

A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform

Omer Shapira
Ono Academic College

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Repository Citation

Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform*, 100 Marq. L. Rev. 81 (2016).

Available at: <http://scholarship.law.marquette.edu/mulr/vol100/iss1/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

A CRITICAL ASSESSMENT OF THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005): CALL FOR REFORM

OMER SHAPIRA*

The Model Standards of Conduct for Mediators (2005), which were developed and adopted by leading organizations in the field of mediation, were designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts, inform mediating parties, and promote public confidence in mediation as a process for resolving disputes.

The Model Standards have proved to be an influential ethical source for mediators, mediation scholars, and legislatures. They have inspired many codes of conduct for mediators in the United States and abroad and influenced their content. Many commentators and mediators treat them as an authoritative statement on the ethical conduct expected of mediators.

Over the years, commentators have raised concerns about some aspects of the Model Standards, for example, their failure to adequately guide mediators in situations of competing values, and the vagueness of their substantive provisions. No work to date has exposed the Model Standards to a systematic and comprehensive assessment, which is necessary for an evaluation of their adequacy as a coherent statement of the fundamental ethical guidelines for mediators, and for the development of a viable alternative to them. Ten years after the adoption of the revised Model Standards in 2005, this Article comes to fill the gap in the literature and open the discussion on the next version of the Model Standards.

The Article argues that the Model Standards are in need of reform, points to key issues that should be addressed in reforming them, and calls for a renewed debate over the shape, content, and vision of the Model Standards.

I.	INTRODUCTION.....	83
II.	CONCEPTUAL CRITIQUE OF THE MODEL STANDARDS.....	88
	A. <i>An Inadequate Definition of Mediation: Mixing Descriptive and Normative Features</i>	89
	B. <i>An Outdated Statement on the Purposes of Mediation: Moving Beyond Problem-Solving Mediation</i>	90
	C. <i>Misguided Use of Levels of Guidance: Between Shall, Should, and May</i>	92

D.	<i>A Missing Statement on the Obligations of Mediators: A Need to Openly Recognize the Duties toward the Profession, the Public, and Courts or Referring Bodies</i>	95
E.	<i>Too Limited Guidance on What to Do When Standards Conflict</i>	104
F.	<i>The Missing Standards: Deconstructing the Standard of Quality of the Process into Standards of Diligence, Honesty, Respect, Professional Integrity, and Fairness</i>	107
	1. The Imprecise Scope of the Standard of Quality of the Process	107
	2. Misplaced Elements that Belong to Other Existing Standards.....	107
	3. A Mismatch between the Standard's Statement and the Provisions that Follow	108
	4. The Missing Standards Hiding in the Standard of Quality of the Process	109
	a. <i>Diligence</i>	109
	b. <i>Honesty</i>	110
	c. <i>Respect</i>	111
	d. <i>Party Self-determination</i>	112
	e. <i>Professional Integrity</i>	113
	i. An Exercise of Professional Discretion	114
	ii. Separation of Professional Roles and Services	114
	iii. The Appropriateness of a Case to Mediation...	115
	iv. The Prevention of Process Abuse or Substantial Defects in the Process	116
	v. A Summary of the Argument on Professional Integrity.....	118
	5. Moving from Procedural Fairness (as a Component of a Quality Process) to a Standard of Fairness	118
G.	<i>Ignoring the Accountability of Mediators to Outcomes</i>	119
	1. Uninformed Outcomes.....	120
	2. Illegal Outcomes	122
III.	CRITIQUE OF PARTICULAR STANDARDS	125
A.	<i>Self-determination</i>	125
	1. No Clear Message on the Allocation of Decision-making Power between Parties and Mediators	125
	2. Failure to Incorporate Party Competency as a Component of Self-determination	126
	3. Wrong Approach to Informed Consent.....	127
B.	<i>Impartiality</i>	127

1. Failure to Distinguish between Implicit and Explicit Bias	127
2. Ignoring the Full Implications of Perceived Partiality..	127
3. Failure to Distinguish between Legitimate and Illegitimate Favoritism	129
C. <i>Conflicts of Interest</i>	130
1. A Partial Definition of a Conflict of Interest	130
2. A Need to Externalize the Rationale of a Serious Conflict of Interest	131
D. <i>Competence</i>	132
E. <i>Confidentiality</i>	134
1. Lack of Guidance on Limitations on Disclosure of Information with Parties' Consent	134
2. A Partial Statement on the Discussion of the Extent of Confidentiality with the Parties	135
IV. CONCLUSION	136

I. INTRODUCTION

The Model Standards of Conduct for Mediators (2005) (hereinafter *Model Standards*) were designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts, inform mediating parties, and promote public confidence in mediation as a process for resolving disputes.¹ They were developed and adopted for the first time in 1994 by three leading organizations in the field of mediation: the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Society of Professionals in Dispute Resolution (SPIDR)—now the Association for Conflict Resolution.² The 1994 version was revised in 2005 and replaced by the current *Model Standards*.³

The *Model Standards* have proved to be an influential ethical source for mediators, mediation scholars, and legislatures. In both their old and revised versions, they have inspired many codes of conduct for mediators in the United

* Senior Lecturer, Faculty of Law, Ono Academic College. Parts of this Article have been presented at the AALS Alternative Dispute Resolution Section's 9th Annual Works-in-Progress Conference held in Texas A&M University School of Law in October 23–24, 2015. I would like to thank the participants of that conference for their comments.

1. MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmbl. (AM. ARBITRATION ASS'N, AM. BAR ASS'N, AND ASS'N FOR CONFLICT RESOLUTION 2005) [hereinafter MODEL STANDARDS].

2. *Id.* at intro., n.1.

3. *Id.* at intro.

States and abroad and influenced their content.⁴ They were, in general, warmly welcomed by mediation scholars.⁵ One commentator has recently suggested that the *Model Standards* are “the most authoritative mediator ethical code in the United States.”⁶ Another commentator observed that “[t]he Standards have assumed a Talmudic status in a field eager for direction. Like the Bible, Quran, or other holy texts, the Standards serve as the textual touchstone for virtually every argument regarding what mediation is or should be.”⁷

The importance of the *Model Standards* has been enhanced in a reality in which mediation is for the most part left unregulated. Thousands of mediators across the United States and abroad, especially in private settings, are not subject to any applicable ethical code which governs their actions.⁸ In the absence of applicable codes, these mediators are likely to turn to the *Model Standards*, which stand out as a shining example of an authoritative statement on the conduct expected of mediators.⁹

Over the years, however, commentators have raised concerns about some aspects of the revised *Model Standards*. Michael L. Moffitt, for example, has drawn attention to their failure to adequately guide mediators in situations of competing values.¹⁰ Similarly, Laura E. Weidner noted that the revised *Model Standards*, like the 1994 version, fail to guide mediators on the way to deal with

4. See, e.g., MICHIGAN STANDARDS OF CONDUCT FOR MEDIATORS (MICH. STATE COURT ADMIN. OFFICE 2013), <http://www.courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Standards%20of%20Conduct%202.1.13.pdf> [https://perma.cc/V34E-V6E4]; ETHICAL GUIDELINES FOR MEDIATORS (LAW COUNCIL OF AUSTL. 2011), <http://www.law-council.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/EthicalGuidelinesforMediators.pdf> [https://perma.cc/5QPG-PMWG] (Australian Ethical Guidelines); A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS (FED. INTERAGENCY ADR WORKING GRP. STEERING COMM. 2006), http://www.adr.gov/pdf/final_manual.pdf [https://perma.cc/2EK4-XUGH] [hereinafter FEDERAL EMPLOYEE MEDIATORS GUIDE]; Andrea C. Yang, *Ethics Codes for Mediator Conduct: Necessary but Still Insufficient*, 22 GEO. J. LEGAL ETHICS 1229, 1239–42 (2009) (discussing state ethics codes which implemented the MODEL STANDARDS in various forms and degrees).

5. Laura E. Weidner, *Model Standards of Conduct for Mediators*, 21 OHIO ST. J. ON DISP. RESOL. 547, 565 (2006); Yang, *supra* note 4, at 1236 (discussing the positive reception of the MODEL STANDARDS); Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 APPAL. J. L. 195, 195 (2006).

6. Michael T. Colatrella, Jr., *Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring the Mediator's Ethical Duties*, 15 CARDOZO J. CONFLICT RESOL. 705, 709 (2014).

7. MEDIATION ETHICS: CASES AND COMMENTARIES 10 (Ellen Waldman ed., 2011) [hereinafter MEDIATION ETHICS].

8. *Id.*

9. See, e.g., *id.*

10. See, e.g., Michael L. Moffitt, *The Wrong Model, Again: Why the Devil is Not in the Details of the New Model Standards of Conduct for Mediators*, 12 DISP. RESOL. MAG. 31, 31–32 (2006).

imbalance of power situations while observing their obligation to maintain impartiality.¹¹ Andrea C. Yang has noted that most criticism of the *Model Standards* focuses on the vagueness of their substantive provisions.¹² Kimberlee K. Kovach, for example, criticized their treatment of honesty in mediation;¹³ Susan Nauss Exon pointed out the vague nature of the *Model Standards*' provisions relating to mediator impartiality and fairness;¹⁴ Michael T. Colatrella, Jr. discussed the *Model Standards*' shortcomings regarding informed consent;¹⁵ and Paul Springer evaluated their approach to advertising.¹⁶

The critique of the *Model Standards* has been *sporadic*, focusing on particular and isolated aspects of them. My research of the literature has found no work that has exposed the *Model Standards* to a systematic and comprehensive assessment,¹⁷ which is, in my view, necessary if we are to evaluate their adequacy as a coherent statement of the "fundamental ethical guidelines for persons mediating in all practice contexts,"¹⁸ and if we are to develop a viable alternative to them. Ten years after the adoption of the revised *Model Standards*, this Article comes to fill this gap in the literature and open the discussion on the next version of the *Model Standards*.

This Article argues that the *Model Standards* are in need of reform, points to key issues that should be addressed in reforming them, and calls for a renewed debate over the shape, content, and vision of the *Model Standards*. It does not offer a comprehensive and detailed proposal for *New Model Standards*, a task which cannot be accomplished within the limited scope of an article, and which I have undertaken elsewhere.¹⁹

Part II discusses seven major *conceptual* changes that the *Model Standards* should undergo. Section A argues that the *definition* of mediation in the *Model*

11. Weidner, *supra* note 5, at 566.

12. Yang, *supra* note 4, at 1237.

13. Kimberlee K. Kovach, *Musing on Idea(l)s in the Ethical Regulation of Mediators: Honesty, Enforcement, and Education*, 21 OHIO ST. J. ON DISP. RESOL. 123, 127, 135–37 (2005).

14. 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, 393, 395–406 (2006).

15. Colatrella, *supra* note 6, at 710–11.

16. Paul Springer, *Avoiding the Full Court Press: Amending the ABA Model Standards of Conduct to Better Regulate Mediator Advertising*, 27 GEO. J. LEGAL ETHICS 901, 901 (2014).

17. For an appraisal of the 1994 version of the MODEL STANDARDS, see Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 87 (1997).

18. MODEL STANDARDS, *supra* note 1, at pmb1.

19. See OMER SHAPIRA, *A THEORY OF MEDIATORS' ETHICS: FOUNDATIONS, RATIONALE, AND APPLICATION* (Cambridge Univ. Press, 2016).

Standards is wrong in mixing descriptive and normative features.²⁰ This Article calls for the adoption of a factual definition which states what mediation is, not what mediation ought to be.

Section B criticizes the *Model Standards*' statement of the *purposes* of mediation. This statement suits problem-solving mediation, but does not fit other mediation styles.²¹ This Article argues that the *Model Standards* should apply to mediation styles other than problem-solving mediation and should state so explicitly.

Section C argues that the levels of guidance "shall" and "should," which the *Model Standards* use to guide mediators, are used inconsistently and sometimes in a wrong way.²² Furthermore, this Article draws attention to a third level of guidance—"may"—which the *Model Standards* use without proper explanation.

Section D claims that although the *Model Standards* implicitly recognize that mediators owe duties *beyond* their duties toward the parties, they fail to state so openly and clarify those additional duties.²³ As a result, mediators receive a partial and inaccurate picture of their ethical obligations, which undermines their ability to engage in an ethical practice of mediation. This Article argues that the *Model Standards* should expressly state that mediators owe duties toward the profession, the public, and courts or referring bodies, as well as duties toward the parties. It further argues that such a change could have a significant effect on the way mediators understand their role, exercise discretion, and practice mediation ethically.

Section E focuses on the inadequate guidance offered by the *Model Standards* on the conduct expected of mediators in the event that particular standards conflict, and suggests that a clarification is in place.²⁴ Section F argues that the nine-standard architecture of the *Model Standards* needs to be revised to include new Standards of Diligence, Honesty, Respect, Professional Integrity, and Fairness.²⁵ This Article shows that some aspects of the proposed standards are partially, yet inadequately, covered by the current Standard of Quality of the Process. It argues, however, that the Standard of Quality of the Process should be deconstructed, its content broadened, and the *Model Standards* restructured to include the newly proposed standards.

Section G challenges the common assumption that the *Model Standards* do

20. See *infra* Section II.A.

21. See *infra* Section II.B.

22. See *infra* Section II.C.

23. See *infra* Section II.D.

24. See *infra* Section II.E.

25. See *infra* Section II.F.

not hold mediators accountable for mediation outcomes.²⁶ This Article suggests that the *Model Standards*' guidance on the process of mediation could be interpreted as an implied and partial (although far from satisfying) recognition of mediator accountability for outcomes, illustrating this point with regard to uninformed and illegal outcomes. This Article calls for amending the *Model Standards* to offer a higher degree of accountability for mediation outcomes, consistent with other codes of conduct for mediators and in line with supportive comments of mediation experts.

Part III focuses on the content of *particular* standards, identifying weaknesses in some of them that require attention. Section A argues that the Standard of Self-determination should be revised in order to improve its guidance on the allocation of decision-making power between the parties and the mediator.²⁷ It further argues that the standard should incorporate party competency as a component of self-determination, and should attach more weight to informed consent.

Section B claims that if the Standard of Impartiality is to be taken seriously as a realistic normative guide for mediator conduct, it needs to be redrafted in order to properly address explicit bias or prejudice (to be distinguished from implicit bias), make perceived partiality (or the appearance of partiality) subject to a test of reasonableness, acknowledge the appearance of partiality as a ground for declining a case and withdrawal, and provide for legitimate instances of favoritism that address the need for mediators to treat parties differently during a mediation.²⁸

Section C argues that the Standard of Conflicts of Interest offers an incomplete definition of conflicts of interest, which ignores the possibility that the mediator preferred his *own* interest over the interests of *all* parties.²⁹ In addition, it is argued that the rationale for *serious* conflicts of interest which the parties cannot legitimize should be clarified and made explicit in the phrasing of the standard.

Section D maintains that the Standard of Competence does not adequately define competence, and sends a wrong, subjective message on the level of competence required of mediators, inconsistent with the *Reporter's Notes* on competence.³⁰

Section E argues that the grounds for permitted disclosure listed by the

26. See *infra* Section II.G.

27. See *infra* Section III.A.

28. See *infra* Section III.B.

29. See *infra* Section III.C.

30. See *infra* Section III.D.

Standard of Confidentiality should be qualified with a reminder to mediators that disclosures, notwithstanding the parties' agreement, must be consistent with the other standards.³¹ It further argues that the standard should be amended to include a reference to a mediator's responsibility to make certain that parties understand the extent to which *the mediator* will maintain the confidentiality of information that surfaces in mediation.³²

Part IV concludes the Article, calling upon the ADR community to start a process of reforming the *Model Standards*.³³

II. CONCEPTUAL CRITIQUE OF THE MODEL STANDARDS

The greatest weakness of the *Model Standards* goes unnoticed. The standards were "designed to serve as *fundamental ethical guidelines* for persons mediating in all practice contexts,"³⁴ but the theory that informs these ethical guidelines and justifies them is nowhere to be found. What is the *Model Standards'* ethical source of authority? Why should we accept the *Model Standards* as an authoritative statement of the ethical obligations of mediators? Why should mediators, who are not members of the three organizations that have formally adopted the *Model Standards*, treat them as an authoritative statement of the ethical obligations of mediators? Why, for example, do the *Model Standards* consist of *nine* standards and not sixteen? Why these nine standards and not others? And how can we be sure that the *content* of the standards is correct and accurate?

Neither the *Model Standards* nor the *Reporter's Notes* that accompany them answer these questions. Without adequate answers, the *Model Standards'* authority is undermined, and their structure and content open to a charge of arbitrariness. What the *Model Standards* lack is a *theory* that supports and *justifies* them. What they fail to provide is a method to *identify* the ethical obligations of mediators and *ascertain* their particular content.

I believe it is possible to construct a theory that justifies a set of ethical standards that applies to all mediators.³⁵ This, however, is not the focus of this Article, which is designed to offer a critical reading of the *Model Standards*, demonstrate some of their deficiencies, call for reform, and suggest key points on the road to reform. The following sections undertake that task.

31. See *infra* Section III.E.

32. See *infra* Section III.E.

33. See *infra* Part IV.

34. MODEL STANDARDS, *supra* note 1, at pmb1. (emphasis added).

35. See SHAPIRA, *supra* note 19, at ch. 3.

A. *An Inadequate Definition of Mediation: Mixing Descriptive and Normative Features*

The *Model Standards* define mediation as “a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.”³⁶ For the most part it is a fine definition because its wording can capture, in my view, the main types or orientations of mediation, most notably problem-solving mediation (including facilitative and evaluative styles of mediation), transformative mediation, and narrative mediation.³⁷ These types of mediation,³⁸ despite their differences, exhibit several fundamental features which any mediation process shares: (1) a third party, (2) who assists parties to a dispute, (3) to communicate and make voluntary decisions. True, one would be correct to observe that a problem-solver mediator will be more outcome-oriented and use the language and tools of needs and interests, a transformative mediator more process-oriented, seeking to empower the parties and bring about recognition shifts,³⁹ and a narrative mediator more fixed on the relationship between the parties, seeking to deconstruct the conflict stories and help the parties to develop an alternative narrative;⁴⁰ however, whether one is a problem-solver, transformative, or narrative mediator, the *core* of one’s practice is helping parties in a dispute to communicate and make voluntary decisions.⁴¹ In this sense, therefore, the *Model Standards* are on the right track.

The difficulty with the *Model Standards*’ definition of mediation is its description of the third party as *impartial*, thereby making impartiality a component of the process definition. This is wrong because no one seriously argues that when a mediator *is not* impartial the process he is conducting is not *in fact* a mediation.⁴² Impartiality is a *normative* concept, which the *Model Standards*

36. MODEL STANDARDS, *supra* note 1, at pmb1.

37. See, e.g., MEDIATION ETHICS, *supra* note 7, at 19–24 (treating these styles, in effect, as the main styles of mediation).

38. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994) (discussing transformative mediation); Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in A Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L. J. 935, 942 (2001) (discussing problem solving mediation); JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION (2000) (discussing narrative mediation).

39. BUSH & FOLGER, *supra* note 38, at 89–94; TRANSFORMATIVE MEDIATION: A SOURCEBOOK 25–26 (Joseph P. Folger et al. eds., 2010) [hereinafter TRANSFORMATIVE MEDIATION].

40. WINSLADE & MONK, *supra* note 38, at 38, 82.

41. MEDIATION ETHICS, *supra* note 7, at 18.

42. On the difference between a descriptive definition of mediation that factually describes mediation practice, and a normative definition of mediation that describes what mediation *ought* to look

further develop in a Standard of Impartiality.⁴³ According to the norm of impartiality, mediators have a *normative obligation* to conduct mediations impartially, and if they fail to do so they are conducting the mediation in a normatively wrong way. While the three elements of the definition of mediation mentioned above are factual and necessary for any mediation process to exist, impartiality, like other common norms of mediation such as confidentiality and conflicts of interest, is a normative standard that mediators are expected to follow, and a failure on their part to do so does not strip the process of its mediation title.⁴⁴ The definition of mediation in the *Model Standards* therefore should not include a reference to the impartiality of the mediator, though impartiality should continue to be one of the standards applicable to mediators.

B. An Outdated Statement on the Purposes of Mediation: Moving Beyond Problem-Solving Mediation

The *Model Standards* accompany the definition of mediation with a statement on the purposes of mediation. It provides that “[m]ediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.”⁴⁵ Mediators who belong to the problem-solving school of mediation, both facilitative and evaluative, will probably feel comfortable with this list of purposes and its reference to the language of issues, interests, and options. However, a growing number of mediators who have a transformative or narrative orientation are likely to find it partial and unsatisfactory. Transformative mediators, for example, will probably want to add the goals of empowering disputants,⁴⁶ recognition (helping parties to connect to the other),⁴⁷ and the transformation of “conflict interaction from destructive and demonizing to positive and humanizing.”⁴⁸ And narrative mediators will add to the goals of mediation the deconstruction of the conflict stories of the parties⁴⁹ and the construction of an alternative story of cooperation that will allow the parties to cooperate with each other.⁵⁰

like, see, for example, Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 79–89 (2005) (discussing prescriptive and descriptive definitions of mediation).

43. MODEL STANDARDS, *supra* note 1, at Standard II.

44. See Moffitt, *supra* note 42, at 79–89.

45. MODEL STANDARDS, *supra* note 1, at pmb1.

46. BUSH & FOLGER, *supra* note 38, at 85; TRANSFORMATIVE MEDIATION, *supra* note 39, at 25.

47. BUSH & FOLGER, *supra* note 38, at 92; TRANSFORMATIVE MEDIATION, *supra* note 39, at 25.

48. TRANSFORMATIVE MEDIATION, *supra* note 39, at 26.

49. See WINSLADE & MONK, *supra* note 38, at 38.

50. See *id.* at 82.

The *Model Standards* do not state that they are intended for the guidance of problem-solving mediators alone. On the contrary, some comments in the *Reporter's Notes* to the *Model Standards* suggest that they are aimed at other mediation styles as well. Already in 2005, the *Reporter's Notes* noted:

Since the publication of the 1994 Version, there has been significant academic and policy discussion focused on mediation style or theory. In particular, the terms, facilitative and evaluative, to describe mediator orientations have taken on particular meanings in the popular literature and approaches to mediation differently conceptualized in such frameworks as problem-solving or transformative have been trenchantly analyzed. The revised definition of mediation *is not designed to exclude any mediation style or approach* consistent with Standard I's commitment to support and respect the parties' decision-making roles in the process.⁵¹

Since the adoption of the revised *Model Standards* in 2005, the transformative and narrative styles have further developed and gained recognition. For example, Ellen Waldman's casebook on mediation ethics discusses these styles of mediation practice alongside the problem-solving style as representing the current field of mediation.⁵² Thus, the purposes of transformative and narrative mediation should be explicitly recognized in a reformed version of the *Model Standards*. Alternatively, the "various purposes of mediation" paragraph should be dropped, and a general definition of mediation applicable to all styles of mediation as mentioned earlier retained.

This last point raises, of course, the question whether a single code of conduct can apply simultaneously to different styles of mediation. Some scholars have suggested that the differences in style require different codes,⁵³ but no one to date has developed this idea beyond making the argument itself. In fact, to

51. REPORTER'S NOTES (2005), http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/mscm_reporternotes.authcheckdam.pdf, [https://perma.cc/W8LK-DFDX] (analyzing the MODEL STANDARDS) (emphasis added).

52. See MEDIATION ETHICS, *supra* note 7, at 122–24.

53. See Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 846 (1998) (arguing that states should develop specific standards for discrete types of mediation); see also Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 258 (1989) (arguing that different conceptions of mediation support different mediator standards); Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 284 (2003) ("On the one hand, mediators need clear ethical rules to guide their behavior. On the other hand, the mediation profession is radically heterogeneous. The types of mediations, dispute contexts in which mediation is used, and styles of mediation are many. Simple ethical rules will often not apply comfortably across such contexts.").

the best of my knowledge there are no published codes of conduct for mediators specifically developed and designed for transformative and narrative mediators. It seems to me that the primary goals of the *Model Standards*—“to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes”⁵⁴—equally apply in the context of transformative and narrative mediation. I believe that all mediators, irrespective of style, are subject to core ethical standards whose content may be ascertained, by using role-morality theory and applying it to a core definition of mediators’ role.⁵⁵ Any mediator, for example, irrespective of style, must be competent, respect party self-determination, disclose conflicts of interest, and maintain confidentiality. It is time that the mediation community discussed the meaning of these standards from the perspective of each style, incorporated them into newly revised *Model Standards*, and made it clear to mediators, mediation parties, and the general public that all mediators, whether problem-solvers, transformative, or narrative, are guided by the reformed code.

C. *Misguided Use of Levels of Guidance: Between Shall, Should, and May*

The *Model Standards*’ Note on Construction refers to two levels of guidance for mediator conduct:

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.⁵⁶

However, the use of these terms in the *Model Standards* is inconsistent and the reason for preferring one over the other is unclear. For example, the Standard of Impartiality states in section II.B that “[a] mediator *shall* conduct a mediation in an impartial manner,” but then goes on to provide in subsection II.B.1 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 any other reason.”⁵⁷ No explanation is given for the variation in guidance, which in fact seems to be mistaken in light of the *Reporter’s Notes* comment on that subsection, which reads:

54. MODEL STANDARDS, *supra* note 1, at pmb1.

55. I develop and defend this argument in SHAPIRA, *supra* note 19, at ch. 3.

56. MODEL STANDARDS, *supra* note 1, at Note on Construction.

57. *Id.* at Standard II.B & II.B.1 (emphasis added).

In response to insightful public comment, the Joint Committee revised the language of what is now Standard II (B)(1) to reflect that the mediator *must not* act in a manner that favors or prejudices any mediation participant based on the personal characteristics, background, values and beliefs, or performance at a mediation of that individual.⁵⁸

This inconsistency continues in subsection II.B.2, which provides that “[a] mediator *should* neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator’s actual or perceived impartiality.”⁵⁹ Again, in light of the mandatory requirement in section II.B that the mediator “*shall* conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality,”⁶⁰ one would expect the *Model Standards* to have prescribed that a mediator *shall* “neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator’s actual or perceived impartiality.”⁶¹

This inconsistency can be further illustrated by the choice of terms in other standards as well. The Standard of Confidentiality, for example, states in section V.A that “[a] mediator *shall* maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law,”⁶² but then provides in subsection V.A.2 that “[a] mediator *should not* communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.”⁶³ One could attempt to explain and justify these different levels of guidance by arguing that “information obtained by the mediator” is not the same as “information about how the parties acted.”⁶⁴ However, this does not seem to be the *Reporter’s Notes* understanding of the matter, the latter noting that

some public comments suggested that Standard I [Self-determination] should contain guidance to a mediator regarding his or her duty to report “good faith” participation by various mediation participant However, in Standard V (A) (2) on confidentiality, the Joint Committee explicitly supports the po-

58. REPORTER’S NOTES, *supra* note 51, at 11 (emphasis added).

59. MODEL STANDARDS, *supra* note 1, at Standard II.B.2 (emphasis added).

60. *Id.* at Standard II.B (emphasis added).

61. *Id.* at Standard II.B.2.

62. *Id.* at Standard V.A (emphasis added).

63. *Id.* at Standard V.A.2 (emphasis added).

64. *Id.*

sition widely adopted in practice and program rules that a mediator can override confidentiality, if required, *for only two* purposes: to report whether parties appeared at a scheduled mediation or to report whether the parties reached a resolution; the Joint Committee *rejected overriding the confidentiality requirement for any other purpose*.⁶⁵

It appears, then, that the *Model Standards* should have provided that a mediator *shall not* “communicate to any non-participant information about how the parties acted in the mediation,” subject to the two mentioned exceptions.⁶⁶ These examples of the confusion between shall and should suggest that such a distinction is unsupported in the context of the *Model Standards* and must be reconsidered, explained, and applied consistently throughout them.

Moreover, the *Model Standards* confusingly use another term of guidance—“may”—without explaining its meaning in their context. One might have thought that if “shall” indicates mandatory conduct and “should” indicates a highly recommended conduct that “can be discarded only for compelling reasons,”⁶⁷ then “may” indicates unguided, free choice on the part of the mediator, which requires no justification. However, in effect even permitted actions or decisions require an exercise of professional discretion based on good and relevant reasons.

For example, the *Model Standards* provide that “[a] mediator *may* accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms *so long as such practices do not raise questions as to a mediator’s actual or perceived impartiality*.”⁶⁸ Despite the use of the permissive term “may,” then, it seems that the mediator, as in the case of “should” as guidance, is here in fact provided with “strong guidance” (to use the language of the *Reporter’s Notes*⁶⁹) that requires him to justify his actions. The point I am making here is that conceptually the use of *both* “may” and “should” imposes a *burden* on the mediator to justify his actions, and the *Model Standards* with their emphasis on the meaning of “should” and disregard of the meaning of “may” send a wrong message to mediators.⁷⁰ In effect, a

65. REPORTER’S NOTES, *supra* note 51, at 10 (emphasis added).

66. MODEL STANDARDS, *supra* note 1, at Standard V.A.2.

67. REPORTER’S NOTES, *supra* note 51, at 8.

68. MODEL STANDARDS, *supra* note 1, at Standard II.B.3 (emphasis added).

69. REPORTER’S NOTES, *supra* note 51, at 8.

70. See MCI PROFESSIONAL STANDARDS OF PRACTICE FOR MEDIATORS (MEDIATION COUNCIL OF ILL. 2009), http://www.mediationcouncilofillinois.org/sites/default/files/MCI%20Professional%20Standards%20of%20Practice_0.pdf [https://perma.cc/Z7KJ-N8BX] (“Use of the term ‘may’ in a Standard is the lowest strength of guidance and indicates a practice that

mediator *may* only take an action when that action is consistent with the exercise of his role in accordance with the *Model Standards*, and this should be made clear in them.

D. A Missing Statement on the Obligations of Mediators: A Need to Openly Recognize the Duties toward the Profession, the Public, and Courts or Referring Bodies

The *Model Standards* “serve as fundamental ethical guidelines” for mediators,⁷¹ indicating what mediators must and should do in the course of practice.⁷² They lay down various obligations of mediators, such as a duty to conduct mediation on the basis of party self-determination,⁷³ avoid conflicts of interest,⁷⁴ and act with competence.⁷⁵ Clearly, these obligations are owed to the *mediation parties*. For example, the *Model Standards* provide that the parties have a right to exercise self-determination in the course of the mediation,⁷⁶ to know about a mediator’s conflict of interest,⁷⁷ and to be “satisfied with the mediator’s competence and qualifications.”⁷⁸

However, mediators have responsibilities other than their obligations to the parties. The *Model Standards* do not explicitly state that point, but it necessarily follows from some of their provisions. For example, the Standard of Self-determination provides that “a mediator may need to balance . . . party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.”⁷⁹ This means that the *Model Standards* envisage cases in which the mediator may act *against* the wishes of the parties, and unless one understands their approach as paternalistic, aimed at protecting the parties from themselves, the conclusion must be that the mediator in such cases is discharging responsibilities to persons or bodies *other than the parties*.

This point is made clear by the language of the Standard of Conflicts of Interest, which provides in section III.E that “[i]f a mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation,

the mediator should consider adopting but which can be deviated from in the *exercise of good professional judgment.*”) (emphasis added) [hereinafter ILLINOIS STANDARDS].

71. MODEL STANDARDS, *supra* note 1, at pmbl.

72. *Id.* at Note on Construction.

73. *Id.* at Standard I.A.

74. *Id.* at Standard III.A.

75. *Id.* at Standard IV.A.

76. *Id.* at Standard I.A.

77. *Id.* at Standard III.C.

78. *Id.* at Standard IV.A.1.

79. *Id.* at Standard I.A.1.

a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.”⁸⁰ In this section, the *Model Standards* in effect refer to a duty of mediators to avoid conduct that “might reasonably be viewed as undermining the integrity of the mediation.” This duty is not aimed at protecting the parties’ interests and is not owed to the parties. Rather, it is designed to protect the process of mediation, reflecting, I would argue, a duty to the *profession of mediation* and to the *public*.

Neither the *Model Standards* nor the *Reporter’s Notes* bring these obligations to the forefront, but they are present between the lines. This explains why, for example, the *Reporter’s Notes* note that the Standard of Impartiality in section II.C will not allow the mediator to conduct a mediation if he is unable to conduct it in an impartial manner, *even if the parties agree that he may proceed*.⁸¹ They see the integrity of the process of mediation as an interest of the profession and the public that is beyond the parties’ control.⁸² The *Reporter’s Notes* come close to making such a statement in their comment on the Standard of Competence, in which they recognize a mediator responsibility to the public, noting that “to promote public confidence in the integrity and usefulness of the process *and to protect the members of the public*, an individual representing himself or herself as a mediator must be committed to serving only in those situations for which he or she possesses the basic competency to assist.”⁸³

The *Model Standards* include other provisions that are phrased in a manner indicating that mediators have ethical obligations to protect interests other than the parties’. The Standard of Quality of the Process, for example, provides in section VI.A.6 that “[a] mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.”⁸⁴ It is clear that the purpose of this provision is not to protect the parties, but the public.⁸⁵ The *Reporter’s Notes* help make this clear, noting that “a mediator cannot engage in a ruse of labeling a dispute resolution process as ‘mediation’ in order to gain its benefits (such as confidentiality protections) when it is apparent that *the participants have designed and participated* in some other form of dispute resolution.”⁸⁶

80. *Id.* at Standard III.E.

81. REPORTER’S NOTES, *supra* note 51, at 13.

82. *Id.* at 14.

83. *Id.* (emphasis added).

84. MODEL STANDARDS, *supra* note 1, at Standard VI.A.6.

85. REPORTER’S NOTES, *supra* note 51, at 18.

86. *Id.* (emphasis added).

Similarly, subsection VI.A.9 provides that “[i]f a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.”⁸⁷ The *Reporter’s Notes* refer to this provision, noting that “it guides a mediator who confronts mediation participants using mediation to further criminal conduct . . . to take appropriate steps to deter them from accomplishing that goal,”⁸⁸ clearly indicating a duty to the *public* rather than to the parties.

An explicit recognition of mediator responsibilities other than to the parties is not rare in codes of conduct for mediators. The *Code of Professional Conduct for Labor Mediators*, for example, provides that “[t]hose who engage in the practice of mediation . . . must be aware that their duties and obligations relate to the parties . . . , to every other mediator, to the agencies which administer the practice of mediation, and to the general public.”⁸⁹ The *Australian National Mediator Accreditation Standards: Practice Standards* provide that “[t]he Practice Standards are intended to govern the relationship of mediators with the participants in the mediation, their professional colleagues, courts and the general public”⁹⁰ The *Florida Rules for Certified and Court-Appointed Mediators* (hereinafter: *Florida Rules*) include separate Rules entitled “Mediator’s Responsibility to the Parties,”⁹¹ “Mediator’s Responsibility to the Mediation Profession,”⁹² “Mediator’s Responsibility to the Mediation Process,”⁹³ and “Mediator’s Responsibility to the Courts.”⁹⁴ And the *North Carolina Revised Standards of Professional Conduct for Mediators* provide that “[p]ersons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner that will merit that confidence.”⁹⁵

87. MODEL STANDARDS, *supra* note 1, at Standard VI.A.9.

88. REPORTER’S NOTES, *supra* note 51, at 18.

89. CODE OF PROF’L CONDUCT FOR LABOR MEDIATORS pmbL., 29 C.F.R. pt. 1400 app. (2012), <http://ethics.iit.edu/ecodes/node/3410> [<https://perma.cc/8TEY-KYKX>].

90. NATIONAL MEDIATOR ACCREDITATION STANDARDS: PRACTICE STANDARDS, Application (MEDIATOR STANDARDS BD. 2012), <http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf> [<https://perma.cc/4TD9-RGRG>].

91. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS *in* ADR RESOURCE HANDBOOK 95, R. 10.300, at 105 (FLA. DISPUTE RESOLUTION CTR. 2015), <http://www.flcourts.org/core/fileparse.php/550/urlt/RuleBookletJanuary2015.pdf> [<https://perma.cc/WM28-JJAN>] [hereinafter FLORIDA RULES].

92. *Id.* at R. 10.600.

93. *Id.* at R. 10.400.

94. *Id.* at R. 10.500.

95. REVISED STANDARDS OF PROF’L CONDUCT FOR MEDIATORS pmbL., at 1 (N.C. DISPUTE RESOLUTION COMM’N 2011), http://www.aoc.state.nc.us/www/public/html/pdf/SOC4_14.pdf [<https://perma.cc/FZ66-D9YR>] (adopted by the Supreme Court of North Carolina); *see also* CAL. R. CT. R. 3.850(a) (Revised January 1, 2015), www.courts.ca.gov/cms/rules/index.cfm?title=three

The *Model Standards*, therefore, should indicate in their Preamble to whom mediator obligations are owed. They should declare that the standards reflect mediators' obligations toward the parties, the profession, the public, and to the courts or referring agencies when appropriate. This statement will have to be followed by a reassessment of the language of many of the standards, in order to ensure that they accurately reflect the multiple obligations of the mediator. For example, the Standard of Competence, which currently provides that "[a]ny person may be selected as a mediator, provided that the *parties* are satisfied with the mediator's competence and qualifications,"⁹⁶ will have to be qualified by the obligation to the profession and the public to maintain the integrity of the process.⁹⁷

I expect these changes to the *Model Standards* will have far-reaching implications for the way mediators understand their role, exercise discretion, and practice mediation ethically. I will illustrate this point by considering the commentaries to an ethical scenario set in Ellen Waldman's book on mediation ethics.⁹⁸ In a nutshell, the scenario involves Ziba and Ahmed, who are an Iranian-American Muslim couple, living in the United States and in a process of separation.⁹⁹ The wife wants a divorce, the husband objects.¹⁰⁰ According to Islamic law and unlike in American law, the divorce cannot proceed without the husband's consent.¹⁰¹ The wife wants to carry out the divorce according to Islamic law in order to meet the expectations of the Muslim community which she belongs to and wants to stay part of.¹⁰² The husband takes advantage of that and puts pressure on the wife to accept unfavorable divorce terms according to which she will forfeit any right to marriage dissolution payments and any other financial support for herself, and also give up custody of their children (aged

[<https://perma.cc/DL2A-DKH8>] ("Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.") [hereinafter CALIFORNIA RULES]; TEX. ETHICAL GUIDELINES FOR MEDIATORS pmbl. (TEX. SUP. CT. 2011), http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/11/11906200.pdf [<https://perma.cc/4ND5-8MJH>] ("Mediators should be responsible to the parties, the courts and the public, and should conduct themselves accordingly.") [hereinafter TEXAS GUIDELINES]; ILLINOIS STANDARDS, *supra* note 70, at Definition § E. ("The mediator's commitment shall be to the participants and the process.").

96. MODEL STANDARDS, *supra* note 1, at Standard IV.A.1 (emphasis added).

97. *See infra* Section III.D.

98. MEDIATION ETHICS, *supra* note 7, at 318.

99. *Id.*

100. *Id.* at 319.

101. *Id.*

102. *Id.* at 318.

two and three) at the age of five.¹⁰³ The wife capitulates and agrees to the husband's terms.¹⁰⁴

Two mediation experts, Professor Harold Abramson and Professor Carrie Menkel-Meadow, have been asked to comment on that scenario. Interestingly, they reach opposite conclusions.¹⁰⁵ Abramson is willing to mediate the case, while Menkel-Meadow refuses to do so.¹⁰⁶

Abramson's gravest concern is that the mediator—any Western mediator, including himself—will be charged with cultural imperialism, that is, that the mediator will impose Westernized values on the parties and replace the *parties'* values with *his or her values*.¹⁰⁷ His approach reflects the great weight mediators traditionally assign to the parties' wishes and right to *self-determination*.¹⁰⁸ However, I find his decision to help the parties reach an agreement unconvincing.

Abramson's decision is affected by his view of the role of mediators: "My limited role as a mediator who perseveres to honor the principle of party self-determination becomes clear in this situation. In the end, all mediators can do is conduct a process where the parties can make an informed choice, regardless of how personally painful the choice may be to one of the parties and how unfair the result may seem to the mediator."¹⁰⁹ Abramson is torn between his values and the parties' choice, but sees no way out that could justify the mediator's withdrawal: "Even in the face of the parties' consent or apparent consent, the mediator may still find the agreement so personally abhorrent as to want to withdraw. But how can a mediator withdraw and avoid the charge of cultural imperialism?"¹¹⁰

He attempts to do so by resorting to what he refers to as "universal international norms":

As difficult as this was, I tried to put my own personal values aside and look instead to see whether working with this couple would violate universally accepted international principles of human rights. My inquiries suggest that the answer is no; norms surrounding gender equity diverge dramatically throughout the world. This is one of the disturbing facts of

103. *Id.* at 319.

104. *Id.*

105. *Compare id.* at 320–27, with *id.* at 327–35.

106. *Id.*

107. *Id.* at 334.

108. *Id.* at 335.

109. *Id.* at 333.

110. *Id.*

multiculturalism, and as a mediator, I am wary of using my own personal views as the yardstick for how the parties should structure their affairs.¹¹¹

Thus, according to Abramson, the mediator's source of ethical guidance in this Muslim-American couple's mediation is international law. He scrutinizes the United Nation Convention on the Elimination of All Forms of Discrimination Against Women and the Universal Declaration of Human Rights, and finds that although they declare that men and women have equal rights in marriage and its dissolution,¹¹² many Middle Eastern Islamic countries have not ratified the convention and even took explicit exception to gender equality.¹¹³ He concludes that his "forays into international law revealed no principled source of internationally recognized standards that could be the basis for withdrawing from the mediation."¹¹⁴

I do not find that argument persuasive. Why should an American mediator, mediating a case on American soil between two American citizens who are Muslims, all being subject to American law and members of the American public, be ethically guided by the decision of Middle Eastern countries to reject international treaties on human rights? I believe that the effort to legitimize the parties' choice at all costs is a reflection of a version of mediation ethics that is over-dominated by party self-determination and ignores the fact that mediators have other ethical obligations as well.

In fact, Abramson refers in his comment to such obligations, but does not treat them as such or appreciate their implications. One occasion in which Abramson abandons the party self-determination version of mediation ethics is where he states that "[i]f both parties want to continue with me and the mediation, I think I should try to mediate the best agreement the parties are willing to enter into, so long as the *agreement is not illegal*."¹¹⁵ Abramson believes, therefore, that as a mediator he should not facilitate an illegal agreement no matter what the parties want, recognizing that mediators have responsibilities that go beyond their duty toward the parties to respect their self-determination.

Describing the hard choice he faces, Abramson makes another observation that hints at mediator obligations toward nonparties that may conflict with the parties' choice:

I would not want the mediation process (or me) to be associated with such an unfair mediated result. I would want to avoid

111. *Id.* at 327.

112. *Id.* at 333.

113. *Id.*

114. *Id.* at 334.

115. *Id.* at 335 (emphasis added).

conferring the imprimatur of mediation on a process and result that violated such a core value of fairness, even when my definition of fairness was shaped by distinctively Westernized values.¹¹⁶

Abramson captures with these comments the idea that mediation is not about the relationship between the parties and the mediator alone; a particular mediation can have an impact on the way *other mediation processes* and *other mediators* are publicly perceived; it can have an effect on *public confidence* in the mediation profession and process; and it may influence the *willingness* of potential parties to use mediation in the future to resolve differences. These concerns reflect the relationships of mediators with the profession of mediation and the public, establishing an ethical obligation of mediators to conduct mediation in a manner that maintains the standing of the profession and process of mediation and public trust in them.¹¹⁷

Abramson is right to refuse to help the parties reach an illegal agreement. An illegal agreement is likely to bring mediation into disrepute, harming the standing of mediation and undermining public trust in the profession and process of mediation, and as a mediator he has ethical duties toward the public and toward the profession of mediation to prevent the harm to the public and the profession that would follow from facilitation of an illegal mediated agreement.¹¹⁸ It is, however, difficult to reconcile this responsibility with Abramson's own legal assessment of the case (which is also shared by the other commentator, Menkel-Meadow):¹¹⁹

Consider the way Ahmed's power over granting a divorce was being used to extort a one-sided agreement, at least from a Westernized point of view. A Western mediator would likely view as unfair an agreement where unemployed Ziba waives needed financial support and relinquishes rights to her children once they turn five. Under Westernized common law and statutory laws, such a one-sided agreement is also likely to be invalid and unenforceable due to Ahmed's extortionate behavior and the duress suffered by Ziba who wants the divorce.¹²⁰

Note that the ethical obligation concerning the standing of the institution of

116. *Id.*

117. See Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281, 324–27, 329–34 (2012) [hereinafter *Fairness*]; SHAPIRA, *supra* note 19, at ch. 3 § 3.7.

118. See Shapira, *Fairness*, *supra* note 117, at 339–40; SHAPIRA, *supra* note 19, at ch. 8 § 8.2.4.3; *infra* Section II.G.2.

119. MEDIATION ETHICS, *supra* note 7, at 323, 326–27.

120. *Id.* at 328.

mediation and mediators is not confined to illegal outcomes. This equally explains why mediators have a duty to prevent an agreement which is *not illegal* yet radically departs from social norms to a degree that could jeopardize public faith in the process and profession of mediation.¹²¹ This *does not* mean that a mediator may substitute *his or her personal* notions of fairness and unfairness for the parties', because the mediator's conception of fairness must be grounded in a *public* conception of fairness, which reflects a norm or perception which is external to the mediator.

The public in the scenario is American society. It is neither the Muslim community in which the parties reside nor the Islamic communities of some Middle Eastern countries. The mediator in the scenario is conducting a dispute resolution process in the United States, which he and the parties label "mediation." As such, this process should be conducted consistent with the norms that apply to mediation in the United States. The conduct of the mediator will be evaluated according to these norms and his or her conduct can potentially affect his or her fellow American mediators and mediation processes all over the United States. On the facts of the scenario, it seems to me that even if the proposed terms of the agreement were not illegal they are extreme to a degree that would lead the general public to perceive the mediation as faulty and to question the integrity of the mediator.

Turning to the other commentator, Menkel-Meadow, unlike Abramson, is not afraid of being charged with cultural imperialism. She is convinced and openly declares that gender equality is right, and explains that it would be wrong for *her* to mediate the case.¹²² If the parties came to see her she would refer them to a mediator in a specialized religion-based mediation center after advising them to seek legal advice about what is necessary for a legal divorce in her community.¹²³

Like Abramson, Menkel-Meadow feels the heavy weight of party self-determination. She notes, for example, that "some mediators might ask who am I to judge what these parties want; in the interest of self-determination, they have chosen to be governed by their own religious norms."¹²⁴ However, unlike Abramson, she has no hesitation rejecting the case:

I could not, given *my* own "ethical culture" . . . , act or be "complicit" in an agreement that *I felt* was legally, morally, or ethically wrong . . . in my view, no mediator (and certainly not this mediator) should participate in a mediation that *she thinks*

121. See Shapira, *Fairness*, *supra* note 117, at 337–38.

122. See MEDIATION ETHICS, *supra* note 7, at 322.

123. *Id.* at 320, 326–27.

124. *Id.* at 323.

will lead to a morally, legally, or ethically “unconscionable” result. What is unconscionable is, of course, *subjective, personal*, and nonuniversal.¹²⁵

Menkel-Meadow’s analysis of the scenario is clearly much more personal than Abramson’s. In a way, her analysis replaces Abramson’s party self-determination version of mediation ethics with a more personal, subjective version. In Menkel-Meadow’s words:

For me . . . a mediator is also a party to a mediation, and thus the agreement that is reached must also be one that I can be accountable and responsible for as a participant in the process. *My sense of ethics, culture, and yes, even justice is also at stake, for I am a party too.*¹²⁶

I am concerned that mediators who read this account of mediation ethics might be tempted to replace the over-dominance of the parties’ wishes in Abramson’s account of mediation ethics with an over-dominance of the personal values, beliefs, and preferences of the mediator, thereby undermining the legitimacy and weight of guidelines and standards *external* to the mediator.

It seems to me that if mediation ethics were to be widely understood as encompassing the responsibilities of mediators to their profession and the public as well as their duties to the parties and their personal integrity, mediators would have a sounder basis for making ethical decisions. Moreover, philosophers of morality have consistently argued that morality and ethics are *non-subjective* in the sense that the norms of morality and ethics can be rationally and impartially justified.¹²⁷ This is the dominant approach in professional ethics thinking. Michael Davis, for example, warned that “[i]ndividual-centered relativism . . . cuts off ethical discussion as soon as it begins,”¹²⁸ and Michael Pritchard commented that “professional ethics is not an ethics for each individual professional simply to conjure up.”¹²⁹

The alternative to both *party-centered* mediation ethics and *mediator-cen-*

125. *Id.* (emphasis added).

126. *Id.* at 326.

127. See, e.g., BERNARD GERT, COMMON MORALITY 17 (2004) (“[G]iven agreement on the facts, a moral philosopher can show that a moral decision or judgment is mistaken if he can show that the moral decision or judgment is incompatible with the moral decisions or judgments that would be made by any impartial rational person.”); H.L.A. HART, LAW, LIBERTY AND MORALITY 20 (1963) (distinguishing “positive morality,” the “morality actually accepted and shared by a given social group,” from “critical morality,” the “general moral principles used in the criticism of actual social institutions including positive morality”).

128. MICHAEL DAVIS, THINKING LIKE AN ENGINEER: STUDIES IN THE ETHICS OF A PROFESSION 97 (1998).

129. MICHAEL S. PRITCHARD, PROFESSIONAL INTEGRITY 160 (2006).

tered mediation ethics is a *critical* account of mediation ethics that regards fairness, justice, and unconscionability as normative concepts that can be rationally and impartially defined and distinguished from the subjective perceptions of them by the mediator.¹³⁰ This alternative encourages the ethical mediator to look beyond the parties' and his or her own personal views and beliefs, and to justify his or her decisions on the basis of external criteria.

The previous discussion suggests that Menkel-Meadow was right in her refusal to mediate Ahmed's and Ziba's case on their terms. However, her decision would have carried more weight and been more helpful to other mediators had she grounded it in a general theory of ethics rather than in a personal sense of ethics. I believe she would have been more likely to do so had the *Model Standards* stated the ethical obligations of mediators more clearly. In my view, if mediators became more cognizant of the fact that their obligations lie with their profession and the public as well as with the parties, and if they were trained to assign weight to these obligations and accommodate them with their familiar loyalty to the parties, ethical decision making would become more structured, clear, and less personal.

E. Too Limited Guidance on What to Do When Standards Conflict

Standards may conflict. One standard may conflict with another (for example, Self-determination with Impartiality), or with an external standard (for example, Confidentiality with a court order for disclosure). In such an event mediators have to weigh the conflicting norms, prioritize them, and choose the normative source to be followed.

The guidance offered by the *Model Standards* on this process is quite limited. In their Note on Construction, the *Model Standards* provide that "[t]hese Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear."¹³¹ This point is made again in the *Reporter's Notes*, which note that "[t]he interpretative principle that mandates that each Standard be read and interpreted in such a manner as to promote consistency with all other Standards is the presumed operative principle guiding the drafting of the Model Standards"¹³²

The guidance of the *Model Standards* on events in which a standard conflicts with an external normative source is slightly more detailed. They state

130. See Shapira, *Fairness*, *supra* note 117, at 290–99; SHAPIRA, *supra* note 19, at ch. 11 § 11.3 (discussing mediators' duty of fairness).

131. MODEL STANDARDS, *supra* note 1, at Note on Construction.

132. REPORTER'S NOTES, *supra* note 51, at 7.

that “a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts,”¹³³ and the *Reporter’s Notes* add that “a mediator ought to conduct oneself in a manner that retains and remains faithful to as much of the spirit and intent of the affected Standard, and all other Standards, as is possible.”¹³⁴

This general guidance is followed by more pointed guidance in the phrasing of some of the standards. For example, the Standard of Self-determination provides that “a mediator may need to balance . . . party self-determination [for process design] with a mediator’s duty to conduct a quality process in accordance with these Standards.”¹³⁵ However, other standards, such as the Standard of Impartiality, do not refer to possible conflicts at all.

It is submitted that the *Model Standards* must be carefully redrafted to better respond to potential conflicts between standards. For example, the Standard of Self-determination does not explain what balancing means, how the act of balancing is performed, and whether balancing applies to decisions other than process design. The *Reporter’s Notes* on these points offer better, though incomplete guidance, providing that

while parties can exercise self-determination in the selection of their mediator, a mediator must consider *Standard III: Conflicts of Interests* and *Standard IV: Competence* when deciding whether to accept the invitation to serve. Alternatively, the interplay among Standards may result in a conflict; a mediator, for example, may feel pulled in conflicting directions when the mediator, duty-bound to support party self-determination (*Standard I*), recognizes that parties are trying to design a process that is not mediation but want to call it mediation to gain confidentiality protections, thereby undermining the mediator’s obligation to sustain a quality process (*Standard VI*). Standard I(A)(1) and I(B) explicitly recognize this potential for conflict and indicates to the mediator that sustaining a quality process places limits on the extent to which party autonomy, external influences, and mediator self-interest should shape participant conduct.¹³⁶

The *Reporter’s Notes*, therefore, clearly see “balancing” as extending to mediation decisions other than process design, and this should be reflected in the language of the Standard of Self-determination.¹³⁷

133. MODEL STANDARDS, *supra* note 1, at Note on Construction.

134. REPORTER’S NOTES, *supra* note 51, at 8.

135. MODEL STANDARDS, *supra* note 1, at Standard I.A.1.

136. REPORTER’S NOTES, *supra* note 51, at 9.

137. See Omer Shapira, *A Theory of Sharing Decision-Making in Mediation*, 44 MCGEORGE L.

Moving beyond the particular case of the Standard of Self-determination, the *Model Standards* should state clearly at the outset that all the standards are relative, not absolute, and that no standard has a prima-facie priority over another.¹³⁸ There are probably no readymade answers to potential conflicts between standards but more helpful guidance could be provided. It is submitted that a clearer direction could be incorporated into the *Model Standards* instructing mediators that in the event that their obligations seem to conflict, they must (a) search for an alternative course of action that is consistent with all of the standards; and (b) terminate or withdraw from the mediation when they cannot prevent the violation, minimizing as far as possible the harm resulting from it.

For example, where the parties need legal information in order to make an informed decision (in accordance with the Standard of Self-determination), and the mediator may not provide that information him- or herself (because to do so would be a violation of the Standards of Impartiality or Quality of the Process), the mediator should attempt to resolve this conflict of standards by looking for an alternative course of action which is consistent with the *Model Standards* as a whole. For example, he or she may suggest that the parties receive outside expert advice. In many cases this direction will suffice.

In other cases it might not. For example, a mediator in a divorce case may learn from Party A that he or she is hiding assets from Party B, who is unaware of these assets. The mediator cannot reveal that information to Party B, as it is protected by the Standard of Confidentiality, but equally cannot remain passive because (a) on these facts Party B cannot exercise self-determination (a violation of the Standard of Self-determination), and (b) it seems that the process is being abused by Party A (a violation of the Standard of Quality of the Process). If Party A insists on keeping the information to him- or herself it would seem that the way to reconcile the conflicting standards would be to bring the mediation to an end while minimizing any possible violation of the standards, namely (in this case), without revealing the reason for the mediator's decision to Party B.¹³⁹

REV. 923, 940–43 (2013).

138. *See id.* at 936 (noting “the relativity of mediation values” and arguing that [n]o standard or rule has in-advance priority over all other standards or rules. For example, it cannot be maintained that party self-determination is more important than mediator impartiality, or that mediator impartiality is more important than confidentiality and so forth. The weight of each norm must be ascertained in context, and no norm always trumps the others.).

139. This scenario is discussed in *Advisory Opinion of the North Carolina Dispute Resolution Commission* Opinion 10–16 (2010), http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/10-16r_2010.pdf [<https://perma.cc/54UY-SEB8>].

F. *The Missing Standards: Deconstructing the Standard of Quality of the Process into Standards of Diligence, Honesty, Respect, Professional Integrity, and Fairness*

The *Model Standards* have a nine-standard architecture, which was kept during their revision in 2005.¹⁴⁰ While each standard focuses on a particular ethical concern—for example, party self-determination, mediator impartiality, conflicts of interest, and so on—one standard stands out as an exception. The Standard of Quality of the Process is aimed at advancing a quality process.¹⁴¹ It is the most detailed of the *Model Standards*, purporting to deal with a variety of issues, including “diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.”¹⁴² The following discussion raises serious concerns about the scope, content, integrity, and goals of the Standard of Quality of the Process, and calls for a comprehensive revision of it that will fundamentally change the current structure of the *Model Standards*.

1. The Imprecise Scope of the Standard of Quality of the Process

The Quality of the Process Standard has been described by the *Reporter’s Notes* as “a series of distinct, concrete ways in which a mediator could act to advance a quality process.”¹⁴³ One problem with this statement is that a quality process may be advanced in *many ways already covered* by the other standards, for example by impartial practice, mediator competence, informed party decision-making, and preservation of confidentiality. The standard is therefore *too narrow* in this respect and reads as an arbitrary and partial list of possible ways that can contribute to good practice.

2. Misplaced Elements that Belong to Other Existing Standards

Having noted the vague scope of the term “quality process,” which can equally apply to other standards as well, a closer look at the Quality of the Process Standard indeed reveals that it covers issues belonging to *other existing* standards. The most notable example is “party competency,” which is referred to both in the statement in section VI.A and in subsection VI.A.10, the latter providing that “[i]f a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the

140. MODEL STANDARDS, *supra* note 1.

141. *Id.* at Standard VI.

142. *Id.* at Standard VI.A.

143. REPORTER’S NOTES, *supra* note 51, at 17.

mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination."¹⁴⁴ The *Reporter's Notes* comment on this provision reveals that it was designed to benefit "persons with recognized disabilities,"¹⁴⁵ assuming, so it seems, that "ordinary" mediation parties always comprehend the process, issues, and options, and have no difficulty participating in the mediation. It is argued that in effect subsection VI.A.10 addresses a *general* obligation of mediators, which is part of their duty to "conduct a mediation based on the principle of party self-determination,"¹⁴⁶ and to be mindful of *any* "party's capacity to comprehend, participate and exercise self-determination."¹⁴⁷ This provision therefore addresses a component of party self-determination and belongs to the Standard of Self-determination.

3. A Mismatch between the Standard's Statement and the Provisions that Follow

One might presume that provisions VI.A.1–9 follow from and elaborate on the standard's statement in section VI.A. However, this is hardly the case. As noted above, section VI.A provides that "[a] mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants."¹⁴⁸ Diligence is referred to in provision VI.A.1, and timeliness in provision VI.A.2. Safety is not mentioned in any of section VI.A's provisions, but is referred to in section VI.B. The presence of appropriate participants is addressed in provision VI.A.3. Party participation is discussed in provision VI.A.10. Procedural fairness is not mentioned explicitly as a term or concept in any of the provisions, and as it is left undefined by the *Model Standards*, one can only wonder whether it is or is not reflected in the content of some of them. Party competency is referred to in provision VI.A.10, while mutual respect among all participants is not mentioned in any of the provisions.

The reader is therefore left to wonder: the elements of a quality process that make up the statement in section VI.A *do not correspond* with the subsequent provisions, neither in the *order* in which these elements are set nor in the *content* of the provisions, which seem to cover *some* of the elements but ignore others. Likewise, uncertainty surrounds provisions VI.A.4–9 which are not ex-

144. MODEL STANDARDS, *supra* note 1, at Standard VI.A.10.

145. REPORTER'S NOTES, *supra* note 51, at 19.

146. MODEL STANDARDS, *supra* note 1, at Standard I.A.

147. *Id.* at Standard VI.A.10.

148. *Id.* at Standard VI.A.

licitly referred to in the statement of section VI.A. What is the guiding principle behind them? Are they, for lack of other candidates in section VI.A, illustrations of procedural fairness? Clearly, if section VI.A is to stay it must be redrafted to enable readers to easily identify the components of a quality process and the corresponding provisions that define and explain these components.

4. The Missing Standards Hiding in the Standard of Quality of the Process

A close examination of the Standard of Quality of the Process reveals that in effect it is comprised of *five* separate standards: diligence, honesty, respect, party self-determination, and professional integrity. While self-determination is a standard in its own right (Standard I), the other four are not recognized by the *Model Standards* as independent standards. It is submitted that each of these standards deserves its own independent status. Since I cannot offer a full account of these standards here,¹⁴⁹ the following discussion merely aims to flesh out the various rationales that are served by the Standard of Quality of the Process, and point to the way it can be reorganized and reconstructed within a new set of standards. Doing so, it is further argued, will enhance the clarity of the *Model Standards'* ethical guidance to mediators and other mediation participants.

a. Diligence

Mediators,¹⁵⁰ like lawyers,¹⁵¹ judges,¹⁵² and other professionals must act

149. See SHAPIRA, *supra* note 19, at ch. 4, 8, & 9 (discussing the meaning of these standards).

150. See, e.g., CALIFORNIA RULES, *supra* note 95, at R. 3.857(a); CODE OF ETHICS FOR MEDIATORS Standard 3(c) (amended 2013) (ALA. CTR. FOR DISPUTE RESOLUTION 1995), http://alabamadr.org/web/roster-documents/documents/med_Mediator_Code_of_Ethics_150501_updated.pdf [<https://perma.cc/JL8E-YW56>] [hereinafter ALABAMA CODE]; STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS § K.1, at 7 (JUDICIAL COUNCIL OF VA. 2011), <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf> [<https://perma.cc/F23R-Z8DK>] [hereinafter VIRGINIA STANDARDS]; FLORIDA RULES, *supra* note 91, R. 10.430, at 113; ETHICAL STANDARDS FOR MEDIATORS Standard V, at 32–33 (GA. COMM'N ON DISPUTE RESOLUTION 1994) http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20C,%20CHAP%201,%206-18-2013.pdf [<https://perma.cc/6NXD-3LD8>] [hereinafter GEORGIA STANDARDS].

151. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT R. 1.3, at 17 (AM. BAR ASS'N 2016), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html [<https://perma.cc/W23K-3EG6>].

152. See, e.g., CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (JUDICIAL CONFERENCE OF THE

with diligence. Without attempting to draft a comprehensive Standard of Diligence at the moment, it seems that the distinction that the *Model Standards* suggest between “diligence” and “timeliness” is unnecessary, because an obligation of diligence encompasses both the requirement to be “prepared to commit the *attention* essential to an effective mediation” (VI.A.1, emphasis added), and to be able to “satisfy the reasonable expectation of the parties concerning the *timing* of a mediation” (VI.A.2, emphasis added). The diligence rule that applies to lawyers, for example, refers to commitment and dedication to the interests of the client, controlled workload, and avoidance of procrastination.¹⁵³

One aspect of diligence, therefore, is the provision of services on time, *without delay*, and in the context of a mediation a delay should be judged not only by reference to external criteria such as a hearing date at court, but by reference to the parties’ preferences regarding timing as well. If the parties indicate that they expect the mediator to be available to them in the next month, and he or she is unable to meet that reasonable expectation concerning the timing of the mediation, taking the case and failing to meet that expectation would be in breach of the mediator’s duty of diligence, because the mediation will not be held within the timeframe legitimately expected by the parties. It is suggested, therefore, that what the *Model Standards* term “diligence” and “timeliness” should be brought together under an independent Standard of Diligence, which includes the intention and ability to both commit the attention necessary for an effective mediation, and respond to their needs and expectations regarding timing without undue delay.

b. Honesty

Although section VI.A does not refer to a mediator obligation concerning honesty as an element of a quality process, provision VI.A.4 does, providing that “[a] mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.”¹⁵⁴ Again, I do not wish to elaborate on the meaning of mediator honesty at the moment. Instead I would like to point out that honesty is an important feature of professional conduct¹⁵⁵ and

U.S. 2014), <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> [https://perma.cc/662Y-2K6X].

153. MODEL RULES OF PROF’L CONDUCT, *supra* note 151, R. 1.3 cmt., at 17.

154. MODEL STANDARDS, *supra* note 1, at Standard VI.A.4.

155. *See, e.g.*, MICHAEL D. BAYLES, PROFESSIONAL ETHICS 79–80 (Kenneth King & Donna Oberholtzer eds., 1981).

should be recognized as such by the *Model Standards* within a separate Standard of Honesty.¹⁵⁶

Furthermore, we should recognize that mediator honesty is not only a matter of process quality, but a *legitimate expectation* of parties of a trustworthy professional as well. Professor Arthur A. Chaykin, for example, correctly observed that “[mediation] parties rely on the mediator to be truthful and honest.”¹⁵⁷ A dishonest mediator not only undermines the quality of the mediation, but also betrays the parties’ trust that he or she be truthful and avoid lying and deception. Thus, the obligation of honesty should not be relegated to a subsection of a Standard of Quality of the Process. Rather, it ought to be upgraded into a separate Standard of Honesty standing in its own right, comprised of, inter alia, a duty of mediators to conduct mediations with honesty and encourage honesty between participants.

c. Respect

Respect is mentioned as a component of a quality process in the statement in section VI.A, which provides that “[a] mediator shall conduct a mediation . . . in a manner that promotes . . . mutual respect among all participants.”¹⁵⁸ This element is not referred to again in any subsequent provision of the *Model Standards*. The reader might speculate that provision VI.A.4, which instructs the mediator to promote “honesty and candor” between participants, is aimed at promoting respect among participants, but are “respect” and “honesty and candor” the same? And if they are, should it not be made explicitly clear?

In my view, respect and honesty are *different* aspects of ethical behavior. Respect is a norm which focuses on the preservation of the dignity of participants, instructing the mediator to avoid the use of abusive, discriminatory, and humiliating language, and calling on mediators to encourage the participants to act accordingly.¹⁵⁹ Like honesty, respect reflects a legitimate expectation of mediators to be worthy of the parties’ trust.¹⁶⁰ Respect is not only a way to advance a quality process, but a fundamental duty of the mediator in conducting

156. See, e.g., Kovach, *supra* note 13, at 136–37.

157. See Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731, 744 (1984).

158. MODEL STANDARDS, *supra* note 1, at Standard VI.A.

159. See, e.g., Luban’s treatment of the concept of dignity in DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 70–71, 88 (2007).

160. See, e.g., BAYLES, *supra* note 155.

a mediation.¹⁶¹ The *Model Standards*, therefore, were correct to include a reference to respect in the statement in section VI.A but should have elaborated on its meaning, assigned it more weight, and constructed it as an independent Standard of Respect comprised of, inter alia, a duty of mediators to conduct mediations with respect, and a duty to promote mutual respect among participants. I cannot offer a detailed account of such a standard here, but I believe that there is a sound basis for the development and adoption of a Standard of Respect within a new construction of *Model Standards*.¹⁶²

d. Party Self-determination

The statement in section VI.A refers to two components of quality process which are further discussed in provision VI.A.10: the promotion of *party competency* and *party participation*.¹⁶³ These components actually belong with the Standard of Self-determination, which is an independent standard (Standard I). Self-determination, which is recognized by the *Model Standards* as “a fundamental principle of mediation practice,”¹⁶⁴ is defined by them as “the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”¹⁶⁵ Self-determination can only take place where the parties have the *capacity* or competency to make decisions, and therefore the element of party capacity or competency should be part of the Standard of Self-determination.

With respect to party *participation*, the way it appears in provision VI.A.10 ties it with the Standard of Self-determination as well: it refers to “difficulty participating in a mediation” and to steps the mediator should take to “make possible the party’s capacity to comprehend, participate and exercise self-determination.”¹⁶⁶ If the drafters of the *Model Standards* wanted mediators to encourage party participation as a *general value* of mediation,¹⁶⁷ that is, in any mediation irrespective of difficulties hampering participation or disabilities, this is not made clear.¹⁶⁸ Moreover, we should recognize that party participation in the process is in itself an issue subject to party choice. In other words, a mediator should encourage parties to participate in order to give them more

161. *Id.*

162. For such an account, see SHAPIRA, *supra* note 19, at ch. 9 § 9.2.

163. MODEL STANDARDS, *supra* note 1, at Standard VI.A.

164. *Id.* at Standard I.A.1.

165. *Id.* at Standard I.A.

166. *Id.* at Standard VI.A.10.

167. See, e.g., Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 5 (2001).

168. On the contrary, the REPORTER’S NOTES, *supra* note 51, at 19, refers to provision VI.A.10 as addressing the situation of mediation with persons with recognized disabilities.

opportunity to exercise self-determination with regard to the content and design of the process, but it is up to the parties to decide on the extent of their participation in the process.

e. Professional Integrity

Provisions VI.A.3, VI.A.5–9, and sections VI.B and VI.C cover a wide range of issues under the general heading of “quality process,” including the presence or absence of persons at a mediation,¹⁶⁹ provision of information by the mediator,¹⁷⁰ inadequate labeling of a process as mediation, recommendation of other dispute resolution processes,¹⁷¹ undertaking of additional dispute resolution roles in the same matter,¹⁷² use of mediation to further criminal conduct,¹⁷³ domestic abuse or violence among the parties,¹⁷⁴ and conduct that jeopardizes conducting the mediation consistent with the standards.¹⁷⁵ What is the connection between these issues, besides their association with “quality”? Do they have common themes? Can they be reorganized in a more meaningful way?

I want to suggest that all these instances manifest an underlying obligation of mediators that *exceeds* their duties to the parties. They illustrate mediators’ commitment to *interests other than the parties*; a commitment to the interests of the profession of mediation and the public to protect the *process* of mediation, that is, a responsibility of mediators to preserve the institution of mediation and public trust in it.

I will call this underlying responsibility a *duty of integrity*. Some codes of conduct for mediators refer to this duty explicitly. The *Georgia Ethical Standards for Mediators*, for example, provide that “[a] mediator is the guardian of the integrity of the mediation process,”¹⁷⁶ and the California Dispute Resolution Council (CDRC) *Standards of Practice for California Mediators* state that “[e]very mediator bears the responsibility of conducting mediations in a manner that . . . promotes trust in the integrity . . . of mediators.”¹⁷⁷ None of the codes, however, defines integrity.

169. MODEL STANDARDS, *supra* note 1, at Standard VI.A.3.

170. *Id.* at Standard VI.A.5.

171. *Id.* at Standard VI.A.6, VI.A.7.

172. *Id.* at Standard VI.A.8.

173. *Id.* at Standard VI.A.9.

174. *Id.* at Standard VI.B.

175. *Id.* at Standard VI.C.

176. GEORGIA STANDARDS, *supra* note 150, Standard IV.B, at 31.

177. STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS pmb. (CAL. DISPUTE RESOLUTION COUNCIL), <http://www.cdrc.net/mediator-standards> [<https://perma.cc/FX9D-PMKX>].

Integrity, it is suggested, is the quality of being complete or whole,¹⁷⁸ and I would argue that a mediator exhibits professional integrity when in doing his or her job he or she is truly committed to the definition of his or her role and to the values and principles associated with that role.¹⁷⁹ Thus, a mediator who is truly committed to his or her role must conduct a “whole” or “complete” process. Provisions VI.A.3, VI.A.5–9, VI.B and VI.C are in fact illustrations of *four* distinct aspects of professional integrity, which are briefly discussed next.

i. An Exercise of Professional Discretion

A process of mediation will not be “complete” or “whole” where persons whose presence is important for the mediation to be effective are absent.¹⁸⁰ As a matter of integrity, mediators are expected to exercise *professional discretion*, raise this issue with the parties, and make them aware of it.¹⁸¹ This, it is submitted, is the true rationale of provision VI.A.3, which is an illustration of the duty to exercise professional discretion, providing that “[t]he presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.”¹⁸²

The reader of this provision *should already know*, by reason of the Standard of Self-determination and its application to decisions on process-design, that parties ought to be involved in the decision on the presence or absence of persons at the mediation.¹⁸³ What justifies the inclusion of this provision in the *Model Standards* is the *new element* which is introduced by provision VI.A.3, namely that *the mediator should be a party to the decision*, a requirement which stems from the mediator’s duty to conduct a whole or complete process. What is missing from the current provision, therefore, is a reference to the responsibility of the mediator for bringing up the issue of the presence or absence of persons in a mediation in the first place, when, in his or her professional judgment, it has a bearing on the effectiveness of the mediation.

ii. Separation of Professional Roles and Services

Provision VI.A.5 illustrates another aspect of process integrity rather than

178. See, e.g., PRITCHARD, *supra* note 129, at 67.

179. On the meaning of professional integrity, see DAMIAN COX ET AL., INTEGRITY AND THE FRAGILE SELF 103 (2003).

180. MODEL STANDARDS, *supra* note 1, at Standard VI.A.3.

181. *Id.*

182. *Id.*

183. *Id.* at Standard I.A.

a component of quality: the *separation of professional roles and services*.¹⁸⁴ It provides that “[t]he role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles.”¹⁸⁵ This is not a matter of quality but one of integrity: mediation is not arbitration, counseling, or neutral evaluation, and the provision of services other than mediation by mediators in processes presented as mediation undermines both the integrity of the particular mediations and that of the institution of mediation.

Provision VI.A.8 complements provision VI.A.5. It envisions situations in which mediators switch roles to another dispute resolution role and conditions it upon the parties’ informed consent: “A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change.”¹⁸⁶ This requirement is in line with the Standard of Self-determination, which ties party self-determination with informed choices.¹⁸⁷ Like provision VI.A.5, this provision is about integrity, not quality, warning mediators of the dangers of mixing professional roles. The provision lacks a reminder that mediators may only do so if they can proceed with the new role without violating mediation standards such as confidentiality and conflicts of interest, which have a *continuing application subsequent* to the mediation. For example, the Standard of Conflicts of Interest provides in this context that “[s]ubsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation.”¹⁸⁸

iii. The Appropriateness of a Case to Mediation

Provision VI.A.7 provides that “[a] mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.”¹⁸⁹ What is the purpose of reminding mediators to do so? The *Reporter’s Notes* on this point seems almost apologetic: “it certainly is plausible for a mediator to recommend, when appropriate, that the parties consider resolving their dispute through some other third-party process.”¹⁹⁰

184. *Id.* at Standard VI.A.5.

185. *Id.*

186. *Id.* at Standard VI.A.8.

187. *Id.* at Standard I.A.

188. *Id.* at Standard III.F.

189. *Id.* at Standard VI.A.7.

190. REPORTER’S NOTES, *supra* note 51, at 18.

It is argued that the wording of this provision misses an important point which becomes apparent once one reads it with the rationale of protecting the integrity of the mediation and the mediator in mind: a mediator *must* consider whether mediation is appropriate for the dispute and *must* recommend that the parties consider other processes if he or she considers mediation to be an inappropriate process for the dispute or if he or she considers other procedures to be more appropriate than mediation.¹⁹¹

Compare, for example, the *Model Standards'* provision to the *Florida Rules*, which provide that “[a] mediator is responsible for confirming that mediation is an appropriate dispute resolution process under the circumstances of each case,”¹⁹² and to the *Texas Ethical Guidelines for Mediators*, which note that “[a] mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation.”¹⁹³ Again, behind all these provisions lies the concern for the integrity of mediation: conducting mediation when doing so is inappropriate or less appropriate than other dispute resolution procedures could jeopardize its integrity. This aspect of integrity should be in mind when section VI.B is read: “If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.”¹⁹⁴

iv. The Prevention of Process Abuse or Substantial Defects in the Process

Provisions VI.A.6 and VI.A.9 and subsection VI.C together make an important statement that the *Model Standards* hesitate to present straightforwardly: that mediators have a responsibility to conduct mediation in a manner that does not allow for process abuse or substantive defects in the process.¹⁹⁵ This is another aspect of process integrity, that is the conduct of a “whole” process in accordance with its values and principles, a process which neither is abused (used for purposes for which it has not been designed) nor suffers from serious defects (key elements of the process are missing).

Provision VI.A.6, for example, provides that “[a] mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation

191. *Id.*

192. FLORIDA RULES, *supra* note 91, R. 10.400, at 111.

193. TEXAS GUIDELINES, *supra* note 95, at § 13.

194. MODEL STANDARDS, *supra* note 1, at Standard VI.B.

195. *Id.* at Standards VI.A.6, VI.A.9, VI.C.

in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.”¹⁹⁶ This provision is not about the “quality” of the process, but rather on the inconsistency between a “true” process of mediation with integrity and a process which is (to use the *Reporter’s Notes* words) the product of “a ruse of labeling a dispute resolution process as ‘mediation’ in order to get its benefits.”¹⁹⁷ This is a clear example of the duty of mediators to safeguard the integrity of mediation.

Provision VI.A.9 makes a similar point, providing that “[i]f a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.”¹⁹⁸ It is quite clear that mediation, like any legitimate dispute resolution process, must be carried out in line with the rule of law, and any use of mediation to further illegal purposes would be an abuse of process and result in a defective mediation. Moreover, as commentators such as Robert A. Baruch Bush,¹⁹⁹ John W. Cooley,²⁰⁰ and myself²⁰¹ have observed, allowing mediation to be used for illegal purposes or to produce illegal outcomes is likely to bring mediation into disrepute, harming the standing of mediation and undermining public trust in the profession and process of mediation. With this rationale in mind, provision VI.A.9 seems wanting in at least two respects: first, its unjustified focus on *criminal* rather than illegal conduct—the product of the revision of the 1994 version of the *Model Standards* which did refer to illegal conduct²⁰²—because using mediation to further illegal conduct is also an unwarranted abuse of the process that undermines its integrity; and second, its omission to expressly address the responsibility of mediators with regard to illegal mediated agreements.²⁰³

Subsection VI.C is a sort of *default clause*, triggering, without using these precise words, a mediators’ duty to intervene in incidents of process abuse, providing that “[i]f a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these

196. *Id.* at Standard VI.A.6.

197. REPORTER’S NOTES, *supra* note 51, at 18.

198. MODEL STANDARDS, *supra* note 1, at Standard VI.A.9.

199. Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. OF DISP. RESOL. 1, 24 (1994).

200. John W. Cooley, *A Classical Approach to Mediation—Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83, 130 (1993).

201. Shapira, *Decision-Making in Mediation*, *supra* note 137, at 956.

202. Compare MODEL STANDARDS, *supra* note 1, at Standard VI.A.9., with MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI (1994); Am. Arbitration Ass’n, *Model Standards of Conduct for Mediators*, 17 J. NAT’L ASS’N ADMIN. L. JUDGES 323, 328–29 (1997).

203. See *infra* Section II.G.2.

Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.”²⁰⁴ If, for example, a mediator has reason to believe that one party is concealing vital information from the other party, or hidden assets that are relevant to the dispute, the mediator will have a duty to take some action to prevent the process from being abused. Subsection VI.B may also illustrate such an event, where the mediator suspects that the voluntariness of the process and the self-determination of one of the parties are threatened by domestic abuse or violence among the parties.

v. A Summary of the Argument on Professional Integrity

It is submitted, therefore, that provisions VI.A.3 and VI.A.5–9 and subsections VI.B and VI.C of the Standard of Quality of the Process should be regrouped and reorganized under a Standard of Professional Integrity. The new standard will guide mediators on their responsibility to protect the integrity of the process, identifying four aspects of professional integrity: Exercise of Professional Discretion, Separation of Professional Roles and Services, The Appropriateness of a Case to Mediation, and The Prevention of Process Abuse or Substantial Defects in the Process.

5. Moving from Procedural Fairness (as a Component of a Quality Process) to a Standard of Fairness

The last conceptual issue I would like to draw attention to with respect to the Standard of Quality of the Process is its wanting treatment of fairness. The *Model Standards* use the term “procedural fairness” to indicate one way of promoting a quality process.²⁰⁵ Fairness, however, is defined by neither the *Model Standards* nor the *Reporter’s Notes*. As observed above, it is difficult to ascertain which of the provisions of subsection VI.A is an expression of fairness.

Elsewhere I have offered a detailed account of the meaning of fairness in the context of mediation.²⁰⁶ One meaning of fairness that I identified was fairness as “playing by the rules,” which means, in the context of mediation, following the rules that apply to mediation. On the basis of that account of fairness, it seems to me that by holding mediators to a norm of procedural fairness without saying more, the *Model Standards* merely instruct mediators to follow the standards *that already apply to them* in the conduct of mediation, namely

204. MODEL STANDARDS, *supra* note 1, at Standard VI.C.

205. *Id.* at Standard VI.A.

206. Shapira, *Fairness*, *supra* note 117.

respect party self-determination, be competent, act impartially, disclose conflicts of interest, preserve confidentiality, and so on.²⁰⁷ In other words, the reference in the *Model Standards* to “procedural fairness” as a normative concept does not promote the “quality” of mediation beyond the threshold that the standards already delineate in the language of their provisions. Any *additional* promise of “quality” will require the *Model Standards* to adopt a notion of fairness which I referred to as a *substantive conception of fairness*.²⁰⁸

A substantive conception of fairness is an *attitude* toward rules that prefers substance over form; understands, construes, applies, and enforces rules flexibly; and accommodates circumstances, context, and reality in accordance with the purpose and spirit of the rules.²⁰⁹ For example, an insistence on *informed* consent as an ingredient of party self-determination (while treating *formal* consent as illusionary self-determination) is to insist on “quality” consent consistent with a conception of substantive fairness.²¹⁰ To take another example, to insist on mediator impartiality (or neutrality) while *ignoring power imbalances* between parties is to award priority to form over substance, that is, to prefer in effect the stronger party over the weaker and sacrifice the “quality” or substantive fairness of the process.²¹¹ This approach to the interpretation and application of the standards applies to all of them and should, it is argued, be grounded in a separate Standard of Fairness in the *Model Standards*.

G. Ignoring the Accountability of Mediators to Outcomes

The *Model Standards* regard mediation outcomes as falling within the jurisdiction of the parties, providing in the Standard of Self-determination that outcomes are subject to party self-determination and therefore should be produced by the parties.²¹² They do not explicitly refer to a responsibility of mediators for the content of mediation outcomes. Moreover, nowhere do they refer to any *criteria* that mediated outcomes should meet.

The general impression the reader gets, therefore, is that whatever the parties decide should suffice. Harold Abramson, for example, observed in the course of analyzing the ethical dilemma scenario discussed earlier, that the

207. *Id.* at 290–94 (discussing formal fairness).

208. *Id.* at 295–99.

209. *Id.*

210. *See, e.g., id.* at 298–99; *see also* REPORTER’S NOTES, *supra* note 51, at 16 (The meaning the Reporter’s Notes to the Model Standards assign to the word “consent” in the Standard of Confidentiality, while discussing different approaches of mediators to matters disclosed by mediation parties in a caucus: “Whichever practice is adopted by a mediator, Standard V (B) affirms that it is a mediator’s duty to insure that party consent to the approach is *known, meaningful and timely.*”) (emphasis added).

211. *See, e.g.,* Shapira, *Fairness*, *supra* note 117, at 304–10.

212. MODEL STANDARDS, *supra* note 1, at Standard I.A.

Model Standards “require mediators to focus on process fairness and assume that when process fairness is ensured, substantive fairness will follow”,²¹³ they “steer clear of discussions of fairness, equity, and substantive justice,”²¹⁴ and “do not hold mediators accountable for the substantive fairness of the mediation agreements they help to orchestrate.”²¹⁵

I think that if this is indeed the *Model Standards*’ approach to outcome accountability then it is wrong.²¹⁶ I believe, however, that the *Model Standards*’ guidance on the process of mediation provides two hints regarding the criteria for mediated outcomes, which could be interpreted as an implied and partial (although far from satisfying) recognition of mediator accountability for outcomes. These instances are discussed next under two headings: uninformed outcomes and illegal outcomes.

1. Uninformed Outcomes

The Standard of Self-determination places mediators under a duty to conduct the mediation on the basis of party self-determination,²¹⁷ which is defined, inter alia, as the act of making “*informed* choices as to . . . *outcome*.”²¹⁸ Logically, this should lead to finding here a responsibility of the mediator for the outcome of mediation, because if a mediated outcome is not the product of an informed decision, and the mediator is aware of that, then arguably the mediator has not complied with his or her duty to conduct a mediation based on party self-determination.

However, the *Model Standards* shy away from this conclusion and prefer to dilute it by providing 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.”²¹⁹ The *Reporter’s Notes* explain this choice with the “significant controversy about whether and how a mediator might insure that a party’s decisions are suitably informed.”²²⁰

213. MEDIATION ETHICS, *supra* note 7, at 329.

214. *Id.*

215. *Id.* See also *id.* at 115 (Waldman noting that “the Standards are silent on the matter of substantive fairness”).

216. See Shapira, *Fairness*, *supra* note 117, at 334–39 (arguing for mediators’ accountability for outcomes).

217. MODEL STANDARDS, *supra* note 1, at Standard I.A (“A mediator shall conduct a mediation based on the principle of party self-determination.”).

218. *Id.* (emphasis added).

219. *Id.* at Standard I.A.2.

220. REPORTER’S NOTES, *supra* note 51, at 10.

In my view this is not a convincing argument. Many standards for mediators are saddled with controversies and difficult to apply. Following the *Reporter's Notes*' line of thinking could result, for example, in mediators being held unaccountable for conducting mediation with partiality (what does impartiality really mean?), for ignoring a conflict of interest (what counts as a conflict of interest?), or for giving professional advice (did the mediator advise the parties, evaluate their case, or merely provide them with information?). Evading the difficulty, as the *Model Standards* do, is surely not the right approach.

Elsewhere I have suggested a different approach, arguing that “[f]ollowing logically from the duty to conduct mediations on the basis of party self-determination is a duty to prevent an outcome that a party agrees to without exercising self-determination—a decision that is involuntary, coerced, uninformed, or made in a state of incapacity.”²²¹ This approach is echoed in a number of codes of conduct for mediators. The Mediation Council of Illinois (MCI) *Professional Standards of Practice for Mediators* (hereinafter: *Illinois Standards*), for example, provide that the mediator has a duty to ensure that clients make informed decisions;²²² the Florida Committee Notes to the *Florida Rules* note that “[a] mediator must not . . . knowingly allow a participant to make a decision based on misrepresented facts or circumstances”;²²³ the *Alabama Code of Ethics for Mediators* provides that “[a] mediator shall assist the parties in reaching an informed . . . agreement”;²²⁴ and the Oregon Mediation Association *Core Standards of Mediation Practice* provide that “[m]ediators should suspend, end, or withdraw from the mediation if they believe a participant is unable to give Informed Consent.”²²⁵

While I agree with the *Model Standards* that a mediator cannot ensure that parties make decisions that are based on *complete* information, I believe it is essential to clarify that mediators *must take steps*, consistent with the Standards, so that party decision-making is based on the information relevant to the decision-making.²²⁶ I find some support for this view in the *Model Standards* themselves, in subsection VI.A.10 of the Standard of Quality of the Process. Subsection VI.A.10, which, as I have argued earlier, should be treated as part of the Standard of Self-determination, provides that “[i]f a party appears to have dif-

221. Shapira, *Fairness*, *supra* note 117, at 336 (emphasis added).

222. ILLINOIS STANDARDS, *supra* note 70, at § VI.

223. FLORIDA RULES, *supra* note 91, Committee Notes to R. 10.310, at 106.

224. ALABAMA CODE, *supra* note 150, at Standard 4(a).

225. CORE STANDARDS OF MEDIATION PRACTICE Standard II cmt. 5 (OR. MEDIATION ASS'N 2005), <http://www.omediate.org/pg61.cfm> [<https://perma.cc/6LV5-VP6Q>].

226. See SHAPIRA, *supra* note 19, at ch. 4 § 4.5.3.2.

faculty comprehending the . . . *settlement options* . . . the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination."²²⁷ In my view, this language should be interpreted as an indirect and partial recognition of mediator responsibility for informed mediated outcomes, and should be read as a sign to mediators to take account of outcomes.

Certainly, the *Model Standards* do not go far enough on this issue, and should be amended so as to include clearer guidance on mediators' responsibilities regarding uninformed outcomes. Failure to recognize such responsibility would be wrong for two reasons: first, mediation parties rely on their mediators to support them in the process of mediation and provide them with a minimal safety-net that will protect them from harm which the mediator is aware of or reasonably expected to be aware of;²²⁸ and second, because such accountability is necessary in order to preserve public trust in mediators and the institution of mediation.²²⁹

2. Illegal Outcomes

Another hint as to some form of acknowledgment of mediator outcome accountability by the *Model Standards* can be found in subsection VI.A.9 of the Standard of Quality of the Process, which instructs mediators to take appropriate steps when "a mediation is being used to further criminal conduct."²³⁰ This language, so it seems, could cover under certain circumstances a mediated *agreement* to act in violation of the law. Again, this limited reference to potential mediator intervention due to the content of the mediation or its outcome is inadequate and needs to be addressed.

The *Model Standards* should be much clearer on the expectations of mediators when the mediated outcome is illegal. The *Georgia Standards*, for example, clearly state in a Standard of Fairness that "[t]he mediator . . . must protect the integrity of the process. . . . A mediator should not be a party to an agreement which is illegal . . . ;"²³¹ and the *Guide for Federal Employee Mediators* instructs mediators to withdraw from the mediation if the parties insist on an

227. MODEL STANDARDS, *supra* note 1, at Standard VI.A.10 (emphasis added).

228. See Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. DISP. RESOL. 347, 351 (1990).

229. *Id.* at 349.

230. MODEL STANDARDS, *supra* note 1, at Standard VI.A.9.

231. GEORGIA STANDARDS, *supra* note 150, Standard IV, at 30.

illegal agreement.²³² Mediation commentators have also suggested that an illegal mediation outcome should prompt mediators into action. Bush, for example, argued that “if [the mediator] does nothing, he may bring mediation into disrepute if the illegal agreements are later discovered”;²³³ Cooley noted that “where the mediator or nonparties perceive, or could perceive, the resulting agreement to be illegal . . . the mediator must apprise the parties of the problem, redirect their efforts toward generating new, acceptable options, and, as a last resort, withdraw as mediator and terminate the mediation;”²³⁴ and in an article that explored the limitations on party self-determination in mediation, including the parties’ right to make decisions on outcome, I argued that

a mediation that produces an illegal agreement jeopardizes mediation integrity because it might be perceived as an abuse of process for unworthy goals, undermining important social interests such as preservation of the rule of law and encouragement of public use of mediation. An illegal mediated agreement ignores the rule of law and a process associated with such an outcome might deter ordinary, law-abiding people from using it.²³⁵

Illegal outcomes, as well as uninformed outcomes, are merely examples of possible mediated outcomes that mediators must not ignore, a category that may also include unconscionable, grossly unfair, and immoral agreements.²³⁶ These incidents all raise the same issue of mediators’ accountability for mediated out-

232. FEDERAL EMPLOYEE MEDIATORS GUIDE, *supra* note 4, at Federal Guidance Notes 1 to Standard I.

233. Bush, *Ethical Dilemmas*, *supra* note 199, at 24.

234. Cooley, *supra* note 200, at 130.

235. Shapira, *Decision-Making in Mediation*, *supra* note 137, at 956.

236. See, e.g., FLORIDA RULES, *supra* note 91, R. 10.420(b)(4), at 112 (“A mediator shall . . . terminate a mediation entailing . . . unconscionability . . .”); VIRGINIA STANDARDS, *supra* note 150, § J (requiring mediators to withdraw if they “believe that manifest injustice would result if the agreement was signed”); see also *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1100 (1990) (“[M]ediators and judges must prevent parties from signing agreements that would be unconscionable under contract doctrine.”); Cooley, *supra* note 200, at 130 (noting that mediators must withdraw and terminate the mediation if the resulting agreement is grossly inequitable, or based on false information); Kevin Gibson, *Mediator Attitudes Toward Outcomes: A Philosophical View*, 17 MEDIATION Q. 197, 209 (1999) (“[M]ediation should not endorse [unconscionable] agreements that would not be sanctioned by society.”); Maute, *supra* note 228, at 348–49 (“[T]he mediator must intervene to avoid patently unfair agreements” and “should refuse to finalize an agreement . . . where the agreement is so unfair that it would be a miscarriage of justice.”); Shapira, *Fairness*, *supra* note 117, at 336 (“Mediators would be accountable for an outcome to the extent that mediation rules or other external obligatory rules—i.e., rules of law and morality—require them to take an action with respect to a mediation outcome.”).

comes, sometimes referred to as accountability for substantive fairness or outcome fairness.²³⁷

The idea that mediators have outcome accountability is shared by many mediation experts. Lawrence Susskind, for example, argued that mediators of environmental disputes should ensure that mediated agreements take into account the interests of third parties²³⁸ and that mediators have an obligation to the mediation profession to ensure that mediation produces quality agreements that promote the reputation of the profession;²³⁹ Judith Maute claimed that court-connected mediators are accountable for the effect of mediation on public interests;²⁴⁰ Kevin Gibson argued that mediators sometimes have a duty to question the mediated agreement, noting that “[w]here issues of harm to self or others are involved, the mediator cannot be neutral in the sense of disinterested; he or she has an affirmative obligation to make sure that some kinds of settlement are questioned”;²⁴¹ and Robert Baruch Bush and Joseph Folger have recently commented that “the dominant view in the field . . . [is] that substantive fairness of outcome is indeed one of the mediator’s key responsibilities.”²⁴²

In a recent article on the meaning of fairness in mediation, I have added normative force to this “dominant view in the field” by pointing out the *connection* between the accountability of mediators for outcome and their ethical duties towards the profession of mediation and the general public. Focusing on the duty towards the *profession*, I argued that mediators must avoid conduct that would harm the profession, and therefore must take steps to prevent mediation outcomes that might jeopardize the public’s confidence in mediation. This obligation, owed to the profession rather than the parties, mitigates the parties’ right to self-determination with the effect that the parties cannot relieve the mediator of that responsibility by agreeing on an illegal, unconscionable, or grossly unfair outcome.²⁴³ Moreover, on the basis of a mediators’ duty toward the *public* not to harm important social interests such as the rule of law and critical morality, I argued that mediators are required to take steps to prevent illegal and immoral outcomes even when they do not jeopardize the institution

237. Maute, *supra* note 228, at 248.

238. Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 14–18 (1981).

239. Lawrence Susskind, *Expanding the Ethical Obligations of the Mediator: Mediator Accountability to Parties Not at the Table*, in WHAT’S FAIR: ETHICS FOR NEGOTIATORS 513, 516–17 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004).

240. Maute, *supra* note 228, at 358.

241. Gibson, *supra* note 236, at 209.

242. Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 11 (2012).

243. See Shapira, *Fairness*, *supra* note 117, at 324–27.

of mediation.²⁴⁴

In view of the fact, then, that codes of conduct for mediators and mediation scholars alike recognize mediator accountability for outcomes, there is a strong basis for amending the *Model Standards* to offer a greater degree of accountability of mediators for mediation outcomes.

III. CRITIQUE OF PARTICULAR STANDARDS

The primary focus of Part II has been on major *conceptual* changes that the *Model Standards* should undergo: a change in the definition of mediation; an explicit extension of the application of the standards to mediation styles other than problem-solving mediation; a clearer statement and consistent application of the levels of guidance; an express recognition and statement of mediators' duties other than their duties toward the parties, namely duties toward the profession, the public, and courts or referring bodies; inclusion of guidance on the event that standards conflict; a fundamental change in the current structure of the *Model Standards* through a deconstruction of the Standard of Quality of the Process and its replacement with new Standards of Diligence, Honesty, Respect, Professional Integrity, and Fairness; and an open acknowledgement of mediators' accountability for mediation outcomes. The rest of the Article proceeds with a critical reading of particular standards, exposing defects in their content which merit changes of a more local nature.

A. *Self-determination*

The Standard of Self-determination suffers from several weaknesses that need to be addressed.

1. No Clear Message on the Allocation of Decision-making Power between Parties and Mediators

The *Model Standards* recognize an extensive right of mediation parties to “exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.”²⁴⁵ At the same time the Standard of Self-determination provides that “a mediator may need to balance such party self-determination [on process design] with a mediator’s duty to conduct a quality process”²⁴⁶ It indicates, therefore, that the parties’ right to self-determination is not without limitations

244. *See id.* at 329–34.

245. MODEL STANDARDS, *supra* note 1, at Standard I.A.

246. *Id.* at Standard I.A.1.

and mediators will sometimes have a duty to intervene in (or balance) the parties' decision-making.

The standard's focus on process design seems to me to be wrong, because decisions on *any* mediation issue may require the mediator to intervene and frustrate the parties' choice. In fact, the *Model Standards* themselves illustrate that point in other standards, such as the Standards of Impartiality, Conflicts of Interest, and Confidentiality. For example, according to the Standard of Impartiality, mediators are not allowed to accept gifts and favors which raise a question of impartiality (notwithstanding the parties' wishes),²⁴⁷ the Standard of Conflicts of Interest provides that parties cannot select a mediator "[i]f a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation," thus imposing a limitation on mediator selection,²⁴⁸ and the Standard of Confidentiality recognizes that a mediator may be required by law to disclose mediation information even where the parties object to such disclosure.²⁴⁹ These are not process design decisions, yet the mediator legitimately intervenes in (or balances) the parties' decisions. Moreover, as previously argued, mediators might have to intervene and terminate a mediation when the parties agree on an outcome which is illegal or unconscionable.²⁵⁰ What is missing, therefore, from the current Standard of Self-determination is a general statement which explains *when* and *on what grounds* mediators are required to exercise balancing.²⁵¹

2. Failure to Incorporate Party Competency as a Component of Self-determination

As noted previously, party competency, in the sense of a capacity to perceive information, understand it and participate in the mediation, is an important element of self-determination.²⁵² At the moment, the *Model Standards* refer to party competency in the Standard of the Quality of the Process, treating it as an issue which is relevant to persons with disabilities, while I argue that it should be incorporated instead into the Standard of Self-determination as an integral part of exercising self-determination.²⁵³

247. *Id.* at Standard II.B.2, 3.

248. *Id.* at Standard III.E.

249. *Id.* at Standard V.A.

250. *See supra* Section II.G.2.

251. *See* Shapira, *Decision-Making in Mediation*, *supra* note 137, at 940–44, 959 (discussing the meaning of balancing and suggesting a formulation of that concept).

252. *See supra* Section II.F.2.

253. *See supra* Section II.F.2.

3. Wrong Approach to Informed Consent

As noted previously while discussing the accountability of mediators for mediation outcomes, the guidance on informed decision-making provided by the Standard of Self-determination is unsatisfactory.²⁵⁴ Mediators should be placed under a duty to conduct mediations under conditions that enable parties to make informed decisions, and the standard should clarify the circumstances in which mediators ought to *terminate* the mediation for lack of informed consent.

B. Impartiality

The Standard of Impartiality requires extensive revision because its current wording presents an unrealistic picture of a normative concept of impartiality.

1. Failure to Distinguish between Implicit and Explicit Bias

Impartiality, according to the Standard of Impartiality, “means freedom from favoritism, bias or prejudice.”²⁵⁵ This definition is wrong because it does not differentiate between implicit and explicit favoritism and bias. No one can be expected to be free of *feelings and thoughts* of favoritism, bias or prejudice.²⁵⁶ What can legitimately be expected of mediators is to refrain from *external* manifestations of favoritism or bias between parties in word or action.²⁵⁷ Many codes of conduct for mediators capture this notion in their definitions of impartiality, providing that impartiality means “freedom from favoritism or bias in *word, action, or appearance*,”²⁵⁸ and so should the *Model Standards*.

2. Ignoring the Full Implications of Perceived Partiality

The Standard of Impartiality directs mediators to “conduct a mediation in

254. See *supra* Section II.G.1.

255. MODEL STANDARDS, *supra* note 1, at Standard II.A.

256. See SHAPIRA, *supra* note 19, at 212.

257. MODEL STANDARDS, *supra* note 1, at Standard II.A.

258. FLORIDA RULES, *supra* note 91, R. 10.330(a), at 107 (emphasis added); see also TEXAS GUIDELINES, *supra* note 95, § 9 cmt ; MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION Standard IV.1 (SYMPOSIUM ON STANDARDS OF PRACTICE 2000), <http://www.americanbar.org/content/dam/aba/migrated/family/reports/mediation.authcheckdam.pdf> [<https://perma.cc/HP2A-KKR7>] [hereinafter FAMILY MEDIATION MODEL STANDARDS]; ALABAMA CODE, *supra* note 150, at Standard 5(a); GEORGIA STANDARDS, *supra* note 150, Standard III.A, at 27.

an impartial manner and avoid conduct that gives the appearance of partiality.”²⁵⁹ This requirement should be tied with a concept of *reasonableness*, following the example of the Standard of Conflicts of Interest, according to which we ask mediators to avoid conduct that might *reasonably* raise a question of a mediator’s impartiality.²⁶⁰ It should be clear that we cannot be satisfied with a merely *subjective* suspicion of partiality of the parties for the normative purpose of assigning ethical responsibility to mediators,²⁶¹ although for practical (as opposed to ethical) reasons mediators would do better to avoid any subjective suspicion of partiality as well. Thus, the Standard of Impartiality should be revised to guide mediators to avoid partiality and any conduct that might *reasonably* create the appearance of partiality.

A second defect of the current Standard of Impartiality lies in its failure to treat the appearance of partiality as a ground for *declining to accept a case and withdrawal*. The standard provides that “[a] mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner,”²⁶² and “[i]f at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.”²⁶³ This wording might be wrongly interpreted by mediators as leaving the question about impartiality completely in their hands, that is, dependent on their *personal* evaluation of their ability to conduct the mediation without favoritism or bias. The better view is that impartiality, like conflicts of interest, must also be evaluated from a *reasonable bystander’s* point of view, in order to ensure that the integrity of mediation is not jeopardized and that public confidence in mediation is not undermined. The *Florida Rules*, for example, state that “[a] mediator shall not accept or continue any engagement for mediation services in which the ability to maintain impartiality is *reasonably* impaired or compromised.”²⁶⁴

The Standard of Impartiality should therefore be redrafted to accommodate

259. MODEL STANDARDS, *supra* note 1, Standard II.B.

260. *See, e.g., id.* at Standard III.A, C, E.

261. *See, e.g.,* MEMBERS CODE OF PROF’L CONDUCT art. 8(3) (FAMILY MEDIATION CAN.), http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf [<https://perma.cc/QP86-7LRQ>] (“The perception by one or both of the participants that the mediator is partial does not in itself require the mediator to withdraw, but in such circumstances, the mediator must remind both parties of their right to terminate the mediation.”) [hereinafter FAMILY MEDIATION CANADA CODE].

262. MODEL STANDARDS, *supra* note 1, at Standard II.A.

263. *Id.* at Standard II.C.

264. FLORIDA RULES, *supra* note 91, Committee Notes to R. 10.330, at 107 (emphasis added); *see also* STANDARDS OF CONDUCT FOR N.Y. STATE CMTY. DISPUTE RESOLUTION CTR. MEDIATORS Standard II, cmt. 2 (N.Y. STATE UNIFIED COURT SYS. DIV. OF PROF’L AND COURT SERVS. 2009), http://www.nycourts.gov/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct.pdf [<https://perma.cc/Q7NH-YPG3>].

this concern, conditioning the acceptance of cases and mandating a withdrawal in circumstances that raise a reasonable concern of partiality or an appearance of partiality that could undermine the institution of mediation and public trust in it.

3. Failure to Distinguish between Legitimate and Illegitimate Favoritism

The Standard of Impartiality places mediators under a duty *not to favor* one party over another (“freedom from favoritism”), but does not explain what that means and how it can be achieved in practice.²⁶⁵ A mediator could understand it to mean that parties should always be treated in the *same* manner, for example, that parties should be allocated the same amount of time for relating their stories, or that where one party is met separately the other party should also be met separately. However, the same treatment (or same mediator conduct) could have *different effects* on the parties. For example, the mediator might provide the same information to both parties (for example, on the importance of their seeking legal advice) with the result that the information favors Party A (who is unaware of his or her legal rights). To complicate matters even more, *inaction* by the mediator could also favor one of the parties. For example, in the previous example the decision *not* to provide the information might favor Party B.

A realistic approach to impartiality must therefore take into account the realities of everyday practice, address these issues, and offer mediators a complex yet plausible concept of impartiality that goes beyond the slogan “freedom from favoritism.” Such a concept would recognize the inevitableness of favoritism, most notably in circumstances of an imbalance of power between the parties,²⁶⁶ and seek to distinguish legitimate favoritism from illegitimate favoritism.

In effect the *Model Standards* already embrace this idea in a limited way. Section VI.A.10 of the Standard of Quality of the Process, which has been mentioned previously in a different context, explicitly recognizes that mediators sometimes have to treat a party *differently*, when “a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty

265. MODEL STANDARDS, *supra* note 1, at Standard II.A.

266. *See, e.g.*, Weidner, *supra* note 5, at 566 (noting, in discussing concerns that remained unresolved by the MODEL STANDARDS, that

most real world mediators when faced with an obvious power imbalance between the parties want to take some sort of action “to ensure that the power imbalance does not threaten the ability of the weaker party to assert his own opinions . . . and to participate fully in the mediation.” However, under the still quite generally-phrased Standard II, that mediator would run the high risk of creating an appearance of partiality.).

participating in a mediation.”²⁶⁷ In such case, the *Model Standards* go on to provide, “the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination.”²⁶⁸

The *Model Standards* are not alone in this respect. The *Illinois Standards*, for example, provide that “[t]he mediator . . . must attempt to defuse any manipulative or intimidating negotiating techniques utilized by either of the parties”;²⁶⁹ the *Family Mediation Canada Code* provides that “[t]he mediator has a duty to ensure balanced negotiations and must not permit manipulative or intimidating negotiating tactics. While mediators must be impartial towards the participants, impartiality does not imply neutrality on the issue of procedural fairness”;²⁷⁰ and the *Model Standards of Practice for Family and Divorce Mediation* direct mediators in mediations involving domestic abuse to “take appropriate steps to shape the mediation process accordingly.”²⁷¹ In addition, extensive scholarship discusses the view that mediators need sometimes intervene to empower weak parties and support balanced negotiation.²⁷²

It is submitted, therefore, that the *Model Standards* should explicitly address the need for mediators to treat parties differently during a mediation, and guide mediators on the circumstances in which such treatment would be justified.²⁷³

C. Conflicts of Interest

1. A Partial Definition of a Conflict of Interest

The Standard of Conflicts of Interest “defines a conflict of interest as a dealing or relationship that undermines a mediator’s *impartiality*.”²⁷⁴ It provides that “[a] conflict of interest can arise from involvement by a mediator with the

267. MODEL STANDARDS, *supra* note 1, at Standard VI.A.10.

268. *Id.*

269. ILLINOIS STANDARDS, *supra* note 70, at § VI.C.

270. FAMILY MEDIATION CANADA CODE, *supra* note 261, at art. 9.4.

271. FAMILY MEDIATION MODEL STANDARDS, *supra* note 258, at Standard X; *see also* ILLINOIS STANDARDS, *supra* note 70, at § I.F.; MODEL STANDARDS, *supra* note 1, at Standard VI.B.

272. *See, e.g.*, James B. Boskey, *The Proper Role of the Mediator: Rational Assessment, Not Pressure*, 10 NEGOT. J. 367, 367 (1994); Bush, *Ethical Dilemmas*, *supra* note 199, at 25–26; Michael Coyle, *Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?*, 36 OSGOODE HALL L.J. 625, 649 (1998); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1592 (1991); Shapira, *Fairness*, *supra* note 117, at 304–10.

273. In addition, as noted earlier while discussing the misguided use of levels of guidance in the MODEL STANDARDS in *supra* Section II.C., the Standard of Impartiality uses the levels of guidance “shall” and “should” inconsistently, and should be amended as suggested.

274. REPORTER’S NOTES, *supra* note 51, at 12 (emphasis added).

subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality."²⁷⁵ The exclusive focus on *impartiality* misses an additional important aspect of conflicts of interest: the possible preference of an interest of the mediator over the interests of *all* parties. Such cases do not necessarily raise partiality concerns, but rather questions about the mediator's commitment to his professional role and to the parties.

For example, charging fees on an hourly basis constitutes a potential conflict of interest because the mediator has an incentive to drag out the mediation in order to maximize his remuneration. Of course, we expect mediators to overcome this temptation and act with professional integrity, that is, provide services when these are needed and make decisions on the basis of professional considerations, but note that the major concern that the mediator might unjustifiably prolong the mediation, thereby preferring his or her personal interest over the parties' interest, is one of *integrity* rather than impartiality.

Another example concerns a (possible) legal duty of the mediator to disclose mediation information to nonparticipants. Unlike the previous example, which describes a corrupt mediator, here the mediator has a legal justification to act in a manner that conflicts with the parties' interest to preserve the confidentiality of the information. The disclosure could undermine the mediator's impartiality if the information adversely affects *one* party, but it could also adversely affect the interests of *all* parties (if, for example, both parties agreed to commit a crime), thereby raising a question about the integrity of the process rather than the impartiality of the mediator.

The point I am making is that a mediator's conflict of interest may raise a concern regarding a *possible preference of the mediator's interest over the interests of the parties* (in addition to a concern regarding mediator partiality), and may arise from a *duty to act in a particular way* (in addition to an involvement with the subject matter of the dispute or from relationship). Mediators and mediation participants should be aware of such conflicts of interest and the Standard of Conflicts of Interest should reflect that in the definition of a conflict of interest.

2. A Need to Externalize the Rationale of a Serious Conflict of Interest

The *Model Standards*, like other codes of conduct for mediators,²⁷⁶ refer in effect to *two* types of conflicts of interest: "minor" conflicts of interest that on

275. MODEL STANDARDS, *supra* note 1, at Standard III.A.

276. See, e.g., FLORIDA RULES, *supra* note 91, Committee Notes to R. 10.340, at 107.

disclosure to the parties and reception of their consent do not prevent the mediator from proceeding with the mediation, and “serious” conflicts of interest that “might reasonably be viewed as undermining the integrity of the mediation,”²⁷⁷ in which case the “mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.”²⁷⁸ This language is unsatisfactory because it leaves doubt as to the *meaning* of “the integrity of mediation” and as to the *reason* why the integrity of mediation should be preserved, thereby reducing the utility of such guidance to mediators.

The *Reporter’s Notes* are more instructive on these points. They explain that the *Model Standards* “retains content and language of the 1994 Version that notes that if the conflict of interest *casts serious doubts on process integrity*, then the mediator shall decline to proceed despite the preferences of the parties,”²⁷⁹ and further note that the Joint Committee which drafted the *Model Standards* wanted to emphasize that “mediator conduct that raises questions of conflicts of interest *serves to undermine public or party confidence in the central integrity of the process*.”²⁸⁰

I think that a better way to describe a process of mediation which lacks integrity would be to use terms such as a “faulty” or “defective” process, and that the type of fault or defect that mandates mediator withdrawal should be described as one that “might undermine public trust in the profession and process of mediation.” I suggest that the rephrased Standard of Conflicts of Interest should provide that where the conflict of interest raises a concern that the mediator will not be able to avoid harming a party’s interest, and as a result the mediation might be publicly perceived as faulty, thereby undermining public trust in the profession and process of mediation, the mediator shall decline to proceed despite the preference of the parties.

D. Competence

The Standard of Competence suffers from two major defects: it does not adequately define competence, and it sends a wrong, subjective message on the level of competence required of mediators, which is inconsistent with the *Reporter’s Notes* on competence.

The Standard begins by stating that “[a] mediator shall mediate only when

277. MODEL STANDARDS, *supra* note 1, at Standard III.E.

278. *Id.*

279. REPORTER’S NOTES, *supra* note 51, at 13 (emphasis added).

280. *Id.* at 12 (emphasis added).

the mediator has the necessary competence to satisfy the reasonable expectations of *the parties*,”²⁸¹ and continues with a declaration that “[a]ny person may be selected as a mediator, provided that *the parties are satisfied* with the mediator’s competence and qualifications.”²⁸² This seems to be a peculiar and shaky criterion for professional competence. Would you, for example, define a lawyer’s, or a doctor’s, or a judge’s competence by reference to his or her clients’, or his or her patients’, or the disputants’ expectations and satisfaction with his or her competence and qualifications?

Clearly, different criteria are needed, and the first thing to note is that while the *Model Standards* refer again and again to “necessary competence,” they do not in fact define competence. They do, however, provide two hints regarding “necessary competence,” by stating that “[t]raining, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence,”²⁸³ and by commenting that “[a] person who offers to serve as a mediator creates the expectation that the person is competent to *mediate effectively*.”²⁸⁴ It is worth noting that these observations focus on the *role* of mediators and on the *process* they conduct. The definitions and existence of the role of mediators and the process of mediation are *professional matters*, largely independent of the parties’ wishes and expectations. The parties’ wishes and expectations can affect and shape a mediator’s role and a mediation process to some extent, but a certain core of knowledge, skills, and practice will always remain fixed, as it is with respect to lawyers, doctors, and judges.

I would argue that basic competence in mediation is *a state of having the knowledge and skills necessary for carrying out the role of a mediator in an effective way*, which will ordinarily require training and experience. One will be able to learn more about this basic competence from the *definitions* of mediation and of the role of mediators that the *Model Standards* adopt,²⁸⁵ from the content of mediation training courses that have become more and more standardized,²⁸⁶ and from the representations a particular mediator makes to the parties. I do not suggest that the Standard of Competence should actually list the knowledge and skills expected of mediators. However, what should become clear is that mediators’ competence is necessarily a matter *beyond* the parties’

281. MODEL STANDARDS, *supra* note 1, at IV.A. (emphasis added).

282. *Id.* at Standard IV.A.1 (emphasis added).

283. *Id.* (emphasis added).

284. *Id.* (emphasis added).

285. *See supra* Section II.A. (discussing the definition of mediation).

286. *See, e.g.*, MEDIATION TRAINING STANDARDS AND PROCEDURES (FLA. SUP. CT. 2013), <http://www.floridasupremecourt.org/clerk/adminorders/2013/AOSC13-41.pdf> [<https://perma.cc/5WB5-R5KZ>]; GUIDELINES FOR THE TRAINING AND CERTIFICATION OF COURT-REFERRED MEDIATORS (VA. SUP. CT. 2011), <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/training/tom.pdf> [<https://perma.cc/XN4D-73JB>].

wishes and expectations, and that a Standard of Competence must aim at protecting the institution of mediation and the public, as well as the interests of the parties.

Unlike the *Model Standards*, the *Reporter's Notes* that accompany them make this point explicitly, stating that "to promote *public confidence in the integrity and usefulness of the process* and to *protect the members of the public*, an individual representing himself or herself as a mediator must be committed to serving only in those situations for which he or she possesses the basic competency to assist."²⁸⁷ This emphasis is lost in the current wording of the Standard of Competence, with its focus on the parties' expectations and satisfaction, and it should be reworked to include a definition of competence which is not satisfied with the parties' wishes.

E. Confidentiality

Several issues should be addressed in reforming the Standard of Confidentiality.

1. Lack of Guidance on Limitations on Disclosure of Information with Parties' Consent

The Standard of Confidentiality correctly conditions disclosure of mediation information by the mediator, which is not sanctioned by law, on the agreement of the parties. It provides that "[i]f the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so."²⁸⁸ However, this permissive language might be wrongly interpreted by mediators as a free license to disclose information with the parties' consent when in fact this is not the case. The Standard of Confidentiality should, of course, be read and interpreted in light of all the obligations mediators are subject to, which might, as we have already seen, defeat the parties' expressed desires.²⁸⁹ A mediator might not be allowed to disclose information notwithstanding the parties' wishes if doing so would be inconsistent with the other standards and undermine the institution of mediation and public trust in it. For example, if disclosure would lead outsiders to question the impartiality of the mediator in the conduct of the mediation, the mediator should not disclose the information despite the parties' agreement because the mediator has a duty to protect the institution of mediation. Thus, the grounds for permitted

287. REPORTER'S NOTES, *supra* note 51, at 14 (emphasis added).

288. MODEL STANDARDS, *supra* note 1, at Standard V.A.1.

289. See *supra* Section II.D.

disclosure²⁹⁰ should be qualified.

2. A Partial Statement on the Discussion of the Extent of Confidentiality with the Parties

Section V.C of the Standard of Confidentiality provides that “[a] mediator shall promote understanding among the parties of the extent to which *the parties* will maintain confidentiality of information they obtain in a mediation.”²⁹¹ This section, the *Reporter’s Notes* observe, “targets a mediator’s responsibility to make certain that the parties understand the extent to which *they*, not the mediator, will maintain confidentiality of information that surface[s] in mediation.”²⁹² What is clearly missing is a reference to the mediator’s responsibility to make certain that the parties understand the extent to which *the mediator* will maintain confidentiality.

Parties should know the extent of their mediator’s duty of confidentiality if they are to be able to exercise self-determination regarding participation in the mediation and regarding the type of information they can safely share with the mediator, knowing that it will not be disclosed. The *California Rules*, for example, provide that “[a]t or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings,”²⁹³ and the *Family Mediation Canada Code* provides that “[t]he mediator shall inform the participants at the outset of mediation of the limitations to confidentiality and the fact that confidentiality cannot be guaranteed.”²⁹⁴

The information provided by the mediator need not be a detailed account of the law of confidentiality which applies to mediation in his or her jurisdiction. After all, the mediator is not the parties’ lawyer and need not be a lawyer him- or herself. However, the mediator must ensure that the parties have a general understanding of the extent of confidentiality which applies to him or her and to the process, in particular the fact that the protection of confidentiality might not be absolute and that disclosures might be permitted or even required in certain circumstances. The mediator could involve the parties’ representatives (if they have any) in this process, or recommend that they consult an outside professional on this matter.²⁹⁵

290. See MODEL STANDARDS, *supra* note 1, at Standard V.A.2, 3.

291. *Id.* at Standard V.C (emphasis added).

292. REPORTER’S NOTES, *supra* note 51, at 16 (emphasis added).

293. CALIFORNIA RULES, *supra* note 95, at R. 3.854(b).

294. FAMILY MEDIATION CANADA CODE, *supra* note 261, at art. 7.3; see also *id.* at art. 11.1(c).

295. An additional modification has been noted previously while discussing the misguided use of levels of guidance in the MODEL STANDARDS. See discussion *supra* Section II.C (The Standard of

IV. CONCLUSION

The introduction of the *Model Standards* in 1994 and their reform in 2005 have been important steps in the professionalization of mediation, contributing to the advancement of ethical conduct in the practice of mediation. The standards were designed “to serve as fundamental ethical guidelines” for mediators, inform mediation parties, and “promote public confidence in mediation as a process for resolving disputes.”²⁹⁶ The critical analysis of the *Model Standards* in this Article has been carried out with the aim of furthering these goals. With these purposes in mind, the Article has suggested conceptual changes and more targeted modifications of particular standards that if accepted will radically alter the scope, structure, and content of the *Model Standards*.

The Article argues that new and reformed *Model Standards* will supply mediators with a better understanding of their ethical obligations, and with clearer and more consistent guidance on ethical decision-making and ethical conduct. Moreover, once reformed, the *Model Standards* will better inform mediation participants on what can be expected of mediators in the course of mediation, and further enhance public confidence in the process and profession of mediation.

The Article is intended to stir up discussion on the need to develop and adopt new *Model Standards*, and on their shape and content. I hope it will stimulate the mediation community to begin a process of reforming the *Model Standards*, by having provided insights on conceptual and particular required amendments.

Confidentiality, it has been observed, uses the levels of guidance “shall” and “should” inconsistently, and should be amended as suggested.).

296. MODEL STANDARDS, *supra* note 1, at pmbl.