sup>315</sup> While it may seem that providing informed outcome consent for the mediated settlement agreement for unrepresented parties would enhance the goal of fairness by helping less sophisticated, *pro se* parties, as we have seen, a closer examination of the impact of this practice demonstrates otherwise. Fairness in mediation can be adequately safeguarded through less onerous means than requiring informed outcome consent. Mediators have a variety of facilitative and evaluative tools available to them to empower the parties and support them in making more informed decisions.

#### A. *Facilitative Techniques to Promote Informed Consent and Self-Determination*

A mediator, operating within ethical propriety, can provide substantial assistance to *pro se* parties to understand the consequences of a particular settlement. Indeed, one of the most important roles of a mediator is to support participants in making good decisions about their disputes.<sup>316</sup> Mediators can use several different kinds of facilitative techniques to promote informed outcome consent. These techniques include assisting parties in identifying

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<sup>312</sup> Cynthia E. Nance, *Unrepresented Parties in Mediation*, 15 *PAC. LITIGATOR* 47 n.3 (2004); see also Maute, *supra* note 195, at 505.

<sup>313</sup> Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to A Mediation-Centered Approach*, 11 *HARV. NEGOT. L. REV.* 1, 28 (2006) (by increasing the value to both parties, fairness is also increased throughout the mediation process).

<sup>314</sup> Maute, *supra* note 195, at 505 (Arguing that mediators should be accountable for “minimally fair substantive outcomes.”).

<sup>315</sup> Engler, *supra* note 1, at 2.

<sup>316</sup> BOULLE ET AL., *supra* note 17, at 1.

relevant information and encouraging the gathering and sharing of that information. Mediators can also employ techniques to help parties more objectively assess that information. Short of providing legal advice, mediators can also help parties identify important gaps in their legal analysis and arguments in ways to help them better assess the strengths and weakness of their claims and defenses.

### 1. Information Gathering

Mediators can enhance the likelihood of informed outcome decision-making without guaranteeing it by “develop[ing] and expand[ing] the information base upon which decisions are premised.”<sup>317</sup> Three informational areas that a mediator typically develops are the factual information, the legal information, and the parties’ future alternatives. The value of each of these will be explored in turn.

The factual information base that the mediator explores and expands can be divided up into legally relevant facts and non-legally relevant facts. *Pro se* parties often come to mediation without sufficient factual information to make wise decisions about the future of their dispute.<sup>318</sup> They may not even fully understand the dispute because people in conflict often cease communicating shortly after the conflict arises, leaving misunderstanding in its wake.<sup>319</sup> Moreover, in circumstances where the other party is represented by counsel, it is likely that the attorney has not shared all of the relevant information because lawyers frequently view sharing information as harmful to their case.<sup>320</sup> Discovery is answered in the narrowest possible fashion, and it is often surprising how much important information is not yet fully understood by one or more participants even when discovery is complete.<sup>321</sup> Thus, the first job of a mediator is to examine the information upon which a

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<sup>317</sup> WALDMAN, *supra* note 4, at 139 (commentary by Lela Love).

<sup>318</sup> Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from A Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 282 (2002) (parties without sufficient knowledge cannot make educated decisions).

<sup>319</sup> FRENKEL ET AL., *supra* note 18, at 161 (stating that “[p]eople involved in difficult disputes often suffer from communication breakdowns”).

<sup>320</sup> DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 124–25 (2009).

<sup>321</sup> *Id.*

party, especially a *pro se* party, bases his or her claim or defense and then seek to expand that information base when possible.<sup>322</sup>

Questioning is one of the primary tools mediators use to not only understand the conflict for themselves, but also for them to assess and expand the factual information for the party so that settlement decisions can be made on as complete and information base as possible.<sup>323</sup> After a party has related their version of the dispute, usually in the party's opening statement, the mediator either in joint sessions or separate meetings can ask the party to provide more detail about aspects of the dispute that the mediator believes are particularly relevant.<sup>324</sup> Let us look at an example of a dispute where a landlord is attempting to evict a tenant for non-payment of rent and the tenant is justifying non-payment because the apartment remained unheated for "much" of December. Here, the mediator would ask a series of questions to try to get an accurate view of how many days in December the heat was unavailable and what times of day it occurred, as this information will be relevant to the claim's merits.

Mediators also use questioning to help to identify and fill in gaps to a dispute narrative.<sup>325</sup> For example, in a case where a supplier failed timely to deliver produce to a restaurant and the restaurant sued the produce supplier for breach of contract, the restaurant owner might not know why the supplier failed to deliver the produce. This information might be important from a legal perspective because there are legal excuses for non-performance, like lack of payment or act of God. Information might also be relevant from a humanistic perspective even though it is meaningless to the legal merits of the claim. For example, the produce supplier might have failed to deliver because of a sudden and tragic death of a loved one. While this might not legally excuse non-performance of the contract, settlement might be easier if the restaurant owner knows that there was a credible situational reason for non-performance. Mediators provide a valuable service through the mere act of helping parties to identify areas that require more de-

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<sup>322</sup> Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 998 (2007) (*pro se* litigants' needs and strengths are determined and recommendations are made).

<sup>323</sup> BOULLE ET AL., *supra* note 17, at 132–35.

<sup>324</sup> DOUGLAS N. FRANKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 162 (2008).

<sup>325</sup> Paris R. Baldacci, *A Full and Fair Hearing: The Role of the Alj in Assisting the Pro Se Litigant*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 447, 478 (2007) (asking questions to get more specific information).

tail and to fill in information gaps.<sup>326</sup> Parties often gloss over certain facts not because they do not know them, but rather because they did not believe them to be particularly relevant to resolving their dispute.<sup>327</sup> Coaxing out of disputants greater factual detail allows parties greater factual context to make decisions that are more informed about whether and how to settle a dispute.<sup>328</sup>

Sometimes the parties are unaware of potentially important factual details or gaps. Here the mediator can help in two ways. First, the mediator can explore ways that the party can uncover potentially relevant information for themselves.<sup>329</sup> In the case of the tenant who withheld rent because the landlord allegedly did not provide heat for some portion of December, the mediator may be able to get a more detailed picture of how often the apartment was without heat by collecting information from other family members in the home or speaking with neighbors in the building who might have had the same problem. These might seem like obvious things to do before a mediation or court proceeding to a mediator or lawyer, but many *pro se* litigants have never been litigants before and frequently are unsophisticated when it comes to the idea of proving one's claims.<sup>330</sup> Often the information they need to make better decisions is accessible but simply not accessed.

Another means of improving parties' information base, and thereby their settlement decisions, is to encourage parties to share information.<sup>331</sup> Parties often enter mediation with an "asymmetry" of information, meaning that one party knows more about the dispute, or some aspect of the dispute than the other party or parties.<sup>332</sup> For example, in medical negligence litigation, the plaintiff will often have more detailed information about the medical damages than the defendant because he or she has lived with those consequences. On the other hand, the defendant-physician and

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<sup>326</sup> *Id.* (asking questions to get more specific information).

<sup>327</sup> Engler, *And Justice for All*, *supra* note 8, at 2029 (judges help determine the relevant facts of a case that might be overlooked otherwise).

<sup>328</sup> See Stulberg, *supra* note 61, at 224 (discussing the importance of questions in mediation).

<sup>329</sup> William A. Blancato, C. Allen Gibson, Jr., *Controlling Your Own Destiny: You Can with Mediation*, DISP. RESOL. J. 14, 19 (2008).

<sup>330</sup> Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. R. 79, 109 (1997) (stating that in landlord-tenant disputes, "ninety percent of tenants do not have lawyers and many—who may not speak English, much less know their rights—are bullied into signing agreements" when in bilateral negotiations).

<sup>331</sup> GOLANN, *supra* note 320, at 124–25.

<sup>332</sup> Jim Hilbert, *Collaborative Lawyering: A Process for Interest-Based Negotiation*, 38 HOFSTRA L. REV. 1083, 1090 (2010).

healthcare provider often know more about the facts surrounding the alleged negligence because they are in control of the witnesses and documents, even where there has been discovery. Part of a mediator's role is not only to uncover facts that seem relevant to settlement, but also to encourage parties to share that information.<sup>333</sup> This is especially true where discovery is incomplete, as is often the case when mediation occurs.<sup>334</sup> To properly assess a settlement, parties should know as much about the facts of the dispute as possible.<sup>335</sup>

An excellent example of the importance of encouraging sharing of information in improving party settlement decisions is found in a wonderful mediation training video called *Mediators at Work, Breach of Warranty*, which is mediated by Professor David Hoffman of Harvard Law School.<sup>336</sup> This simulated dispute concerns the legal action by a trucking company for breach of warranty against its antifreeze supplier, alleging that the antifreeze corroded engine hoses in their trucks.<sup>337</sup> This resulted in damage to the engines of several trucks, and the diminution in value of those trucks that received the antifreeze but have not yet failed, but might nevertheless have suffered damage that has not yet materialized.<sup>338</sup> The plaintiff believes that he has a strong case because he thinks he will be able to obtain a *res ipsa loquitur* charge from the judge that would shift the burden of proof to the defendant.<sup>339</sup> Plaintiff believes this because, based on review of the facts, the engines of all the trucks that received the antifreeze failed, and those trucks that didn't receive the antifreeze showed no signs of problems.<sup>340</sup> Thus, the *res ipsa loquitur* instruction would shift the burden proof to the defendant concerning liability, considerably increasing the likelihood of a success at trial.<sup>341</sup> However, it seems that a more careful review of the trucks' maintenance records, performed independently by the defendants, revealed that some of the engines of trucks that did not receive the questionable antifreeze also failed in

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<sup>333</sup> FRENKEL ET AL., *supra* note 18, at 148.

<sup>334</sup> Lavinia E. Hall, *Eric Green: Finding Alternatives to Litigation in Business Disputes*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 279, 281 (Deborah M. Kolb et al. eds., 2001).

<sup>335</sup> GOLANN, *supra* note 320, at 125–26.

<sup>336</sup> Dwight Golann & Marjorie Corman Aaron, *Mediators at Work, Breach of Warranty*, PROJECT ON NEGOTIATION AT HARVARD LAW SCHOOL, available at <http://www.pon.harvard.edu/shop/category/audio-cd/> (last visited Feb. 15, 2014).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

exactly the same way those trucks that did receive the antifreeze.<sup>342</sup> This raised a credible question of whether the engine problems might be caused by something other than the defendant's anti-freeze, thereby eliminating the possibility of a *res ipsa loquitur* charge and strengthening the defense's case.<sup>343</sup>

Despite the fact that revealing this information strengthened its case, defendants were at first reluctant to reveal it to plaintiff in the mediation.<sup>344</sup> It was only through the mediator's efforts of encouraging the defendant to share this information and explaining that absent this knowledge the plaintiff will think it has a stronger case that it actually does, and, consequently, finding a mutually acceptable settlement value would be unlikely.<sup>345</sup> As odd as it may seem, a party may be reluctant to share information in mediation that can help their case.<sup>346</sup> This reluctance arises from the common, but mistaken belief that sharing *any* information in a negotiation risks weakening one's bargaining position.<sup>347</sup>

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<sup>342</sup> Dwight Golann & Marjorie Corman Aaron, *Mediators at Work, Breach of Warranty*, PROJECT ON NEGOTIATION AT HARVARD LAW SCHOOL, available at <http://www.pon.harvard.edu/shop/category/audio-cd/> (last visited Feb. 15, 2014).

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> GOLANN, *supra* note 320, at 124–25 (Professor Golann explains that “it is surprising how little parties know about each other's cases, even after years of litigation. . . . Discovery rules are intended to give each side near-complete disclosure of the facts, but often this does not happen—in part because litigants conceal evidence as much as possible.”).

<sup>347</sup> ROY J. LEWICKI, BRUCE BARRY, DAVID M. SAUNDERS & JOHN W. MILTON, NEGOTIATION 80–81 (4th ed. 2003). One of the most extreme examples of a reluctance to share essential information in a mediation that this Author has encountered as a mediator was in a dispute involving an alleged violation of a non-compete agreement. The plaintiff alleged that one of its former sales representatives that went to work for a competitor solicited business from a client listed in a non-compete agreement that the sales person had signed with her former employer. The plaintiff arrived at the mediation with a completed motion for an order to show cause, with supporting documents, that it said it would file with the court the next morning if the mediation was unsuccessful in order to prevent any further contact between the sales person and their client. Principals for the defendant explained to the mediator in a private session that it had no knowledge of contacting the plaintiff's client and that its salesperson denied making any such solicitation. Because of this, they deemed the lawsuit an intimidation tactic by a large company against a smaller one. In a separate meeting with the plaintiff, however, the plaintiff showed the mediator a signed affidavit by the plaintiff's client that the unlawful solicitation had indeed occurred, providing credible detail of the conversation with date and time. Although the plaintiff planned to file this affidavit in support of its motion for an order to show cause in a mere twenty-four hours if the mediation did not result in a settlement, the plaintiff refused to show the affidavit to the defendant and refused to allow the mediator to reveal the contents of the affidavit or the identity of the client allegedly solicited. Obviously, in a case like this, where the defendant believes the lawsuit is frivolous and the plaintiff refuses to supply any concrete evidence of breach of contract, a mediated settlement is unlikely. It took nearly an hour of encouragement from this Author as mediator and a complex negotiation between the parties to arrive at a solu-

## 2. Assisting in Objective Information Assessment

Nearly as valuable in helping parties to share information is helping them to assess the meaning and value of the information that is already available to them. The confirming evidence trap, sometimes referred to as selective perception, is one of the most common decision-making traps to which mediation participants fall prey.<sup>348</sup> As the concept's name suggests, people overemphasize the importance of facts (and law, too) that support the view of the world they wish to maintain and minimize or ignore the facts and law that undermine that preferred view.<sup>349</sup> This is a well-documented phenomenon and one that mediators can assist the parties in overcoming.

The most relevant psychological mechanism that causes selective perception is cognitive dissonance.<sup>350</sup> Cognitive dissonance "is a state of tension that occurs whenever a person holds two cognitions (ideas, attitudes, beliefs, opinions) that are psychologically inconsistent."<sup>351</sup> This tension, depending on the degree of dissonance, causes varying degrees of psychological discomfort, and humans are driven to reduce this discomfort.<sup>352</sup> One common way litigants and lawyers reduce this discomfort in lawsuits is to emphasize facts that support a particular view of the case.<sup>353</sup> For instance, if an employee believes that his employer wrongfully terminated him, the employee might focus on the fact that the company has no minority in management positions and minimize the fact that his employee performance reviews for the last two years have been below average. Conversely, the employer accused of illegal employment discrimination might emphasize the employee's poor performance reviews and minimize that it does little minority

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tion. The solution was that the defendant's lawyer would be allowed to review the affidavit with the agreement that she could not share the details of the affidavit with her client, but would nevertheless see proof of an alleged violation and thus the seriousness of the situation. The Plaintiffs suggested that by revealing their client to defendant they would lose the element of surprise during the hearing, allowing defendants to fabricate a reason for improperly contacting their client, even though plaintiffs couldn't seem to offer a reason that might bolster the defense's position. Only through encouraging the parties to share this information was this lawsuit settled.

<sup>348</sup> GOLANN, *supra* note 320, at 129–30.

<sup>349</sup> JOHN S. HAMMOND, RALPH L. KEENEY & HOWARD RAIFFA, *SMART CHOICES* 194–95 (1999).

<sup>350</sup> GOLANN, *supra* note 320, at 204.

<sup>351</sup> CAROL TAVERIS & ELLIOT AARONSON, *MISTAKES WERE MADE, BUT NOT BY ME* 13 (2007); JOEL COOPER, *COGNITIVE DISSONANCE, FIFTY YEARS OF CLASSIC THEORY* 6–7 (2007).

<sup>352</sup> COOPER, *supra* note 351, at 7.

<sup>353</sup> GOLANN, *supra* note 320, at 129.

hiring despite having a diverse employee applicant pool. What is important to note about selective perception is that it is often unconscious.<sup>354</sup> Cognitive dissonance theory is about “how and why people unintentionally blind themselves so that they fail to notice vital events and information that might make them question their behavior or the convictions.”<sup>355</sup> “Naïve realism” is the term scientists use to describe humans’ propensity to use confirmation bias, as well as other cognitive mechanisms, to trick themselves into arriving at the “inescapable conviction that we perceive the objects and events clearly.”<sup>356</sup>

Mediators have several tools at their disposal to mitigate, if not eliminate, naïve realism that results from confirmation bias. Most importantly, mediators can make sure that the factual perceptions and arguments from each side are heard and understood and, if necessary, repeated and/or summarized by the mediator.<sup>357</sup> Alternatively, the mediator can ask a party to “summarize the other side’s key points.”<sup>358</sup> By simply emphasizing facts in mediation, it will be harder for parties to minimize or ignore them.<sup>359</sup> For example, having the employer that is charged with discrimination go through their minority hiring record in detail will often be sufficient to provide greater weight to the employer’s assessment of the merits in the dispute.

Another effective way for mediators to help parties see facts more objectively is to “review the facts and arguments with each side in private gently questioning them about apparent gaps.”<sup>360</sup> This is a form of “reality testing,” a common and effective mediator technique for empowering the parties to more objectively assess the equities of a dispute.<sup>361</sup> For example, in a dispute between a landlord and tenant over the tenant’s alleged repair of a heating system, a mediator might ask for repair receipts that would support the damage claim. If the tenant cannot produce those receipts, a mediator could ask the tenant for arguments that the landlord might make at trial because of the tenant’s lack of evidence.<sup>362</sup> The

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<sup>354</sup> TAVERIS ET AL., *supra* note 351, at 4.

<sup>355</sup> *Id.* at 42.

<sup>356</sup> *Id.*

<sup>357</sup> GOLANN, *supra* note 320, at 204.

<sup>358</sup> *Id.* at 130 (Professor Golann also suggests “encourag[ing] parties to speak, “us[ing] charts and other visual aids” and repeating facts using different phrasing).

<sup>359</sup> *See id.*

<sup>360</sup> *Id.* at 204.

<sup>361</sup> *Id.* at 27.

<sup>362</sup> FRENKEL ET AL., *supra* note 18, at 187.



mediator could further ask what a judge is likely to do without repair receipts or other evidence of the cost of heating repairs. Without ever directly evaluating the lack of evidence, mediators, through employment of thoughtful questions, can force a party to think more objectively about facts or evidence, helping the party to make more informed decisions about settlement.<sup>363</sup>

Finally, if the parties reach an agreement, mediators can and should ensure that the parties understand the terms of the agreement. This does not mean that mediators should be guarantors that the parties have made informed settlement decisions and understand the rights that they may have waived by agreeing to a settlement. As stated previously, if the mediator has provided adequate participation consent, parties are already informed that settlement comes with risks. Short of informed outcome consent, however, mediators can and should “test[ ] the part[ies]’ comprehension of the terms and the consequences of the agreement.”<sup>364</sup> When ensuring that the parties understand the settlement agreement and its consequences, mediators have a “heightened duty” to *pro se* participants to make sure that the explanation is understandable to them.<sup>365</sup> For example, in the landlord-tenant dispute discussed above over non-payment of rent over lack of heat, the tenant should understand what payment obligation, if any, he has and when and how that obligation must be fulfilled. Moreover, the landlord should understand the obligations he has to remedy the problem. Also, both should know that settlement would extinguish the present lawsuit. To accomplish this the mediator might need to spend more time with the *pro se* participant and use different explanatory language to make certain that he or she understands the terms of settlement. This is not acting impartially because the message, intent and effect are the same, to make certain that both parties understand and agree to the terms of the settlement to which they have explicitly agreed. This kind of consent benefits both parties.

### 3. Promoting an Understanding of the Law

Facilitative mediators, including lawyers and other professionals, have the ability to guide parties to a fuller, more accurate understanding of the legal principles that affect their dispute, thereby

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<sup>363</sup> STULBERG ET AL., *supra* note 17, at 67–68 (explaining the use of justification questions in mediation).

<sup>364</sup> Baruch Bush, *Efficiency and Protection of Mediation*, 41 FLA L. REV. 253, 284 (1989).

<sup>365</sup> Love et al., *supra* note 4, at 64.

promoting informed outcome consent. To do this, however, mediators must have a general sense of the relevant law in the dispute over which they preside. A mediator must have both mediation process knowledge and a minimal degree of substantive knowledge about the dispute.<sup>366</sup> Substantive knowledge may be legal knowledge if the law is relevant, like in the case of proving illegal employment discrimination. Substantive knowledge might also be industry knowledge, such as understanding industry practices in commercial construction projects in a dispute over the contractor deviating from the construction plans. To be effective, a mediator might need both legal and industry knowledge.<sup>367</sup> Even though a facilitative mediator would not use this substantive knowledge to make explicit evaluations as part of the mediation process, he or she will need to possess this substantive knowledge to effectively participate in and shape the parties' negotiation in productive ways.<sup>368</sup>

One way a mediator productively can shape the negotiation and help parties attain a better appreciation of the legal principles is by “ask[ing] questions that might be helpful or prob[ing] the plausibility or desirability of party claims.”<sup>369</sup> These are sometimes called “justification questions” and are a common and helpful category of questions that a mediator uses to emphasize the importance of legal rules that might be relevant to resolving the dispute.<sup>370</sup> An example of a justification question is “what legally justifies you from withholding rent?” Or, the mediator might ask an unrepresented landlord “if the tenant can prove that the heat was not working for half the month, on what legal basis will you be able to evict the tenant?” Without providing legal information or analysis, the mediator is signaling the importance of legal rules in the dispute. In some instances, the *pro se* parties will be able to answer these questions credibly because even without the aid of an attorney, they have been able to prepare well for the mediation. The mediator, in these circumstances, can gain a comfort level that they are reasonably well informed to make choices about settlement. In cases in which the parties cannot adequately respond to

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<sup>366</sup> Stulberg, *supra* note 58, at 841.

<sup>367</sup> *Id.*

<sup>368</sup> Stulberg, *supra* note 61, at 241. This does not mean that a mediator needs to be a lawyer to mediate legal issues. A mediator in this circumstance would need to be familiar enough with the law to follow the conversation and to ask questions that will help the parties think more objectively about the dispute.

<sup>369</sup> Stulberg, *supra* note 58, at 841.

<sup>370</sup> STULBERG ET AL., *supra* note 17, at 67.

these questions, the mediator has done them a service in helping to isolate important gaps in their legal knowledge that will make settlement riskier and adjudication riskier still.

If the mediator helps to identify important gaps in legal information, she can provide the additional service of encouraging parties to fill in those gaps before making settlement decisions or proceeding to adjudication. The Model Standards state that a mediator can advise parties “of the importance of consulting other professionals to help them make informed choices.”<sup>371</sup> For *pro se* participants, however, this advice is hollow comfort because in most cases if the litigant could afford counsel they would have counsel.<sup>372</sup> That said, in a small minority of circumstances, the fact that the mediator highlighted the importance of legal knowledge in effectively resolving the dispute might motivate some *pro se* participants to expend more resources and energy in obtaining counsel. However, for the vast majority of *pro se* litigants, obtaining legal counsel is not a realistic option. This does not necessarily mean that they cannot get legal information.

Increasingly, credible legal information is available to the public at low or no cost. Without providing legal information, mediators could emphasize the importance of obtaining it and the risk associated with not obtaining it. In many cases, they could also direct parties to easily obtained resources that could lead to better settlement choices. Many courts “have created *pro se* law clerks, attorneys, assistants, law clerks or offices to assist unrepresented litigants.”<sup>373</sup> There is also a proliferation of information-sheets, pamphlets, websites and even kiosks designated for assisting *pro se* litigants with common litigation in small claims, landlord-tenant and family matters where a high percentage of litigants are *pro se*.<sup>374</sup> Private organizations and academic institutions are also providing free legal data bases and legal information that are lay user friendly.<sup>375</sup> As the legal market changes, limited representation and consultation are also available at a fraction of the cost of full

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<sup>371</sup> MODEL STANDARDS Standard I A (2) (2005).

<sup>372</sup> Engler, *supra* note 1.

<sup>373</sup> *Id.* at 2000.

<sup>374</sup> *Id.*; *Self-Help*, SUPERIOR COURT OF CALIFORNIA-COUNTY OF ORANGE, <http://www.occourts.org/self-help> (last visited Aug. 15, 2013).

<sup>375</sup> RICHARD SUSSKIND, TOMORROW'S LAWYERS 44–45 (2013) (citing as an example Cornell University Law School's program of publishing legal resources and materials for people to better understand the law at no charge).

representation.<sup>376</sup> Although these certainly are not equivalent substitutes for full legal representation, they provide many *pro se* parties the ability to better inform themselves about legal rights implicated in the dispute in which they are embroiled, helping them make more informed decisions.

### B. *Evaluative Mediation Techniques To Promote Informed Consent*

Short of imposing a duty on mediators to obtain informed consent from *pro se* litigants, mediators could protect litigants' legal rights by strategically and appropriately employing evaluative mediation. As we will see, the distinction between serving as an evaluative mediator and serving as a mediator who provides legal advice for the purpose of obtaining informed consent is sometimes a subtle one. Evaluative mediators do provide legal information and opinions, but they do so evenhandedly to serve both parties, not for the purpose of aiding one party who lacks legal counsel. While conducting an evaluative mediation might be objectionable to some, and certainly not a substitute for legal counsel, it can help parties make legally informed decisions while honoring mediator impartiality, if not neutrality.

This author believes, as do many other mediation scholars, that evaluative mediation if properly implemented "is a legitimate weapon in the mediator's arsenal."<sup>377</sup> Yet, evaluative mediation is a "weapon" that should be used appropriately, cautiously and sparingly because of the many potential risks that it poses to procedural and outcome fairness. In their eminently practical article on the topic, Professors Dwight Golann and Marjorie Corman Aaron convincingly argue that evaluative mediation can be used to overcome selective perception and advocacy distortion, topics discussed above, when facilitative methods have been tried and have failed to reorient the parties.<sup>378</sup> They also explain that in some instances an evaluative mediation can provide a valuable psychological benefit to a party by providing an assessment of the merits of their case. This gives the party, at least symbolically, their "day in court."<sup>379</sup>

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<sup>376</sup> Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1344 (2012).

<sup>377</sup> Golann et al., *supra* note 274, at 27.

<sup>378</sup> *Id.* at 27–28.

<sup>379</sup> *Id.*

There is empirical evidence to support that lawyers and clients alike value evaluative mediation. In an extensive study on the perceptions of mediation participants, Professor Tamara Relis found that “most legal actors preferred evaluative, rights-based mediators to facilitative, interest-based mediators.”<sup>380</sup> In a different study involving family disputes, parents valued evaluative mediation “when they discerned that the mediators understood their concerns.”<sup>381</sup> Providing a legal evaluation affords some protection of a *pro se* participant’s legal rights. It provides legal information without providing legal advice to one party to the detriment of another. Even though it is not necessarily neutral because the evaluation may benefit one party more than the other, it is impartial if properly employed.

Evaluative mediation, although widely used, is controversial in the dispute resolution field.<sup>382</sup> An evaluative mediator, as we have seen above, “guides and advises the parties on the basis of his or her expertise with a view to their reaching a settlement that accords with their legal rights and obligations, industry norms or other objective standards.”<sup>383</sup> When evaluating, a mediator “can focus on a single issue or on the overall result in a case.”<sup>384</sup> Whether evaluating more narrowly or more broadly, however, many scholars deem evaluative mediation improper. In their frequently cited article, Professors Kimberlee Kovach and Lela Love unequivocally state that “‘evaluative’ mediation is an oxymoron.”<sup>385</sup> In their view, evaluative mediation “jeopardizes neutrality because a mediator’s assessment invariably favors one side over another.”<sup>386</sup> It also discourages more problem-solving dialogue and promotes more debate dialogue, creating a more adversarial environment.<sup>387</sup> Evaluative mediation also can backfire, these scholars point out, by vindicating one parties view and rendering them less flexible for the remainder of the mediation.<sup>388</sup> Among the most concerning potential dangers of evaluative mediation,

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<sup>380</sup> TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION 207 (2009).

<sup>381</sup> Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 644 (2004).

<sup>382</sup> Golann et al., *supra* note 274, at 27.

<sup>383</sup> BOULLE ET AL., *supra* note 17, at 13.

<sup>384</sup> Golann et al., *supra* note 274, at 27.

<sup>385</sup> Kovach & Love, *supra* note 264, at 31.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

however, is that it threatens party self-determination.<sup>389</sup> This is especially true while working with *pro se* litigants who would be highly susceptible to the one “impartial” expert in the room analyzing the strengths and weaknesses of their case. The legitimate fear, of course, is that “an evaluative mediator becomes an ‘activist’—one who takes control of the mediation by advising parties how to proceed.”<sup>390</sup>

Another legitimate concern of evaluative mediation is that, once we set mediators up as judges of fairness, who checks them? There is virtually no oversight of mediators in this country.<sup>391</sup> Presently no state licenses mediators or provides any thorough review of their credentials.<sup>392</sup> Unlike the practice of law, few states have ethical boards to which unhappy mediation participants can go to lodge complaints about a mediator behavior.<sup>393</sup> Moreover, mediation occurs under the veil of confidentiality, and while the mediated agreement is usually not covered under that privilege, it is frequently not available for public scrutiny.<sup>394</sup> The concept of “fair” is subjective.

Douglas Rosenthal’s study of personal injury cases in New York demonstrates the highly subjective nature of “fair settlements.” Rosenthal chose sixty-one personal injury matters that had been settled and then asked experienced personal injury lawyers and one experienced insurance claims adjuster to review the actual case file and assess the cases’ settlement value.<sup>395</sup> Thus, the study produced six values: the actual settlement amount and five assessments of the value by experts. The degree of variability among the expert assessors was dramatic.<sup>396</sup> In one case, which is typical of the degree of variability, the five assessors, respectively, valued the case as follows: \$11,600, \$7,500, \$12,500, \$20,000, \$15,000, and \$3,000.<sup>397</sup> The case actually settled for \$5,000. Given this outcome, it would not be outrageous to suggest that had the

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<sup>389</sup> Kovach & Love, *supra* note 264; Golann et al., *supra* note 274, at 27.

<sup>390</sup> Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 479, 491 (2000).

<sup>391</sup> Judith Meyer & Michael Leathes, *How Mediators Can Obtain Professional Certification and Thereby Elevate Their Profession: A Look at IMI’s Voluntary Credentialing Program*, 63 DISP. RESOL. J. 22, 24 (2008).

<sup>392</sup> *Id.*

<sup>393</sup> Steven T. Peluso, *Mediating the Licensing and Certification Labyrinth*, 8 DISP. RESOL. MAG. 3 (2001).

<sup>394</sup> Moffitt, *supra* note 244, at 172.

<sup>395</sup> GERALD R. WILLIAMS, *LEGAL NEGOTIATIONS IN SETTLEMENTS* 112–13 (1983).

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

expert who valued the case at \$20,000 been a mediator in this dispute, a proposed settlement of \$5,000 would be deemed self-evidently “unfair.” Yet, to the other expert who valued the case at \$3,000, the \$5,000 settlement looks like a very good deal. The experts’ assessment of value in another case with a particularly wide spread of value spanned from a value of \$2,000 to a value of \$30,000, where the actual settlement was \$5,250.<sup>398</sup> This case had a coefficient of variability of 0.8950, which means that there was nearly a 90% variation from the mean.<sup>399</sup> The Rosenthal study demonstrated the significant subjectivity inherent in the concept of fairness and why propping up mediators as arbiters of substance fairness of mediated agreements is suspect.

The real concern with evaluative mediation, however, is not that mediators perform it, but that they frequently perform poorly. In addressing best practices in the use of evaluative mediation, Professors Golann and Aaron, make two recommendations worth noting here because they go a long way to mitigate many of the dangers that evaluative mediation poses to *pro se* litigants especially. The first rule of good evaluation, they posit, is to “only evaluate when necessary.”<sup>400</sup> This advice correctly takes into account that even if done well, evaluation is an “inherently risky” and highly directive settlement tool that implicates the dangers Professors Kovach and Love highlight.<sup>401</sup> Before performing an evaluation, the mediator should first try to settle the matter with facilitative techniques that cede much more control over the dispute to the parties, which is a significant goal of mediation in the first place.<sup>402</sup> Yet, it never occurs to many mediators not to evaluate. One common reason for this is that evaluation is the only way that they know how to settle cases, having not been trained, or at least not adequately trained, in facilitative mediation techniques.<sup>403</sup> This implicates the quality of mediator training in this country, which is beyond the scope of this Article, But it is relevant to the extent that many mediators, being lawyers, are highly informed about legal analysis, but poorly informed on conflict analysis.<sup>404</sup>

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<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> Golann et al., *supra* note 274, at 29.

<sup>401</sup> Love et al., *supra* note 4, at 58. (explaining the “danger inherent in mediator evaluations”).

<sup>402</sup> FRENKEL ET AL., *supra* note 18, at 83.

<sup>403</sup> Michael T. Colatrella Jr., *A “Lawyer For All Seasons”: The Lawyer As Conflict Manager*, 49 SAN DIEGO L. REV. 93, 103–04 (2012).

<sup>404</sup> *Id.* at 112.

Thus, they believe, often wrongly, that the dispute is about a disagreement over law and/or facts. In reality, the more significant obstacle to settlement might be “the need to vent arguments and emotions, poorly conducted positional bargaining, lack of information or hidden psychological issues,” none of which are related to the merits of the dispute or would benefit from an evaluation.<sup>405</sup> To put it more succinctly, when all you have is a hammer every problem looks like a nail.

The other invaluable piece of advice that the article provides is that “an evaluation should be delayed as late in the mediation as possible.”<sup>406</sup> This has the benefit of mitigating many of the potential dangers of evaluation. It allows information sharing and problem solving to be more fully developed, giving the parties a greater voice in the mediation process and increasing the likelihood that evaluation might not be needed at all.<sup>407</sup> If you provide an evaluation shortly after the parties’ initial statements, as many mediators do, you have deprived the parties the opportunity to resolve the matter without substantive direction and have perhaps unnecessarily exposed them to all the potential dangers of such a directive tactic. Let us explore how the use of evaluation might work in practice to better inform party decision-making.

Section 1983 Prisoner Civil Rights Claims is an area of litigation that is benefiting from increased use of mediation.<sup>408</sup> A prisoner can file a Section 1983 claim in federal district court for alleged violations of their federal constitutional or statutory rights after exhausting their administrative process within their respective correctional institutions.<sup>409</sup> A typical prisoner Section 1983 claim may involve physical abuse by prison personnel, destruction of property, or improper medical care.<sup>410</sup> As one might expect, most prisoners are *pro se* litigants because they lack the income to hire

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<sup>405</sup> GOLANN, *supra* note 320, at 124–25.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> John F. Murtha & Brett Bitzer, *A New Pro Bono Opportunity with the District Court of Nevada: Mediation of Prisoners § 1983 Civil Rights Claims*, NEV. LAW. (July 2008).

<sup>409</sup> 42 U.S.C. § 1983 (1996); Steven W. Miller, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to Good Faith Defenses in § 1983 Lawsuits*, 84 NOTRE DAME L. REV. 829 (2009).

<sup>410</sup> Michael S. Vaughn, *Section 1983 Civil Liability of Prison Officials for Denying and Delaying Medication and Drugs to Prison Inmates*, 11 ISSUES L. & MED. 47, 55 (1995) (stating that prison guards intentionally deny or delay access to medical care or intentionally interfere with their treatment).



an attorney.<sup>411</sup> One of the obstacles in settling these types of disputes is that the prisoner, because of their lack of legal expertise, overestimate the likelihood of success at trial either because they do not understand the proper legal standard or ignore relevant rules of evidence that would make proving their claim, however heartfelt, difficult.<sup>412</sup> Medical claims are particularly difficult to prove because the applicable legal standard under Section 1983 claims is “deliberate indifference to a known medical condition,” not negligence, as a layperson might suppose.<sup>413</sup> Therefore, a prisoner could not state a claim for injury caused by negligent failure for a prison physician to diagnose diabetes.<sup>414</sup> In such a case, the prisoner would need to show that the prison physician knew about diabetes and intentionally failed to provide treatment.<sup>415</sup> If this case is being mediated and the prisoner believes he has a valid claim under a simple negligence standard, a mediator, after employing more facilitative tactics, could evaluate the claim by informing him of the proper, more demanding legal standard and then explore with plaintiff how this might affect his chances of success. This would help the prisoner make a more informed decision about settlement.<sup>416</sup> For example, let us assume that the state, as the defendant, is offering \$2,000 to settle the claim in mediation, but the plaintiff is demanding a minimum of \$100,000 to settle the claim based upon reliance in a mistaken legal standard. The mediator’s evaluation could help the prisoner look more realistically at the state’s offer, which might be fair, given that the prisoner’s claim has little chance of success if the plaintiff has to prove deliberate indifference. This kind of evaluation, appropriately performed, can help *pro se* litigants make informed decisions, without requiring informed outcome consent.

Whether one believes evaluative mediation is an oxymoron or a legitimate tool, it is a widely used strategy that is ethical.<sup>417</sup> The Model Standards permit evaluative mediation and make no distinc-

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<sup>411</sup> Candice K. Lee, *Access Denied: Limitations on Pro Se Litigants’ Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261, 1264 (2003) (stating that most *pro se* litigants are uneducated and poor).

<sup>412</sup> *Id.* at 1283 (stating that *pro se* prisoner litigants lack resources to fully understand the standards of law and misunderstand their claims).

<sup>413</sup> *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

<sup>414</sup> *Id.*

<sup>415</sup> *See id.*

<sup>416</sup> *See GOLANN, supra* note 320, at 151–52.

<sup>417</sup> RELIS, *supra* note 380, at 207.

tion among mediation styles.<sup>418</sup> Moreover, in practice, the distinction between facilitative and evaluative mediators is not black and white. Most mediators fall along a continuum of facilitative and evaluative, making style labeling elusive.<sup>419</sup> Evaluative mediators often use facilitative elements and facilitative mediators often use evaluative elements.<sup>420</sup> Recent research demonstrates that some mediators who categorize themselves as “facilitative,” either unconsciously or consciously use evaluations by offering suggestions or implied evaluation by body language.<sup>421</sup> Thus, the line between facilitation and evaluation is not always a clear one, but evaluative techniques are at least an ethical path to promote informed outcome consent.

Evaluative mediators can further promote informed consent by assisting participants in fashioning enforceable and durable mediated terms and in helping them to understand their rights and responsibilities under the mediated agreement whether or not they are represented by counsel. Neither party is served if a mediated agreement is unenforceable, weak, or ambiguous.<sup>422</sup> A common goal of most mediators that benefits all participants is “to craft a practical and durable agreement—and to protect against the escalation of conflict that can come from non-compliance.”<sup>423</sup> As always, the touchstone in evaluating the propriety of a mediator’s assistance is impartiality.<sup>424</sup>

An excellent example of a mediator impartially assisting *pro se* litigants in crafting an enforceable, durable and practical agreement is recounted in mediator ethics advisory opinion from a family dispute in New York.<sup>425</sup> In this dispute, a father petitioned the New York Family Court to obtain physical custody of his twelve-year-old son and the court sent to case to mediation.<sup>426</sup> During the mediation, the mother agreed to relinquish psychical custody because she wished to honor her son’s wish to live with his father.<sup>427</sup> Despite this agreement by the parties, one of the co-mediators

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<sup>418</sup> *Id.* at 198 (citing research that supports the proposition that “most legal actors preferred evaluative, rights based mediations to facilitative, interest-based mediators”).

<sup>419</sup> Levin, *supra* note 271, at 269.

<sup>420</sup> RELIS, *supra* note 380, at 207.

<sup>421</sup> *Id.*

<sup>422</sup> FRENKEL ET AL., *supra* note 18, at 278.

<sup>423</sup> *Id.*

<sup>424</sup> MODEL STANDARDS Standard II (2005).

<sup>425</sup> New York State Mediator Ethics Advisory Committee Opinion 2009–02 (2009) [hereinafter Ethics Opinion 2009–02].

<sup>426</sup> *Id.* at 1.

<sup>427</sup> *Id.*

knew the financial child support arrangement between the parents would be impacted if they son moved in with his father.<sup>428</sup> The fact that the *pro se* parties seemed to be unaware of this issue left the mediators with a dilemma.<sup>429</sup> On the one hand, the co-mediator did not wish to cross the ethical line between providing legal information and providing legal advice.<sup>430</sup> On the other hand, the mediators felt “strongly that they would be setting the parties up for further conflict if the support issue is not clarified and an agreement signed without being raised.”<sup>431</sup> The co-mediators sought ethical guidance from the New York Mediator Ethics Advisory Committee (“the Committee”).<sup>432</sup>

In its advisory ethics opinion, the Committee addressed the issue of the extent to which the co-mediators could appropriately raise the support issue with the parties without giving legal advice and violating the impartiality provision of the New York State mediator’s ethical code, a provision similar to the impartiality standard under the Model Standards.<sup>433</sup> In a thoughtful opinion that sought to balance party self-determination, quality process and impartiality, the Committee recommended the following course of action to the mediators:

[Where] the mediator is aware of this information, and deems it essential to the principles of self-determination and a quality mediation process that the parties receive outside legal advice on this issue prior to signing an agreement, then in joint session, as part of reality testing the enforceability of the agreement, the mediator should: (1) give the parties the legal information in his/her possession; and (2) recommend that the parties consult outside counsel for legal advice about their specific case.<sup>434</sup>

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<sup>428</sup> *Id.*

<sup>429</sup> *See id.*

<sup>430</sup> *Id.*

<sup>431</sup> Ethics Opinion 2009–02, *supra* note 425, at 1.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.* at 4–5; Standards of Conduct for New York State Community Dispute Resolution Center Mediators Standard II (2005) (The New York impartiality ethical rule states that “a mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality toward or prejudice against a party. Impartiality means freedom from favoritism or prejudice in word, action or appearance.”) The standards can be found at [https://www.nycourts.gov/ip/adr/Publications/Info\\_for\\_Programs/Standards\\_of\\_Conduct\\_CDRC\\_Mediators.pdf](https://www.nycourts.gov/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct_CDRC_Mediators.pdf).

<sup>434</sup> Ethics Opinion 2009–02, *supra* note 425, at 2 (The Committee also stated that the mediator should “emphasize that (s)he is not acting as any party’s attorney and cannot dispense legal advice specific to the case.”).

The Committee found that the “potential link between custody and support appears to constitute substantial information” that would undermine that type of informed decision-making and quality process that mediators are bound to promote under party self-determination.<sup>435</sup> Wisely, however, the committee acknowledged that neither of these important mediation values should trump the equally important mediation value of impartiality.<sup>436</sup> Thus, the Committee advised the mediators to raise the issue generally before the agreement was signed, but nothing more.<sup>437</sup> The Committee explained, “the mediator may relay general legal information regarding custody and support in joint session with the parties, as part of reality testing the enforceability of the dispute.”<sup>438</sup> The Committee further advised that “[t]o avoid favoring one party over another, such reality testing could be done by sharing the mediator’s general understanding that the custody decisions may affect support, or by asking whether the parties are aware of any laws or precedents that might impact support in the event of a custody change.”<sup>439</sup> After raising the issue, the mediator, the committee stated, should then recommend that the parties seek legal counsel on the issue.<sup>440</sup> Importantly, the Committee emphasized that mediators had no obligation to know the law.<sup>441</sup> In other words, mediators did not have a duty of informed outcome consent.<sup>442</sup> Only if the mediator knows the law and deems it “substantial information” necessary to promote self-determination and a quality process for both parties, does a mediator have a duty to raise the issue.<sup>443</sup>

This ethics opinion demonstrates that mediators absent a duty of informed outcome consent can still assist pro se participants in understanding the consequences of their agreements and, in some cases, help them to avoid bad settlement choices. To help parties to craft durable and practical agreements, however, the important mediation protections of self-determination, quality process, and impartiality should extend only so far as they do not subordinate

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<sup>435</sup> *Id.* at 3.

<sup>436</sup> *See id.* at 4–5.

<sup>437</sup> *Id.* at 2.

<sup>438</sup> *Id.* at 4–5.

<sup>439</sup> *Id.*

<sup>440</sup> Ethics Opinion 2009–02, *supra* note 425.

<sup>441</sup> *Id.* at 1.

<sup>442</sup> *See id.* at 2.

<sup>443</sup> *Id.* at 1–2.

one other. To do otherwise undermines and distorts the mediation process.

## VI. CONCLUSION

Mediators should do all in their power to assist *pro se* litigants in overcoming the many obstacles that they face in pursuing their legal rights and making wise settlement decisions. But they must discharge this duty while honoring their other ethical obligations. Mediators cannot be required to obtain informed outcome consent from *pro se* participants. To do this, they would in many instances need to act as legal advisors and counselors to unrepresented parties, and this behavior would violate their duty of impartiality, a core mediation value that should not be compromised. Mediators should strive to achieve fair agreements, but they must do so by conducting a fair procedure. "Mediation," as has been said, "chooses to stand in connection to all sides for justice's sake."<sup>444</sup>

To further promote fair procedure, the law should require mediators to obtain informed participation consent. Mediation participants should be informed about the nature of the process in which they are to engage because mediation is practiced in numerous styles, with each style possessing different associated benefits and risks. Mediators can ethically explain the nature of the mediation process and the benefits and risks associated with their particular style of mediation because they can do so while being impartial. Such an explanation does not require them to treat the parties substantially differently, as is the case with informed outcome consent. Moreover, understanding the risks and benefits of a mediation process when participants enter into it will help participants to make wiser choices about the future of their dispute.

As this Article has explored, mediators already possess considerable ability to improve informed decision-making for *pro se* mediation participants within the current ethical framework. This includes facilitative techniques that help parties recognize important factual gaps and other strategies to increase the participant's information base upon which he or she will make settlement decisions. Mediators also can assist parties to more objectively assess that information once collected by helping them to avoid common decision-making traps like selective perception and advocacy bias.

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<sup>444</sup> JOHN PAUL LEDERACH, PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES 14 (1995).

Mediators can further aid parties by highlighting gaps in their legal analysis through both facilitative and evaluative methods. In extreme circumstances, mediators can even offer legal opinions and legal information relevant to the dispute as long as they do so impartially and in the services of all participants.

Of course, mediators do much more to help parties to better understand the circumstances of their dispute than has been explored in this Article. Mediators improve parties' communication process by helping them communicate more accurately, comprehensively and appropriately.<sup>445</sup> They act as communication traffic cops so that parties can have the opportunity to communicate their interests, arguments and claims.<sup>446</sup> Moreover, if necessary, they can act as a buffer by keeping parties separate to mitigate the power imbalances that can occur when a more domineering party, wittingly or unwittingly, attempts to use intimidation tactics to obtain the advantage in the negotiation.<sup>447</sup>

Mediators do more still, in that they help to overlay a problem solving process onto a stalled negotiation, which also enhances participant informed decision-making.<sup>448</sup> This process has been called "high quality consent" by Professor John Lande, and includes helping participants to identify "goals and interests," explore "options for satisfying those interests," and selection of options for careful "evaluation" as a potential solution.<sup>449</sup> As part of this problem solving process, mediators can also help parties more thoroughly understand the relevant legal principles that affect their dispute. Although mediators cannot, and should not, provide the "robust" form of informed outcome consent for which some scholars argue, the assistance they ethically can provide is nevertheless significant and meaningful.<sup>450</sup>

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<sup>445</sup> BOULLE ET AL., *supra* note 17, at 115.

<sup>446</sup> FRENKEL ET AL., *supra* note 18, at 298.

<sup>447</sup> BOULLE ET AL., *supra* note 17, at 106-07.

<sup>448</sup> *Id.* at 61-62.

<sup>449</sup> Professor Lande's "high quality consent" includes seven factors in total. They are as follows: "(1) explicit identification of the principals' goals and interests, (2) explicit identification of Plausible options for satisfying these interests, (3) the principals' explicit selection of options for evaluation, (4) careful consideration of these options, (5) mediator's restraint in pressuring principals to accept particular substantive options, (6) limitation on use of time pressure, and (7) conformation of principals' consent to select options." John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 869 (1997).

<sup>450</sup> A different issue of particular importance to recognize, but one beyond the scope of this Article, is the existence of studies that find that minorities, who make up a significant percentage of *pro se* litigants, often fare worse in mediation than non-minorities because of mediator prejudice. Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 CAP. U.

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L. REV. 819, 828 (2011). The data is complex and sometimes conflicting, leaving the more specific reasons why minorities' monetary settlements are not as high as their non-minority counterparts open to debate. *Id.* at 828–31. Solutions to this problem have not focused on improving informed consent, but rather have mostly focused on improving the way mediators are assigned to disputes, diversity of the mediator pools, and quality of mediator training. *Id.* at 840–43.

