

THE LAWYER AS MEDIATOR: PROFESSIONAL RESPONSIBILITY PROBLEMS OR PROFESSION PROBLEMS?

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The increasing emphasis on alternative forms of dispute resolution has focussed the attention of the legal profession on the process of mediation and the lawyer's role in that process. In this article, I examine the major result of that attention—professional responsibility regulations for the lawyer as mediator. By examining the significant themes that exist in the various Standards of Practice or Codes of Ethics that have been promulgated by the legal profession, and by comparing these developments with the history of traditional professional responsibility regulation, a disturbing conclusion is suggested. While further analysis and empirical study is necessary, I suggest that this regulation will unnecessarily restrict lawyers from practicing mediation, will dampen the demand for lawyers as mediators and, most unfortunately, will alter the nature of the mediation process.

L'importance donnée de plus en plus aux moyens autres que le procès pour résoudre les conflits a poussé le milieu juridique à porter son attention sur la procédure de médiation et le rôle que l'avocat joue dans cette procédure. J'examine ici les principaux résultats de cette attention, c'est-à-dire les règlements de responsabilité professionnelle auxquels doit se soumettre l'avocat dans son rôle de médiateur. Après avoir examiné les thèmes importants qui reviennent dans les divers codes de déontologie et les règles de conduite des divers barreaux, et après avoir comparé ces développements à l'histoire de la réglementation traditionnelle de la responsabilité professionnelle, j'en suis arrivé à une conclusion inquiétante. Tout en concédant qu'une analyse plus poussée et qu'une étude empirique sont nécessaires, j'avance que cette réglementation aura pour effet d'empêcher les avocats de servir de médiateur autant qu'ils le voudraient, de limiter le nombre des avocats requis comme médiateurs et, ce qui est particulièrement regrettable, de modifier la nature de la procédure de médiation.

Introduction

That meanness, that infernal knavery, which multiplies needless litigations, which retards the operation of justice, which from court to court, upon the most trifling pretences, postpones trial to glean the last emptyings of a client's pocket, for unjust fees of everlasting attendance, which artfully twists the meaning of law to the side we espouse, which seizes unwarrantable advantages from the prepossessions, ignorance, interests and prejudices of a jury, you will shun rather than death or infamy.

The laws that govern affluent clients and large institutions are numerous, intricate,

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and applied by highly sophisticated practitioners. In this sector of society, rules proliferate, lawsuits abound, and the cost of legal services grows much faster than the cost of living. For the bulk of the population, however, the situation is very different. Access to the courts may be open in principle. In practice, however, most people find their legal rights severely compromised by the cost of legal services, the baffling complications of existing rules and procedures, and the long, frustrating delays involved in bringing proceedings to a conclusion. From afar, therefore, the legal system looks grossly inequitable and inefficient. There is far too much law for those who can afford it and far too little for those who cannot. No one can be satisfied with this state of affairs.

At first glance there appears to be little to distinguish between these two statements. Both represent severe criticism of lawyers, both are directed at the manner in which lawyers deal with disputes, and both implicitly, or perhaps even explicitly, demand change. A surreptitious historian might be quick to point out there is a distinction between them. They were made 206 years apart.¹ However, the time factor may not be a distinguishing feature at all. It could be argued these criticisms merely bookend two centuries of similar distrust and dissatisfaction with the legal profession's management of dispute resolution.² Accordingly, even time does not distinguish Dwight and Bok.

On closer examination, however, there does appear to be a significant distinction between the statements. That distinction arises as a result of their implicit message. That message is change and the distinction may be that times are changing. While the exhortations of Dwight seemed to result in no change, the legal profession seems to be responding to the more recent urgings of Bok, Burger, Auerbach, McEachern and their contemporaries.³ The alternative dispute resolution movement or delegatization reform movement in the United States and, to a lesser degree, in

¹ The first statement was made by the President of Yale College, Timothy Dwight, to the graduating class in 1776 and is quoted in Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (1976), p. 39. The second statement was made by the President of Harvard University, Derek C. Bok, in his report to Harvard's Board of Overseers in 1982 and is reprinted in (1983), 33 *J. Legal Ed.* 570, at p. 570.

² It is not difficult to locate a myriad of sources of such continuing criticisms. See for example, John Quincy Adams, in *Diary of John Quincy Adams*, Massachusetts Historical Society Proceedings, 2nd ser., vol. 16 (1902); quoted in Charles Warren, *A History of the American Bar* (1912), p. 224; President Theodore Roosevelt at Harvard in 1905, quoted in Jerold S. Auerbach, *Unequal Justice* (1976), p. 32; Chief Justice McEachern of the British Columbia Supreme Court, *The Trial Process* (1982), 40 *The Advocate* 217; Chief Justice Burger of the United States Supreme Court, *Isn't There A Better Way?* (1982), 68 *A.B.A.J.* 274. And Jerold S. Auerbach's particularly stinging "not frogs nor gnats, flies nor boils, hail nor locusts, persuaded Pharoah to let the children of Israel go. It is foolhardy to question divine wisdom, but it is at least arguable that somewhere between gnats and locust, and surely before the death of the firstborn shattered Pharaoh's stubborn resolve, a plague of lawyers would have been enough"; *As Lawyers Multiply, Civilization Decays* (1977), 4 *Learning and The Law* 10.

³ R.L. Abel (ed.), *The Politics of Informal Justice: Vol. 1, The American Experience* (1982), p. 1, refers to "a major transformation of our legal system".

Canada has been the highly visible force for change demanded by the virtually timeless critics of the legal profession.

The most noticeable component in this movement for change has been the process of mediation. In the United States, there are approximately 200 recently developed mediation programmes which deal with over 200,000 disputes a year.⁴ In Canada, one hundred and fifty-two delegates to a recent mediation conference reflected widespread and growing developments in mediation.⁵ There are, of course, other supporting players in the alternative dispute resolution movement. There has been increasing emphasis on negotiation, conciliation, arbitration and changes in adjudication. But it would appear to be accurate to say that mediation has the potential to be the critical factor in dealing with some of the legal system's plaguing problems.

An exact description of how this potential might be fulfilled is impossible to give. The prominence of mediation and its impact in Western society could depend on a wide number of economic, social and political variables.⁶ One might expect, however, that no matter how mediation develops lawyers will play a major role in the process. Lawyers have had substantial involvement in the alternative dispute resolution movement, and particularly in the growth and development of mediation. In the United States, the legal profession has been instrumental in the development of diversion—mediation in the criminal justice system, in the development of Neighbourhood Justice Centres to mediate "minor" disputes, and in the development of family mediation. In Canada, alternative dispute resolution was addressed much later, but by the legal profession. The Federal Department of Justice and the Ministry of the Solicitor General of Canada have been responsible for the development of diversion programmes as part of the formal criminal justice process. Perhaps the most visible mediation programme in Canada is the Windsor-Essex Mediation Centre, a project developed from a 1980 Canadian Bar Foundation study of delays in the courts.⁷

Despite all of this, the legal profession's strong influence in the search for alternatives has not been paralleled by a noticeable actual

⁴ J.J. McCarthy, *Dispute Resolution: Seeking Justice Outside the Courtroom* (1982), 8 *Corrections Magazine* 33.

⁵ *Mediation 1984, Training, Program Development, The Future*; a national conference held in Toronto, June 15-17, 1984.

⁶ Few studies have empirically assessed the mediation process at all. But see J. Pearson, N. Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation* (1984), 17 *Fam. L. Q.* 497. See also, however, R.J. Levy, *Comment on the Pearson-Thoennes Study and on Mediation* (1984), 17 *Fam. L. Q.* 525, which describes "major shortcomings in the 'author's' empirical method".

⁷ See also Canadian Bar Foundation's *Pilot Project Evaluation: The Windsor-Essex Mediation Centre* (1984).

participation in the mediation process. Riskin⁸ identified a number of factors which might explain this. They included the strength of the traditional adversary system, which assumes the application of a rule of law to determine a winner or a loser, the lack of training in mediation skills, and the fear that a lawyer may lose his sense of power, of professional integrity, and of specific identity if he departs from his traditional role. But there are countervailing forces. Consumer demand, and consequential monetary rewards, will attract lawyers to mediation, training is beginning to be done to equip lawyers with skills that are necessary, and there are streams in modern legal philosophy strong enough to carry mediation into prominence⁹ in the lawyer's role concept.

These countervailing forces will, in the long or in the short run, prevail; and it is most desirable that they should. There are at least two reasons for that. First, the lawyer's role is one that demands participation in the mediation process. The recent re-articulation by Chief Justice Burger of lawyers' historical and traditional obligation of being "healers of human conflict"¹⁰ emphasizes a need to acquire training in the skills necessary to resolve disputes by means other than the adversary process. Mediation, as a form of dispute resolution, will necessarily attract lawyers wanting to complement their "healing" abilities. The second reason is the prominence of law itself. In mediation the parties must, inevitably, understand the law and how it applies to their particular situation. If knowledge of law is essential, so also is the lawyer. No doubt lawyers are not the only persons who will act as mediators, and the non-lawyer can always seek legal advice from someone who is professionally trained. But if knowledge of the law is an essential factor, and lawyers can add other necessary skills to that knowledge, they should obviously play a primary role in mediation itself.

If, to a significant degree, lawyers will be mediators, it seems fair to posit that the success or failure of the mediation process may depend on the nature of the role of the lawyer as mediator. This article will examine one variable that will be critical to that role. That variable is the manner in which the legal profession regulates the lawyer as mediator. The profession's specific concern has been with professional responsibility problems that are thought to be associated with mediation. These concerns may or may not be well founded. There is however a danger that professional regulations may have a negative effect on the supply of, demand for, or quality of mediation services. The legal profession, and indeed all those interested in mediation, should be concerned if any potential consequences of the legal profession's influence are negative. Such result could very well mean that the surreptitious historian is right.

⁸ L.L. Riskin, *Mediation and Lawyers* (1982), 43 Ohio State L.J. 29, at pp. 43-55.

⁹ *Ibid.*, p. 54.

¹⁰ *Loc. cit.*, footnote 2, at p. 274.

I. *The Mediation Process*

It is essential to understand the mediation process in order to understand and evaluate how the legal profession regulates the lawyer as mediator. With some exceptions,¹¹ few writers have attempted a comprehensive definition of mediation, let alone an analysis of the essential elements of the process. This is not surprising, for a definition is difficult for at least two reasons. First, mediation is used in a wide variety of institutional settings and models, deals with a myriad of disputes, and involves a complex interweaving of many inter-disciplinary skills. Second, the literature on mediation has tended to focus on its practical elements—the institutional setting or model, the subject matter, or the skills involved.¹²

Nonetheless definition and analysis are important and must be attempted. For the purpose of this article mediation can be defined as a process of conflict resolution in which a neutral third party helps parties in dispute reach a voluntary agreement. Three essential elements may be derived from this definition: mediator neutrality, individual responsibility, and mutual fairness. An understanding of these three elements is a necessary prerequisite to understanding the importance of the lawyer as mediator and in evaluating the legal profession's influence on the mediation process.

A. *Neutrality of the Mediator*

The mediator is a neutral third party. The mediator is not a representative nor an agent of the parties to the dispute, nor an advocate for their interests. The mediator is simply a helper—a catalyst to the negotiations between the parties. But neutrality does not imply inactivity. The mediator exercises a wide array of inter-disciplinary skills involving communicating, listening, observing, analyzing, questioning, drafting, problem defining and problem solving. The mediator's behaviour must be impartial. A grave danger arises if neutrality and impartiality are not present:

[The mediator] becomes a negotiator and as such, inevitably brings with him, deliberately or not, certain ideas, knowledge and assumptions, as well as certain interests and concerns of his own and those of other people whom he represents. Therefore, he is not, and cannot be neutral and merely a catalyst. He not only affects the interaction but, at least in part, seeks and encourages an outcome that is tolerable to him in terms of his own ideas and interests.¹³

¹¹ See L. Riskin, *Mediation in the Law Schools* (1984), 33 J. Legal Ed. 259; Family Law Section, American Bar Association, *Standards of Practice for Family Mediators* (1984), 17 Fam. L.Q. 455; S. Kessler, *Creative Conflict Resolution: Mediation* (1978); L. Fuller, *Mediation, Its Form and Functions* (1971), 44 S. Cal. L. Rev. 305.

¹² See for example O.J. Coogler, *Structured Mediation in Divorce Settlement: a Handbook for Marital Mediators* (1978); L. Nader, H. Todd, *The Disputing Process: The Law in Ten Societies* (1978); J.M. Spencer, J. P. Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, [1976] Duke L.J. 911.

¹³ P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (1979), pp. 213-214.

An important consequence follows from this characteristic of the mediation process. The parties to the dispute can develop trust and confidence in the mediator. This relationship between the parties and mediator, nurtured by the mediator's neutrality, enhances the effectiveness of the mediation process.

B. Individual Responsibility

While the mediator must express neutral behaviour, the parties to the dispute must express individual responsibility. This responsibility is evidenced in a number of ways, whatever the structure of the mediation process. First, the parties must illustrate a decision to "stand up for themselves". There may be a variety of factors that prevent this. Is one of the parties' attitude less open to the mediation process? Has the parties' resort to mediation been involuntary?¹⁴ Is the motivation behind their interest in mediation based solely on time and money? Does one party dominate the other due to education, social, psychological or economic variables? Is either party unable to identify what is important in the mediation process or unable to assert or express important needs? It will be the mediator's responsibility to ensure that each party is standing up for himself or herself.

Second, the parties must take individual responsibility for decisions in the mediation process. Decisions may be procedural or substantive. Any ultimate substantive decision or agreement is the responsibility of the parties. The neutral mediator has no power to impose a decision on the parties.

C. Mutual Fairness

Connected to neutrality and responsibility is the concept of mutual fairness. The objective of the mediation process is for the parties to reach an agreement that they each believe is mutually fair. The neutral mediator helps the parties reach this agreement but the parties have the responsibility for agreeing what is fair.

Much could be (and has been) written about fairness in other disciplines. But from the mediation perspective three factors appear relevant. First, mutual fairness demands that self-interests not be the only focal point. The needs of other parties in the dispute must be understood and

¹⁴ Many mediation programmes are connected to or positioned within the criminal or civil justice systems. A number of programmes require parties to a dispute to submit to mediation before any adjudication. See for example Cal. Civ. Code, section 4607 (West Supp. 1980) which requires mandatory mediation of child custody issues in divorce cases before adversary processing. Compulsory mediation or conciliation in various circumstances has been a common feature of provincial industrial relations legislation in Canada. While resort to the process may be involuntary, this coercive element is simply a factor to be taken into account in assessing individual responsibility.

recognized. Fuller referred to this when he described the "central quality of mediation":¹⁵

... its capacity to reorient the parties toward each other not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.

If the process is viewed as creating winners and losers, mutual fairness evaporates.

Second, mutual fairness allows the parties to evaluate and weigh societal norms or values in reaching an agreement. The sources of these norms or values are wide and varied. The parties to a mediation may resort to unwritten customary rules in deciding what is fair. They may resort to formal written laws. Religious convictions may be relevant to fairness. Particular community values may be treated as being important in determining what is fair notwithstanding there may be differences in these values from community to community. A range of economic considerations might well be significant in determining if an agreement is mutually fair. Mutual fairness may be affected by the parties' perceptions of how an agreement affects human values.

Two points should be made about the role of law in relation to mutual fairness. First, if there exist legal principles, rules of law or other legal information that regulates or could regulate the dispute, it is critical the parties understand this law. If the law is unknown or not understood, it becomes irrelevant, an inhibitor to agreement or even a false standard or value in reaching agreement. In any case, mutual fairness is sacrificed. Second, in determining what is mutually fair, law will only be a relevant factor in the process. Law will not automatically be an absolute standard for the parties. The parties may decide what the law says is fair to both. But they may also legitimately decide what the law says is unfair or only partly fair. Law is simply an indication of societal norms or values. If law was viewed in the mediation process as being decisive, law would usurp the role of the parties in assessing fairness.

The third factor that is relevant to mutual fairness has been referred to indirectly. In evaluating societal norms and values, it is the parties who decide what is mutually fair. The neutral mediator does not impose his or her advice.¹⁶ If this occurred it would again remove a critical foundation of the mediation process.

¹⁵ Fuller, *loc. cit.*, footnote 11, at p. 325. This is a similar concept to the problem solving approach to negotiation referred to in R. Fisher, W. Ury, *Getting to Yes* (1981), and C. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving* (1984), 31 U.C.L.A. L. Rev. 754.

¹⁶ It is recognized there may be limited circumstances where the mediator intervenes and questions the mutual fairness. If one party is taking advantage of the other so there is no expression of individual responsibility, the mediator will intervene. If practically the agreement is unworkable the mediator will intervene. The mediator should not intervene

II. *The Regulation of the Lawyer as Mediator*

A. *The Historical Background*

Just as with a lawyer's traditional practice, a wide array of economic, social and political factors will determine how well any individual lawyer acts as mediator. However, there is one major influence that will be extremely relevant to the success or failure of the lawyer as mediator. That influence is the imposition of rules of professional responsibility established by the governing bodies of the legal profession. Both in the United States and Canada, rules of professional responsibility have a relatively brief history. In order to understand and evaluate their possible impact on the lawyer as mediator, it is helpful to have an appreciation of their historical roots and development.

In the United States, the need for adopting rules of professional conduct was advocated by Henry St. George Tucker, President of the American Bar Association and Chairman of its Committee on a Code of Professional Ethics. Reporting in 1906, he said:¹⁷

We cannot be blind to the fact that, however high may be the motives of some, the trend of many is away from the ideals of the past and the tendency more and more to reduce our high calling to the level of a trade, to a mere means of livelihood or of personal aggrandizement. With the influx of increasing numbers, who seek admission to the profession mainly for its emoluments, have come new and changed conditions . . . the shyster, the barratrously inclined, the ambulance chaser, the member of the Bar with a system of runners, pursue their nefarious methods with no check save the rope of sand of moral suasion so long as they stop short of actual fraud and violate no criminal law . . . Such men are . . . not true ministers of . . . courts of justice robed in the priestly garments of truth, honor and integrity. All such are unworthy of a place upon the rolls of the great and noble profession of the law . . .

The "thus it is written" of an American Bar Association code of ethics should prove a beacon of light on the mountain of high resolve to lead the young practitioner safely through the snares and pitfalls of his early practice up to and along the straight and narrow path of high and honorable professional achievement.

The preamble to the thirty-two Canons of Ethics adopted by the American Bar Association in 1908 also reflected the reason for the rules:¹⁸

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

simply because the agreement does not appear fair to the mediator although at some point the mediator may regard the agreement as so unreasonable that some type of intervention in the parties' decision is necessary.

¹⁷ (1906), 29 A.B.A. Reports 600.

¹⁸ (1908), 33 A.B.A. Reports 575.

Although the American Bar Association Canons were not first or original,¹⁹ they were to be a long lasting model. In fact, the first major revision to the Canons did not come until a new Code of Professional Responsibility was adopted by the Association in 1969.²⁰ The need for a change after sixty-one years of "occasional amendments, hundreds of oracular interpretations by the ABA's Committee on Professional Ethics and Grievances and dozens of undefined terms"²¹ was reflected by the Committee evaluating the 1908 Canons:²²

The present Canons are not an effective teaching instrument and they fail to give guidance to young lawyers, beyond the language of the Canons themselves. There is no organized interrelationship of the Canons and they often overlap. They are not cast in language designed for disciplinary enforcement and many abound with quaint expressions of the past. The present Canons, nevertheless, contain many provisions that are sound in substance.

The 1969 Code did not last for sixty-one years. In 1983 the Association adopted the Model Rules of Professional Conduct developed by the Kutak Committee.²³ The reasons for such an early revision seems to parallel the birth of the Canons. In the introductory note to the Rules, Robert Kutak makes the following observation:²⁴

There can be no question but that our profession—more so than any other—is seriously committed to self-regulation and the enforcement of its professional standards. But, as disciplinary committees and bar counsel would be the first to acknowledge, self-regulation of a profession having more than 500,000 members demands more than enforcement through disciplinary proceedings. The primary mechanism for effective self-regulation must be widespread voluntary compliance with the profession's standards of conduct. And widespread voluntary compliance in turn requires clear, workable, common-sense standards by which individual lawyers can regulate their own conduct . . . It is a conservative document in the truest sense of the word, for it aims to preserve and enhance fundamental professional values in the face of a rapidly expanding and changing profession . . . a document worthy of a proud profession, jealous of its tradition of independence and committed to its long-standing tradition of self-regulation.

¹⁹ The ABA Canons drew heavily on the first formal Code of Ethics adopted in Alabama in 1877. This was not surprising since Thomas Goode Jones, chairman of the Alabama Bar Committee that drafted the Alabama code, was on the ABA Committee. The Alabama Code had in turn been influenced by Justice George Sharswood's *Essays on Legal Ethics* published in 1854 and David Hoffman's 50 Resolutions published in the early nineteenth century.

²⁰ The Code of Professional Responsibility was approved August 12, 1969 and became effective January 1, 1970. Prior to this, thirteen of fifteen additional canons had been added in 1928. The other two had been added in the depression years.

²¹ J.K. Lieberman, *Crisis at the Bar* (1978), p. 63.

²² Report of the Special Committee on Evaluation of Ethical Standards (1960), 94 A.B.A. Reports 729, at p. 730.

²³ (1982), 68 A.B.A.J. 1411, where the rules are set out in a special supplement numbered pp. 1-31. Subsequent references are to this latter numbering.

²⁴ *Ibid.*, at p. 3.

The developments in Canada bore striking similarities to the American experience. Despite strong representations that a written code of ethics was not necessary and even dangerous, the Canadian Bar Association adopted its first model Canons of Legal Ethics in 1920.²⁵ The American connection was seen in the address by William H. Taft immediately after the Canons were approved. He stated that he was "glad, very glad, that the Canadian Bar Association has added its authority and its weight in forming a precedent for a set of rules so much like ours that they can be referred to as sustaining the position that the American Bar Association has taken".²⁶ The American influence was also observable in the reasons given for the need for such Canons. There were people "coming into the profession in the development of this country, many who have not the traditions, the inherited traditions behind them".²⁷ A code of ethics was necessary "in view of the changed and changing conditions of this country, and the large number of students now admitted to practice, many of whom come from various countries whose traditions and surroundings have not been similar to those of our own and the Motherland . . .".²⁸ And an earlier report had noted:²⁹

. . . perhaps one of the most dangerous causes at work affecting the reputation of our Profession is the scheming for business. In most places particularly where there are large factories, electric railways and similar undertakings, involving great personal risk, there are always a certain number of lawyers who appear on the scene in company with the ambulance or the coroner. Men, not lawyers, have to my knowledge been employed by legal vultures, and have received a commission on bringing in the body dead or alive . . . The soliciting of business in the manner I have indicated should disqualify any lawyer from ever practising again . . .

The Canadian Bar Association Canons of Legal Ethics, like their American progenitors, served as a model in Canada for fifty-four years. In 1974, a revised Code of Professional Conduct, which bore a strong resemblance to the 1969 American Code of Professional Responsibility, was adopted.³⁰ It was not so much a substantive change as a change to "facilitate ease of reference and practical utility" and "to provide a sound basis for the delivery to members of the public of competent legal services according to the highest ethical traditions of the profession".³¹

²⁵ (1920), 5 C.B.A. Proc. 261. For warnings against a written code of ethics see the address of Mr. Justice Riddell, A Code of Legal Ethics (1919), 4 C.B.A. Proc. 136.

²⁶ (1920), 5 C.B.A. Proc. 265, at p. 267. In presenting the suggested code, the Standing Committee on Legal Ethics indicated the draft was "based largely on the American Bar Association Rules..."; *ibid.*, at p. 95.

²⁷ *Ibid.*, at p. 108, although the speaker was arguing against the introduction of a written code of ethics.

²⁸ Report of the Committee on Legal Ethics (1919), 4 C.B.A. Proc. 129, at p. 131.

²⁹ Address by E.F.B. Johnston, K.C., The Honour of the Profession (1915), 1 C.B.A. Proc. 30, at pp. 36-37.

³⁰ Canadian Bar Association, Code of Professional Conduct (1974).

³¹ *Ibid.*, p. vi.

One would no doubt have theorized that these American and Canadian rules of professional responsibility for lawyers developed to meet one very important purpose—the protection of the public interest. That is to say, due to the nature of the relationship between lawyers and clients, certain standards of conduct must necessarily be met in order to ensure potential harm to clients would be eliminated or, at least, significantly reduced. Yet, the history of professional responsibility rules suggests that the protection of the public interest was not an important purpose at all. The real purpose was protection of traditional professional values that were being threatened by “changed and changing conditions”. Auerbach suggests that ethical rules were part of “a crusade for professional purification” by “lawyers who clung to older values”. He also asserts “the Canons reflected and reinforced an increasingly stratified profession . . . The Canons represented a counter-revolutionary thrust within the legal profession . . . The Canons of Ethics measured the depth of elite discomfort in an urban industrial age”.³² For sceptics, the history of the rules of professional responsibility for lawyers at least shows there was a formidable tension between protection of the public interest and protection of the profession’s interest.

Against this background,³³ the application of rules of professional responsibility to the lawyer as mediator may be examined. The following analysis is not intended to be exhaustive. Rather, it is intended to be illustrative of the approach of the legal profession to the lawyer as mediator. The analysis can be divided into two parts, the old rules and the new rules.

B. *The Old Rules*

It was not surprising that in 1908 in the United States and in 1920 in Canada mediation was not uppermost in the minds of the framers of the original canons of ethics. However, this has not stopped the legal profession in the United States from simply imposing the old rules of professional conduct on the new lawyer as mediator. As yet, there does not appear to be any similar express regulation in Canada by the use of the “old rules”. However, the American experience will probably foreshadow future Canadian developments.

The rule that has been of the greatest significance to the lawyer as mediator is that concerning conflict of duty and interest. Both the original United States and Canadian Codes contained provisions dealing with conflict of interest. While the wording has changed over time, the rule is perhaps best aptly summarized in the present Canadian Bar Association Code:³⁴

³² J.S. Auerbach, *op. cit.*, footnote 2, pp. 40, 51, 52.

³³ For a more detailed history see: H.S. Drinker, *Legal Ethics* (1953); Auerbach, *ibid.*; Lieberman, *op. cit.*, footnote 21; M. Orkin, *Legal Ethics* (1957).

³⁴ *Op. cit.*, footnote 30, p. 16.

The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, he should not act or continue to act in a matter when there is or there is likely to be a conflicting interest. A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interests of a client or prospective client.

An amendment to conflict of interest rules in 1969 in the United States resulted in a brief reference to the lawyer as mediator.³⁵

A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

But it was clear the mediation process was not seriously addressed.

The application of these "old rules" takes two forms, prohibition on mediation and restrictions on mediation.³⁶ First, certain rulings of state ethics committees in Minnesota, New Hampshire, Washington and Wisconsin have virtually prohibited lawyers serving as family mediators. The reasoning given in the Wisconsin opinion is illustrative:³⁷

The proposed agreement asks too much of the lawyer. It asks him to serve as a legal adviser for each of the parties as well as ultimately to resolve the dispute to the best interest of each party. The Committee does not believe an attorney can serve as legal counsel for both parties in the mediation process and at the same time give both parties the representation each will expect. The proposed mediation agreement places the lawyer in an unresolvable conflict position. The mediation agreement is therefore improper.

Second, the application of the "old rules" has resulted in the imposition of restrictions. Ethics committees in Boston, Connecticut, Maryland, New York City, Oregon and Virginia have unenthusiastically allowed mediation by lawyers, but under very restrictive controls. The exact form of restriction differs from state to state. However, the 1981 opinion of the New York City Bar Association Committee on Professional and Judicial Ethics³⁸ was representative of the legal profession's concerns. The Committee decided that the Code "does not impose a per se bar to lawyers participating in divorce mediation activities", but "the application of labels such as 'mediation' or 'impartial' advice does not

³⁵ Code of Professional Responsibility, 1969, EC5-20. The Canadian equivalent contained in the commentary to the CBA rule on impartiality and conflict of interest referred to a lawyer arbitrating or settling a dispute between two or more clients or former clients who wish to submit the dispute to him.

³⁶ For a summary of recent ethics opinions, see Linda J. Silberman, *Professional Responsibility Problems of Divorce Mediation* (1981), 7 Fam. L. Rep. 4001.

³⁷ Olavi Maru, 1980 Supplement to the Digest of Bar Association Ethics Opinions (1982), p. 597

³⁸ New York City Bar Association Committee on Professional and Judicial Ethics, Opinion No. 80-23 (1981), 7 Fam. L. Rep. 3097.

satisfy the Code's concern for the administration of justice, the dangers inherent in the reliance of laymen with differing interests on the legal advice of a single lawyer, and the appearance of impropriety attendant on such situations". Accordingly, the Committee required the lawyer as mediator to take "certain precautions" to "assure that the parties fully understand the lawyer's limited role and all the risks involved and to minimize the danger of subsequent charges that the lawyer favored the interests of one party to the detriment of the other".³⁹

The Committee therefore imposed a threshold condition:⁴⁰

The lawyer may not participate in the divorce mediation process where it appears that the issues between the parties are of such complexity or difficulty that the parties cannot prudently reach a resolution without the advice of separate and independent legal counsel.

If the threshold is crossed, a lawyer could act as mediator provided the following seven rules were observed:⁴¹

- (1) The lawyer must clearly advise the parties that the lawyer's role is limited, that the lawyer represents neither party and that they should not look to the lawyer to protect individual interests or to keep confidences from one another.
- (2) The lawyer must clearly explain the risks of proceeding without separate counsel and the parties understand the risks and consent to proceed.
- (3) The lawyer may only participate in mediation activities permissible to lay mediators which must not require the exercise of professional legal judgment.
- (4) Impartial legal advice may be given and an agreement may be reduced to writing only where the lawyer fully explains all pertinent alternatives and consequences of choosing the agreed-upon resolution.
- (5) Legal advice may only be given to both parties together.
- (6) The lawyer must advise the parties of the advantages of seeking independent legal advice before executing any agreement.
- (7) The lawyer may not represent either of the parties in any subsequent legal proceeding related to the divorce.

A short explanation of condition 3 is necessary. It is connected to, but appears to extend, the threshold condition. The Committee indicates a lawyer would not be exercising professional legal judgment, and would therefore be able to be a mediator, when "for example, a lawyer is seeking to bring about a compromise or find a common ground for the division of

³⁹ *Ibid.*, pp. 3097.

⁴⁰ *Ibid.*, pp. 3099.

⁴¹ *Ibid.*, pp. 3099-3100.

articles of personal property. Such typical mediation activities can be performed by non-lawyers and we cannot conclude that the Code (which permits lawyers to serve as mediators) intended to bar lawyers from performing the same activities".⁴²

C. *The New Rules*

The difficulties in applying old rules to new situations has not gone unnoticed. In both the United States and Canada, the legal profession has been instrumental in designing new rules of professional responsibility for lawyers as mediators. Again, it is not necessary, and probably very difficult, to survey all the new rules. Rather, an examination of the major developments in this area will provide a focus on the approach of the legal profession. The major developments to be briefly described will be the American Bar Association Model Rules of Professional Conduct (Kutak Commission); Standards of Practice for Lawyer Mediators in Family Disputes, Family Law Section of the American Bar Association; The Association of Family and Conciliation Courts Model Standards for Practice: Family and Divorce Mediation; The Conduct Code in Mediation of the Ontario Association for Family Mediation; and the British Columbia Family Law Mediation Ruling.

(1) *ABA Model Rules of Professional Conduct*⁴³

Unlike the 1969 Code, the new Model Rules of Professional Conduct provide much more specific regulation of the lawyer as mediator. Rule 2.2⁴⁴ permits a lawyer to act as intermediary between clients provided:

- (1) the lawyer explains the advantages and risks associated with common representation and obtains each client's consent to the common representation;
- (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to interests of any of the clients if the contemplated resolution is unsuccessful; and
- (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

If any of these conditions is not satisfied or if any client requests, the lawyer must withdraw as intermediary. On withdrawal the lawyer is prohibited from representing any of the clients unless it is clearly compatible with the lawyer's responsibilities to the other client.

⁴² *Ibid.*, p.3099.

⁴³ *Loc. cit.*, footnote 23.

⁴⁴ *Ibid.*, p. 19.

Rule 2.2 also requires the lawyer to provide full explanations on all matters to the clients so that they can make adequately informed decisions.

A comment following Rule 2.2 provides an interpretation of when intermediation is permissible:⁴⁵

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

(2) *Standards of Practice for Lawyer Mediators in Family Disputes*

In 1983 the Family Law Section of the American Bar Association adopted in principle six standards of practice for family mediators,⁴⁶ and these were approved in slightly modified form by the American Bar Association in August 1984.⁴⁷

- I. The mediator has a duty to define and describe the process of mediation and its cost before the parties reach an agreement to mediate.
- II. The mediator shall not voluntarily disclose any information obtained through the mediation process without the prior consent of both participants.
- III. The mediator has a duty to be impartial.
- IV. The mediator has a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge.
- V. The mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm one or more of the participants.
- VI. The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement.

Both the preamble to the standards and the comments on them sound cautionary notes. The short preamble concludes:⁴⁸

While family mediation may be viewed as an alternate means of conflict resolution, it is not a substitute for the benefit of independent legal advice.

⁴⁵ *Ibid.*

⁴⁶ Standards of Practice For Family Mediators (1984), 17 Fam. L.Q. 455-460.

⁴⁷ Standards of Practice for Lawyer Mediators in Family Disputes (1984), 18 Fam. L. Q. 363-368.

⁴⁸ *Ibid.*, at p. 363.

The specific comments take up the same point.⁴⁹ In defining and describing the mediation process (Standard I), the mediator is required to inform the participants of the need to employ independent legal counsel for advice throughout the mediation process. This requirement for independent legal advice is also an integral part of Standards IV and, obviously, VI. If the participants choose to proceed without independent legal counsel, "the mediator shall warn them of any risk involved in not being represented, including where appropriate, the possibility that the agreement they submit to a court may be rejected as unreasonable in light of both parties' legal rights or may not be binding on them",⁵⁰ and "they should be discouraged from signing any agreement which has not been so reviewed".⁵¹ In meeting the duty to be impartial (Standard III) the mediator is prohibited from undertaking mediation involving a former client and is also prohibited from representing either party after the mediation process in any legal matters.

(3) *AFCC Model Standards for Practice: Family and Divorce Mediation*

Another major source of rules that will be used to regulate lawyers as mediators are the Model Standards for Practice: Family and Divorce Mediation. The Model Standards arose out of a symposium organized by the Mediation Committee of the Association of Family and Conciliation Courts.⁵² These Model Standards, "intended to assist and guide public and private, voluntary and mandatory mediation",⁵³ are made up of thirteen guidelines dealing with initiating the process, impartiality and neutrality of the mediator, costs and fees, confidentiality and exchange of information, full disclosure of information, self determination, professional advice matters, the parties' ability to negotiate, concluding the mediation, training and education, advertising, relationship with other professionals and the advancement of mediation.

Of particular importance to the lawyer are standards dealing with impartiality and independent legal advice. First, the Model Standards require the mediator to maintain impartiality towards all participants. However the standards go on to state that "a mediator's actual or perceived impartiality may be compromised by social or professional relationships with one of the participants at any point in time".⁵⁴ Accordingly the standards provide two rules to deal with past and future relationships. First, "the mediator shall not proceed if previous legal or counseling

⁴⁹ *Ibid.*, at pp. 363-368.

⁵⁰ *Ibid.*, at p. 368.

⁵¹ *Ibid.*

⁵² Denver, Colorado, May 22-23, 1984. The Standards approved at the symposium were adopted by the A.F.C.C. at its mid-winter meeting in December 1984.

⁵³ Preamble to the Model Standards.

⁵⁴ Rule II, B(1).

services have been provided to one of the participants''; second, ''the mediator should be aware that post-mediation professional or social relationships may compromise the mediators continued availability as a neutral third party''.⁵⁵ While the former rule is clear, the second rule appears to strongly discourage future relationships with the parties involved in the mediation.

The Model Standards, in dealing with professional advice, make a clear distinction between independent expert advice and independent legal advice. While the mediator is required to ''encourage and assist the participants to obtain independent expert information and advice when such information is needed'',⁵⁶ a separate provision is established for independent legal advice. This provision states:⁵⁷

When the mediation may affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel prior to resolving the issues and in conjunction with formalizing an agreement.

(4) *Conduct Code in Mediation*

The Ontario Association for Family Mediation was responsible for preparing a draft conduct code for family mediators in 1984.⁵⁸ It is the first of its kind in Canada. While these proposed regulations do not come directly from the legal profession, the Code can be treated as the legal profession's regulation of the lawyer as mediator for two reasons. First, the input of lawyers into the Code was not insubstantial. Second, and more importantly, it appears the absence of direct legal profession regulation implies tacit approval of the Code which is intended to govern lawyers as mediators.

The Ontario Code, which has some similarities to the American Bar Association Standards of Practice for Lawyer Mediators in Family Disputes, has rules dealing with mediator competence, a duty of confidentiality, mediator impartiality, the agreement to mediate, the availability of information and advice, independent legal advice, a duty to ensure no harm or prejudice to participants, public communications, the mediator's duty to report breaches of the Code and potential problems in mediation.

Two aspects of these rules are illuminating. First, in order to ensure impartiality, the Code prohibits a mediator from undertaking mediation ''if the mediator is a lawyer who has represented one of the parties beforehand''.⁵⁹ Second, in dealing with independent legal advice, the Code imposes clear requirements. The mediator must advise clients ''of

⁵⁵ Rule II, B(1)(2).

⁵⁶ Rule VII, A.

⁵⁷ Rule VII, C.

⁵⁸ Published in (1984), 2 O.A.F.M. Newsletter.

⁵⁹ *Ibid.*, Rule 5(c).

the availability of independent legal advice for each spouse” and “the advisability of obtaining it from the outset of the mediation”.⁶⁰ This obligation exists even if the mediator is a lawyer. Language virtually identical to the Standards of Practice for Lawyer Mediators in Family Disputes forces mediators to warn participants of “the risk involved in not being represented”, to warn that they “may not be making fully informed choices in light of their respective legal rights”, and to warn of “the possibility that the agreement they reach may not be enforced by a court”.⁶¹ The Code similarly imposes an obligation on the mediator to discourage the parties from signing any agreement which has not been reviewed by independent counsel.

(5) *British Columbia Family Law Mediation Ruling*

The Law Society of British Columbia has been the only legal governing body in Canada to formulate express rules for lawyers as mediators. The Professional Standards Committee of the Society noted:⁶²

... matrimonial mediation appeared to be inevitable and was even now being carried on by non-lawyers and would become the exclusive province of unqualified and possibly unethical individuals if the Law Society abdicated responsibility for taking some action in this area.

The Committee accordingly recommended a draft ruling on Family Law Mediation to be added to the Professional Conduct Handbook and this was approved, with revisions, by the Benchers of the Law Society on July 29, 1984.

The ruling has four key components.⁶³

- (1) **Qualifications:** The ruling prohibits a lawyer from acting as a mediator unless he or she has been engaged in the full time practice of law for at least three years (or part time equivalent) or is given exemption from this practice requirement because of special qualifications or experience. Whichever way this prohibition is overcome, the lawyer must successfully complete a course of study in family law mediation to be offered by the Law Society.
- (2) **Disqualifications:** The ruling prohibits a lawyer from acting as a family law mediator if the lawyer, or a partner, associate or employee of the lawyer, has represented either party in relation

⁶⁰ *Ibid.*, Rule 8.

⁶¹ *Ibid.*, Rule 7(b).

⁶² From a memorandum dated November 9, 1983 from the Chairman of the Professional Standards Committee to the Family Law Subsection — Canadian Bar Association and interested members of the Family Law Bar.

⁶³ Professional Conduct Handbook of the Law Society of British Columbia, Ruling G12.

to their matrimonial affairs or any matter which may reasonably be expected to become an issue in the mediation. A lawyer who has acted as a mediator, or a partner, associate or employee of the lawyer, cannot represent one spouse against the other spouse after the mediation process in any matter. There is a similar restriction against representing either party after the mediation process where disclosure or use of confidential information given in the course of mediation might be required.

- (3) **Mediator's Duties:** The ruling requires that the lawyer who acts as a family law mediator must ensure that "he or she actively encourages each spouse to obtain independent legal advice before executing" any agreement reached by the parties.
- (4) **Written Agreement:** The ruling also requires the mediator and the spouses to enter into a written agreement before mediation commences. The agreement must include a provision that the lawyer is not acting as legal counsel for either party throughout the mediation process.

III. *Professional Responsibility Problems or Profession Problems?*

An analysis of these various rules leads, it is suggested, to a disturbing conclusion. Regulation of the type so far promulgated will restrict lawyers from practising mediation, will dampen the demand for lawyers as mediators and, most strikingly, will alter the nature of the mediation process. In fact, professional responsibility regulation will tend to trivialize the impact of the mediation process. This unsettling conclusion is not based on empirical data. None is yet available. Rather it is based on an analysis of the regulations from two perspectives, the consequences of regulation and the motivation for the regulation.

A. *Consequences of Professional Responsibility Regulation*

Given the variety of sources of regulation for the lawyer as mediator, identifying the consequences of regulation appears difficult. However, two assumptions can be made that facilitate this process. First, the simple application of old codes of ethics will undoubtedly not be the final form of regulation. Even if old rules are applied it is likely the result will be the adoption of new rules such as those articulated in the New York City Bar decision.⁶⁴ Second, while many differences exist among the "new rules", there are either significant common denominators or critically significant rules among them all. By examining these rules, the major consequences of regulation can be isolated.

⁶⁴ *Supra*, footnote 38.

Having made these assumptions, there appear to be four classes of professional responsibility rules that will have the most important consequences for the lawyer as mediator. They are (1) absolute restrictions, (2) training, (3) independent legal advice, and (4) former and future clients.

(1) *Absolute Restrictions*

An ethical rule that absolutely restricts lawyers from practising mediation has grave consequences for the mediation process. Yet absolute restrictions on lawyers acting as mediators is a major theme of many rules of professional conduct. And this absolute restriction is not simply the prohibition which arose when a number of state ethics committees struggled applying old rules.⁶⁵ The new absolute restriction rules are much more subtle. The New York City Bar Association Committee on Professional and Judicial Ethics absolutely restricted lawyers from acting as mediators when the lawyer was asked to exercise "professional legal judgment". The Committee stated:⁶⁶

... in some circumstances, the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolutions . . . make it virtually impossible to achieve a just result.

The Kutak Commission sent a similar message for interpreting the "intermediary" rule. It created the absolute restriction when the parties were "contemplating contentious negotiations" or where there were "definite antagonisms" between the parties.⁶⁷

If the two rules were combined, one would wonder whether a lawyer could ever act as a mediator. But even taken separately, the restrictions seem enormous. In a family or other dispute, how many cases will exist where there is no contemplation of contentious negotiations, no definite antagonisms, or no opportunity for a lawyer to exercise professional legal judgment on a legal issue? Either rule amounts to a virtual bar on the lawyer acting as mediator.⁶⁸

There are three other reasons that suggest the supply of lawyers as mediators and the demand for their services could be even further restricted by this type of "ethical" rule. First, the nature of the dispute that is not excluded by this type of rule is not likely to attract a legally trained mediator. "Such typical mediation activities can be performed by non-

⁶⁵ *Supra*, the text at footnotes 36,37.

⁶⁶ *Loc. cit.*, footnote 38, at p. 3099.

⁶⁷ *Loc. cit.*, footnote 23, at p. 19.

⁶⁸ Cf. L.L. Loeb, Introduction to the Standards of Practice for Family Mediators (1984), 17 Fam. L.Q. 451, at p. 452: "... within the spectrum of divorce...actions, there is a narrow band of cases where a qualified mediator may be efficacious". (Emphasis added). Loeb was the Chairman of the Mediation and Arbitration Committee, Family Law Section, ABA.

lawyers . . . ”.⁶⁹ These disputes may be regarded by the legal profession as “junk cases” — “matters that fail to use their legal skills and may even resist legal resolution, that appear politically, economically or socially insignificant, or that have become highly repetitive”.⁷⁰ Second, whether a lawyer may be interested in the work, the parties to a non-contentious, non-antagonistic, non-legal dispute would be unlikely to retain a mediator who was a lawyer. Third, even if one concludes that this rule leaves some leeway to lawyers and that lawyers and the parties to these disputes would be attracted to each other, a final hurdle arises. The lawyer must still make a distinction between restricted and non-restricted disputes. This requires answers to very difficult questions. Is there too much contention? Is the relationship too antagonistic? Do the issues require professional legal judgment? By classifying this part of the mediation process in this type of language as an ethical question and by imposing sanctions for ethically wrong answers, a significant disincentive to lawyer involvement is created. Rather than risk the potential stigma of disciplinary or other proceedings by answering these conundrums incorrectly, there would be a significant pressure to leave these disputes in the adversarial mainstream.

(2) *Training*

If the manner in which the legal profession regulates the lawyer as mediator is critical to the success or failure of mediation, the training of the mediator must also be regarded as similarly critical. The mediator's acquisition of the skills necessary to manage the mediation process to ensure mediator neutrality, individual autonomy and mutually fair agreements is obviously important. Accordingly, rules of professional responsibility that regulate the manner in which lawyers receive mediation training require special attention.

No one would disagree with the principle that anyone acting as a mediator is obliged to ensure that he or she is fully qualified to deal with the specific issues involved. The inclusion of such a general principle of competence in a professional conduct code for lawyers as mediators does not present potentially negative consequences for the mediation process. However, one jurisdiction has particularized the necessity for mediation training into a narrow rule which has serious implications.

The British Columbia Family Law Mediation Ruling has two rules relating to training.⁷¹ First, before a lawyer may act as a family mediator, the lawyer must attend and complete a course approved by a Professional Standards Committee. Second, a lawyer wishing to act as a mediator

⁶⁹ New York City Bar Association Committee on Professional and Judicial Ethics, Opinion, *loc. cit.*, footnote 38, at p. 3099.

⁷⁰ Abel, *op. cit.*, footnote 3, p. 302.

⁷¹ *Op. cit.*, footnote 63, Ruling G12.3.

must have practised law for at least three years, or have received exemption from this practice requirement because of special qualifications or experience.

The latter rule may have deleterious consequences. It is highly likely that a major source of lawyer-mediators will be new lawyers who have recently graduated from law school with some exposure to the mediation process as an alternative form of dispute resolution. But these lawyers will be prohibited from practising mediation for at least three years. A lawyer restricted to traditional practice for that period of time could find it extremely difficult to develop a significant mediation practice for a variety of obvious reasons. Skills may have been lost, client and firm responsibilities may have been created, economic and social reliances may have developed. In short, after a lengthy period of traditional lawyering, the need or desire to practice mediation may well have been supplanted by traditional lawyering concerns. A major supply of lawyers as mediators could be virtually extinguished.

There is an escape clause in the ruling that theoretically might prevent this result. A new lawyer who has special qualifications or experience can obtain exemption from the practice requirement. But it is unlikely that this provision will remedy the problem. If the escape clause was intended to permit accreditation of new lawyers who were fully qualified to act as family mediators by reason of prior training or mediation experience there would be no reason to require such lawyers to complete a further course of study. Instead, it is likely the escape clause is simply a practice replacement. The major and important qualification criterion, listed first in the rules, is practice. The special qualifications or experience needed to gain exemption from this criterion may not be assessed on the basis of competency but on the basis of similarity to three years of traditional legal practice. It is a rule that mandates practice, legal or equivalent, as critical to competency. While a new lawyer's qualifications to interview and counsel clients in family law without practice is not challenged on admission to the bar, a new lawyer's qualifications to act as a family mediator could well be challenged even if an approved course of study in family law mediation has been completed. While some new lawyers may escape, it is likely most will not.

(3) *Independent Legal Advice*

A recurrent rule in virtually all of the "new rules" is the requirement that the parties seek independent legal advice. While the rules do not expressly prohibit lawyer mediation if the parties do not obtain independent legal advice, they virtually assure this occurs. The British Columbia rules require a lawyer to "actively encourage each spouse to obtain independent legal advice".⁷² If the parties choose to proceed with-

⁷² *Ibid.*, Ruling G12.5.

out independent counsel, the Standards of Practice for Lawyer Mediators in Family Disputes and the Ontario Code require the mediator to warn of the risk involved in not being represented including "the possibility that any agreement they submit to a court may be rejected as unreasonable".⁷³ In view of this strongly worded ethical obligation to urge independent legal advice at every step in the mediation process, it is not difficult to predict that a result of this rule will be that the parties will get independent legal advice, and that may have at least two adverse consequences.

In many disputes it will be necessary for the parties to have and understand legal information in order to reach a decision that is mutually fair. When the neutral mediator is a lawyer, he or she will be in a position to provide this legal information. At one level, an ethical rule forcing the mediator to "actively encourage" independent legal advice is going to increase the time and costs involved in resolving the dispute. Since time and cost savings have been viewed as important advantages of the mediation process,⁷⁴ this rule will dampen the demand for the mediation services of a lawyer. The extent of the impact of this extra time and cost on demand is difficult to predict, but it should not be assumed to be minimal. The time and cost involved for two extra lawyers to review competently and independently all the circumstances surrounding the dispute, including relevant documents, to identify the legal issues involved, to review the applicable statutory and case law, to counsel their respective clients on the possible alternatives available, to review the agreement reached in the mediation process and to counsel on the advantages and disadvantages of that agreement compared with other available alternatives, could be substantial. This second opinion, duplicating the process of supplying legal information by the lawyer as mediator, could well eliminate all time and cost advantages attributable to the mediation process.

At another level, this rule could well have deleterious effects on the quality of the mediation. The requirement that the parties be encouraged to seek independent legal advice introduces into the mediation process a number of factors that conflict with its essential elements. First, the rule challenges, not the competency of the lawyer to give accurate legal information, but rather the ability of the lawyer to do this impartially. No studies suggest this skill is impossible, or is unlikely to develop with appropriate training. That is not to say that freedom from bias or favouritism is easily achieved. Yet this rule, at best, ignores the mediator's neutrality and, at worst, seriously undermines it. With respect to giving legal information, the rule sends a clear message to the parties, and indeed even the mediator, that impartiality is impossible. The result can be that trust in the mediator, essential to the mediation process and developed in large part due to a perception of mediator neutrality, will be

⁷³ *Supra*, footnotes 52,58.

⁷⁴ See, for example, Pearson, Thoenes, *loc. cit.*, footnote 6, at p. 499.

jeopardized. Trust in the mediator will be replaced by trust in the independent legal advice.

There can be a second adverse effect on the quality of the mediation process. Two of the features that distinguish the mediation process from the adversarial process are that the parties take responsibility for decisions and agreements, and that the parties determine what they believe is a mutually fair agreement. The opposite is the case in the adversarial process. The parties generally delegate much responsibility to their legal advocates, and a judge or other decision-maker determines what is just. The independent legal advice rule sabotages the distinguishing features of the mediation process and, in fact, replaces them with elements of the adversarial process. Instead of the relationship between the parties being important, the relationship between each party and his or her lawyer becomes paramount. Instead of the parties assuming responsibility for decisions and agreements, the independent legal representatives will assume much responsibility. Instead of the parties determining what is mutually fair, the lawyers and the law will be important decision-makers. In fact, the emphasis on independent legal advice will create a process virtually analagous to the adversarial system. While the parties may still negotiate with the help of a third party, the qualities of that process will be clearly changed.

This result occurs because independent legal advice is not just a "second opinion" to be sought at the instance of the parties when either or both decide such information is necessary to confirm, reinforce or supplement the information provided by the lawyer as mediator. Independent legal advice is a strictly worded rule of professional conduct. It is, in the eyes of the regulators, the watchdog of a suspect process.

(4) *Former and Future Clients*

Similar in popularity to the independent legal advice provisions are two rules that prohibit lawyers from acting as mediators for certain parties with whom the lawyer has had a past relationship, or with whom the lawyer could have a future relationship.

First, there has been virtually unanimous adoption of a rule that a lawyer may not act as mediator if the lawyer has represented one of the parties beforehand.⁷⁵ This restriction is applicable even in cases where the subject matter of the mediation is completely unrelated to the past representation. The Standards of Practice for Lawyer Mediators in Family Disputes are illustrative. They simply state:⁷⁶

⁷⁵ Standards of Practice for Lawyer Mediators in Family Disputes, *loc. cit.*, footnote 47, Rule III; A.F.C.C. Model Standards, *loc. cit.*, footnote 52, Rule II, B(1); Ontario Association For Family Mediation Draft Code, *loc. cit.*, footnote 58, Rule 5(c); Law Society of British Columbia, Ruling G.12.4, *op. cit.*, footnote 63.

⁷⁶ *Ibid.*

In the event the mediator has represented one of the parties beforehand, the mediator shall not undertake the mediation.

The extent of the impact of this rule is difficult to predict. It seems safe to assume, however, that a large percentage of the people interested in using mediation to resolve their disputes and needing a lawyer as mediator would seek a familiar lawyer or familiar firm. While there may be some reluctance to approach a lawyer to act as mediator where only one of the parties is a former client, this circumstance does not automatically create a perception of partiality, particularly when the previous representation was in an unrelated area. Accordingly, if former clients would initially and continually represent a significant part of the demand, this rule effectively eliminates that demand, and, correspondingly, affects the supply of lawyers as mediators.

The second rule under this heading may have even more dramatic consequences. This rule prohibits a lawyer, who has acted as a mediator for parties to a dispute, from representing either party after the mediation process. Some rules restrict this post-mediation solicitor-client relationship to any legal matters.⁷⁷ Other rules apply the restriction only to legal matters arising out of the issues discussed in the mediation.⁷⁸

While this rule does not directly restrict lawyers from mediating disputes, it may have two important indirect effects on supply. First, a lawyer who is prohibited from representing either party after the mediation process, in respect of legal issues arising in the mediation, would undoubtedly still undertake the mediation. While there are costs involved in giving up adversarial representation for one party if mediation fails, these costs appear significantly outweighed by the advantages to be gained in establishing the neutrality of the mediator. But a rule that prohibits post-mediation representation in unrelated legal matters imposes much more significant costs. The parties involved in the mediation are foreclosed as clients forever. Whether this wider rule is of assistance in establishing mediator neutrality is extremely questionable. The costs simply appear to outweigh any benefits. Accordingly, a lawyer could well face great pressure not to act as a mediator.

The second effect of this rule is related to the first. The pressure to avoid this involuntary estrangement of clients will exist whether the lawyer is a sole practitioner or a partner or associate in a law firm. However, it is unlikely the pressure will be overcome in situations where the lawyer is a partner, associate or employee of a law firm. The economics and

⁷⁷ Standards of Practice for Lawyer Mediators, *ibid.*, Rule III; Law Society of British Columbia, Ruling G12.4(g), *op. cit.*, footnote 63. Restriction applies to representation of either spouse against the other spouse in any legal matter; A.F.C.C. Model Standards, *loc. cit.*, footnote 52, Rule II.B(2). The A.F.C.C. rule is not an absolute restriction but a strong warning regarding any post-mediation professional relationships.

⁷⁸ Ontario Association for Mediation Draft Code, *loc. cit.*, footnote 58, Rule 5(d).

politics of law firms create extra complications, particularly in British Columbia where partners, associates or employees of the lawyer-mediator are subject to the restriction on future representation. The consequence of the rule will be that the supply of lawyers as mediators will come primarily from sole practitioners. This will have unfortunate consequences. It will reduce drastically the pool of potential mediators,⁷⁹ and will impose an obligation to develop a mediation practice on a section of the legal profession that may not, for economic reasons, be able to fulfill the obligation.⁸⁰

B. *Motivation Behind Professional Responsibility Regulation*

Two responses might be made to the argument that the consequences of the regulation of the lawyer as mediator by the legal profession will tend to trivialize the effect of mediation. First, such a result is speculative. Empirical data may prove otherwise. Second, if the described consequences do occur, they are undesirable but necessary evils. No reply can yet be made to the first response. However the accuracy of the second response may be analysed by investigating the motivation behind regulation.

The reasons given for the need for regulation sound suspiciously similar to reasons given for the initial introduction of Canons of Ethics. For example, in introducing standards of practice for family mediators, the chairman of the Mediation and Arbitration Committee, Family Law Section, American Bar Association, stated:⁸¹

... to protect the public and to preserve the concept of mediation as may be appropriate in that narrow band of divorce actions, the need for guidelines in divorce mediation becomes manifest.

Similarly the Professional Standards Committee of the Law Society of British Columbia expressed the concern that mediation "would become the exclusive province of unqualified and possibly unethical individuals if the Law Society abdicated responsibility for taking some action".⁸²

The New York City Bar Association Committee on Professional and Judicial Ethics created guidelines to meet "concerns for the administration of justice, the dangers inherent in the reliance of laymen with differ-

⁷⁹ A 1979 study in Canada found that only 17% of all lawyers are in sole practice; see Canadian Bar Association, *Survey of Canadian Lawyers* (1979).

⁸⁰ A survey of income from law practice in Canada for 1979 and 1981 found the median income of sole practitioners had not increased from 1979 to 1981 despite an increase of 24% in the consumer price index. In addition, the survey confirmed there was a direct correlation between the size of the law firm and the income of partners. The median income in 1981 of partners in law firms of forty or more lawyers was 430% greater than a sole practitioner's income! See the Canadian Bar Association, *Economic Survey of Canadian Law Firms* (1982), p. 14.

⁸¹ Loeb, *loc. cit.*, footnote 68, at p. 452.

⁸² *Loc. cit.*, footnote 62.

ing interests in the legal advice of a single lawyer and the appearance of impropriety attendant on such situations".⁸³

This type of reasoning is suspect, viewed from any one of three perspectives. From each perspective separately, the conclusion may not be clear. However, cumulatively, the end result becomes much easier to see.

First, and with necessary apologies to historians, history may be repeating itself. There appears to be a significant correlation between the circumstances surrounding the present regulation of the lawyer as mediator and the regulation of lawyers by Canons of Ethics in 1908 and 1920. In both cases, the legal profession was facing a transformation. In both cases there was concern with dramatic increase in numbers. The "shyster, the barratrously inclined, the ambulance chaser" have been replaced in the eyes of the legal profession with "unqualified and possibly unethical individuals"⁸⁴ interested in mediation. The conflict, as it has been seen in the United States, between traditional professional values and the values of the "Jewish and Catholic new immigrant lawyers of lower class origin [who] were concentrated among the urban solo practitioner"⁸⁵ has been replaced by a conflict between traditional professional values and the non-traditional values expressed in the mediation process. The need that existed for a "counter revolutionary thrust within the legal profession" in the early twentieth century may be surfacing again as a result of the development of the mediation process and the increasing interest of lawyers in participating in this process. But, just as Riddell J.A. argued in 1920 against the need for a written Code of Ethics,⁸⁶ one might ask today if any special rules are needed to control the lawyer as mediator. If it is thought such rules are needed, are the rules in place or proposed desirable ones? That question leads us to the second and third perspectives.

The second perspective turns on the contrast between the mediation and adversarial processes. Mediation emphasizes such values as mutuality, community, humanism, communication, individual responsibility and trust. The adversarial process separates the parties, subsumes the parties' responsibilities, imposes a third party decision-maker, emphasizes legal rules as guides to fairness and presents the lawyer as powerful and dominant. As discussed, the proposed regulation of the lawyer as mediator either severely restricts, or alters the quality of, the mediation process. In either case the values behind the mediation process fade into insignificance.

With this fading comes a forceful resurgence of the role of the adversarial process in dispute resolution. When the new rules effectively

⁸³ *Loc. cit.*, footnote 38, at p. 3097.

⁸⁴ See Tucker, *op. cit.*, footnote 17; Law Society of British Columbia, Professional Standards Committee, *op. cit.*, footnote 62.

⁸⁵ Auerbach, *op. cit.*, footnote 2, p. 50.

⁸⁶ *Loc. cit.*, footnote 25.

restrict lawyers from mediating disputes by prohibiting professional judgment to be exercised, contentious relationships to be dealt with and young lawyers to participate, alternative dispute resolution becomes the adversarial process. When the new rules affect demand by increasing costs and time and by eliminating former clients, the alternative becomes the adversarial process. When the new rules effectively change the process of lawyers mediating disputes by de-emphasizing the responsibility of the parties and encouraging the dominance and power of the independent lawyer's advice, mediation looks like the adversarial process. These consequences that the new rules reflect, the assertion of traditional values of the adversarial system and the diminished role for the non-traditional values of the mediation process, must also reflect the motives behind this professional conduct regulation. Can it be said that such results were unforeseen or unintended?

From the third perspective one might concede that the regulation of the lawyer as mediator is indeed a reassertion of traditional values; but necessarily so, if the public interest is to be protected. Is that the case? An examination of each of the major classes of rules discussed suggests that these rules are, in fact, unnecessary.

A rule prohibiting lawyers from mediating disputes involving professional legal judgment or contentious relationships must be based on the following arguments. First, professional legal judgment "will be relied upon by parties who may lack sophistication to recognize the significance of the legal issues involved and the impact they may have on their individual interests".⁸⁷ Second, professional legal judgment requires the lawyer to make "difficult choices between the interests of the parties in giving legal advice"⁸⁸ and this cannot be done impartially. Third, with the presence of contentiousness and antagonism, the "risk or failure is so great that intermediation is plainly impossible".⁸⁹

All of these arguments flow out of the principle that not all disputes are mediatable. No one would argue that mediation is a panacea for all disputes. But the rule is not an appropriate test for determining the suitability of mediation. It takes a critical, continuous component of the mediation process and transforms it into a *threshold* question. The rule states a lawyer cannot undertake mediation if certain factors do or may exist. The rule misconstrues the process by which the appropriateness of mediation is decided upon. The decision not to mediate or to stop the mediation is an ongoing part of the mediation process. The decision is the cornerstone of individual responsibility and mutual fairness in the process. To attempt to standardize this concept at all, particularly when it is

⁸⁷ *Loc. cit.*, footnote 38, at p. 3099.

⁸⁸ *Ibid.*

⁸⁹ From a comment to Rule 2.2 in the ABA Model Rules of Professional Conduct, *loc. cit.*, footnote 23.

done in an unclear and misleading way, is unnecessary and unwise. It would be similar to prohibiting lawyers from representing clients if there was a risk they could not help the clients.

The need for a rule that prohibits lawyers from acting as mediators unless they are qualified must be based on the principle of competency. The question of the education and training necessary for a person to act as a competent mediator and the corresponding dangers in providing services outside of a mediator's capabilities are probably the most important issues confronting both proponents and opponents of the mediation process. At this point in the development of mediation, a rule that attempts to codify educational or training requirements for mediators is probably premature.⁹⁰

However, a rule that prohibits a lawyer from practising mediation without having practised law for at least three years is more than premature. The rule is entirely suspect. It equates law practice with competent mediation practice. It does this despite the fact that no empirical data exists supporting a relationship between three years of practising law and the acquisition of mediation skills. The rule simply assumes that the substantial part of the mediator's training will come from practising law. While undoubtedly some skills acquired practising law will be used in the mediation process, it is wrong to treat law practice as an important source of these skills. There would be no instruction offered practising lawyers on these skills. Feedback to lawyers attempting to practise such skills would be extremely limited and of questionable usefulness. Assessing whether a lawyer had reached an appropriate standard would be based not on competence but on an arbitrary time period. In short, the suitability of law practice as a training vehicle for a person without the necessary skills lacks rationality and an empirical foundation.

Can the rule be supported on the assumption that experience in the practice of law is necessary for mediator competency? Experience may well play a role in competency.⁹¹ But the British Columbia rule lacks the rationality of specialization rules on which it appears modelled. Specialization rules found in some jurisdictions provide that substantial involvement in a particular area of law is the critical part of the standard for specialization in that same area of law.⁹²

The rules "encouraging" independent legal advice, prohibiting mediation for former clients and prohibiting representation of future clients can be dealt with together. The need for these rules is, in large part, based

⁹⁰ One of the major objectives of the recently formed Canadian association, Family Mediation Canada, is to work toward developing training models for family mediators.

⁹¹ However consider the fact that studies show the majority of liability claims against lawyers are made against lawyers with 7-12 years experience.

⁹² For a review of specialization developments see A. Esau, *Recent Developments in Specialization Regulation of the Legal Profession* (1981), 11 *Man. L.J.* 133.

on the argument that the neutrality of the mediator would be seriously undermined in the absence of these rules. Independent legal advice ensures that legal information provided by the mediator can be checked, not for accuracy or thoroughness, but for impartiality.⁹³ It also ensures there is no perception of individual representation by the mediator. Prohibiting mediation for former clients ensures that past professional relationships with one or both of the parties does not result in, or be perceived to result in, partiality. Preventing future solicitor-client relationships on matters unrelated to the mediation similarly ensures impartiality and a perception of impartiality. With these rules, the argument goes, the neutrality of the mediator is preserved.

This argument is based on the assumption that the lawyer as mediator, who does not follow these rules, can never be neutral. Such an assumption is unreasonable. A lawyer, who provides legal information and who indicates lawyers and other consultants are available to review matters if the parties so decide, can be a neutral mediator. A lawyer, who mediates a dispute involving a former client, who fully discloses the prior involvement to all other participants, who is satisfied no biases exist and who clearly indicates the mediation can be terminated if any perception of partiality arises, can be neutral. A lawyer can similarly deal with the question of future representation on matters outside the issues arising in the mediation in a manner that is impartial. There is no doubt that mediator neutrality could, in some cases, be more difficult to establish in the circumstances covered by these rules. However, it must be accepted that in most, if not all cases, it will be difficult for a mediator to establish and maintain neutrality, to ensure personal biases and beliefs do not intrude on the mediation process. Paternalistic rules based on an assumption the task is impossible are simply unnecessary.

There is another argument that can be made to support this paternalism. Even if neutrality is established by the mediator, it should also be seen to be established.⁹⁴ Concern with the appearance of partiality, which has nurtured these professional conduct rules, is, in fact, a concern with potential conflict of interest. The lawyer as mediator, who by definition is to help all parties to a dispute reach agreement, raises instinctively for the legal profession the conflict of interest spectre, particularly when the parties may be former or future clients.

⁹³ If the accuracy or thoroughness of legal information was being questioned, it would also be necessary to have a rule that every lawyer who gave legal information to clients would have to have its accuracy and thoroughness checked.

⁹⁴ In administrative law, the test for bias is divided into two branches, actual bias and a real likelihood of bias. The test in the latter category developed from the oft-quoted saying of Lord Hewart C.J. in *Rex v. Sussex Justices Ex parte McCarthy*, [1924] 1 K.B. 256 (K.B.D.): "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

It is not surprising that conflict of interest is an instinctive concern for the legal profession when regulating the lawyer as mediator. Canon 6 of the original American Bar Association Canons of Ethics strongly admonished the representation of conflicting interests because "even where all the parties agree, the appearance of a lawyer on both sides of the same controversy, particularly in cases of some notoriety, will often give an impression to the public which is most unfortunate for the reputation of the bar, and which of itself should be decisive".⁹⁵ This strict curtailment of conflict of interest situations has continued, both in the United States and Canada, to the present day. In addition to professional regulation, judicial decisions have applied the rule against partiality or bias to decision-makers exercising powers in disparate areas of the law,⁹⁶ although not without exception.⁹⁷

At bottom, this traditional concern with conflict of interest arose in the context of the adversarial process, in which a lawyer has a duty to advocate his or her clients' interests. Indeed that is why, in explaining the meaning of conflict of interest, the original American Bar Association Canon 6 stated that "a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose".⁹⁸ However, is there a need for the same

⁹⁵ Drinker, *op. cit.*, footnote 33, p. 105.

⁹⁶ Most decisions can be divided into three types of cases: (1) cases where there is an association between the decision maker and one of the parties, (2) cases where there is involvement by the decision maker in a preliminary part of the decision, and (3) cases where the decision maker expresses an attitude about the outcome. See, for example, *Convent of the Sacred Heart v. Armstrong's Point Association and Bulgin* (1961), 29 D.L.R. (2d) 373 (Man. C.A.) (A zoning decision of the Municipal Board of Manitoba was quashed because a member of the Board was also a co-owner of a residence in an area enhanced or protected by the decision.); *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 (The chairman of the NEB, who had participated in an industry study of the construction of a natural gas pipeline prior to his appointment to the NEB, was prohibited from hearing an application to construct such a pipeline.); *Regina v. McClevis Ex parte Robbins*, [1971] 1 O.R. 42 (Ont. H.C.) (A request for an adjournment in a criminal case resulted in the judge saying "I'll show somebody who is boss" "someone has some apologizing to do" "I will smarten up some people around here", which remarks resulted in an order prohibiting the judge from hearing the case.).

⁹⁷ Previous association or involvement by the decision-maker does not amount to a real likelihood of bias after the passage of an appropriate period, particularly where the past relationships did not deal with a matter of issue before the decision maker. Thus, in *Re Marques et al. and Dylex Ltd. et. al.* (1978), 18 O.R. (2d) 58 (Ont. Div. Ct.), it was decided that the fact that the vice-chairman of the Labour Relations Board had acted for the union on unrelated matters and been associated with the law firm representing the union did not disqualify him from sitting on a certification hearing one year after all connections had ended. Also, a party with full knowledge of the facts, who consents to the continued presence of a decision-maker in whom there is a reasonable likelihood of bias, is precluded from subsequently complaining; see *Re Thompson and Local 1026 of the Union of Mine, Mill and Smelter Workers* (1962), 35 D.L.R. (2d) 333 (Man.C.A.).

⁹⁸ *Loc. cit.*, footnote 18.

protection in the mediation process? There are significant differences between the processes. The lawyer as mediator is not a representative for any party. The process does not permit the mediator to advocate one client's interests which conflict with another client's interests. Legal information is given and judgments on legal issues are made from a neutral perspective. Loyalty to one client, which could adversely affect information or professional judgment, is absent. It is the parties, not the mediator, who take responsibility for resolving their dispute and reaching a fair agreement. With appropriate training, the lawyer as mediator should not perceive there to be a conflict of interest. With a full and comprehensible explanation of the mediation process, the parties should not perceive there to be a conflict of interest. If circumstances exist which create a real likelihood, or perhaps even a suspicion, of bias, the parties or the mediator can voluntarily terminate the relationship. In fact, the design of the mediation process eliminates the traditional legal concerns with conflict of interests. Conflict of interest rules for the lawyer as mediator are instinctive reactions of the legal profession's adversarial knee.

One other argument in support of the independent legal advice rule should be noted. It is said that the absence of independent legal advice creates risks, "including the possibility that any agreement they [the parties] submit to a court may be rejected as unreasonable . . . or may not be binding on them".⁹⁹ There is, of course, a substantial body of law which permits a party to obtain relief from the consequences of an agreement or contract on the basis of undue influence or unconscionability.¹⁰⁰ In either case a court will interfere and either set aside the contract or refuse to enforce it. Lord Denning in *Lloyds Bank Ltd. v. Bundy*¹⁰¹ identified a "single thread" which connected these rules entitling the court to grant relief:

They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly

⁹⁹ See, for example, *supra*, footnotes 50, 61.

¹⁰⁰ For example see *Royal Bank of Canada v. Hinds* (1978), 20 O.R. (2d) 613 (Ont. H.C.) (A widow, shortly after her husband's death, signed documents taking over her husband's debts to the bank without appreciating the nature and effect of the documents or her own legal position.); *Bomek v. Bomek* (1982), 24 R.P.R. 176 (Man. Q.B.), affirmed [1983] 3 W.W.R. 634 (Man. C.A.) (Parents mortgaged their home to lend money to their son. The son, who was in serious financial difficulty, used the money to pay off a debt to the bank which was also the mortgagee. The parents did not fully understand their son's situation or the real purpose of the loan. The mortgage was not enforceable.); *Canadian Kawasaki Motors Ltd. v. McKenzie* (1981), 126 D.L.R. (3d) 253 (Ont. C.C.) (The wife and father of a prospective franchisee guaranteed his indebtedness in a franchise business but were not told all relevant facts including serious underfinancing, and timing problems. Actions on guarantees were dismissed.).

¹⁰¹ [1975] Q.B. 326, at p.339, [1974] 3 All E.R. 757, at p. 765 (C.A.).

inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.

To equalize bargaining power, the courts have afforded great weight to the existence of independent legal advice. In the eyes of the court, independent legal advice appears to virtually eliminate undue influence or unconscionability.¹⁰² Conversely "the absence of it may be fatal".¹⁰³

Given these rules and the principle behind them, is it necessary to impose on the lawyer as mediator a requirement that the parties seek independent legal advice? Is there a risk that without independent legal advice, "the agreement they reach may not be enforced by the Court"? The answer to the second question provides the answer to the first question. If there is a significant risk that mediated agreements will be rejected by courts in the absence of independent legal advice, the rule is most certainly necessary. The consequences of a rule requiring independent legal advice will have to be swallowed.

How great is the risk? The mediation process is designed to minimize the risk of judicial rejection. It is designed to identify and eliminate the circumstances that give rise to charges of undue influence or unconscionability. A competently trained mediator will exercise skills to ensure the parties exhibit individual responsibility and reach a mutually fair decision. If one party exploits another's weaknesses, misuses a fiduciary relationship, uses fraud, deceit, misrepresentation or other wrongful act to gain an advantage or suggests an agreement that is grossly inadequate, it is the duty of the mediator to intervene. The intervention may be the exposure and correction of the problem or it may be the termination of the mediation. The mediator would also have an obligation to inform the parties, whatever action is taken, that any agreement reached in such circumstances would not be enforceable. The mediation process addresses undue influence and unconscionability concerns. Indeed it is a critical element of the process. The risks are less likely to materialize because such concerns are so prominent.¹⁰⁴ It may well be that there will be rare cases where mediated agreements fall victim to undue influence or unconscionability. But such cases should be dealt with by the courts as are other agreements. Parachuting in independent legal advice rules is simply not a necessary reaction to the mediation process.

¹⁰² But see Lord Denning's comment in *Lloyds Bank v. Bundy*, *ibid.*, at pp.339 (Q.B.), 765 (All E.R.): "I do not mean to suggest that every transaction is saved by independent advice".

¹⁰³ *Lloyds Bank v. Bundy*, *ibid.*, per Lord Denning, at pp. 339(Q.B.), 765 (All E.R.).

¹⁰⁴ There should not be a risk a court would simply presume undue influence exists in the absence of independent legal advice. The courts have held, in cases of special or fiduciary relationships, that a rebuttable presumption of undue influence arises from the

Conclusion

Difficult questions still exist with respect to the regulation of the lawyer as mediator. There is a need for much careful thought about and empirical analysis of the rules of professional responsibility that have been promulgated.¹⁰⁵ It has been argued here that certain major rules emanating from the legal profession, which have acquired a significant degree of uniformity and permanency, have the potential to render impotent the mediation process. The elimination of these offending rules is not the end of the matter. The need to retain any other existing rules or formulate new rules should continue to be assessed, with the aim of trying to ensure that the mediation process is as effective as possible not only in the interests of the parties but also in the interests of the legal profession itself.

nature of the relationship itself; see, *Malicki v. Yankovitch* (1981), 125 D.L.R. (3d) 411, 33 O.R. (2d) 537 (Ont. H.C.), affirmed (1983), 41 O.R. (2d) 160 (Ont. C.A.) (A presumption of undue influence arose when a solicitor loaned money to a client and also drafted the mortgage security for the loan without insisting the client obtain independent legal advice.) However, the presumption does not apply to a husband and wife transaction; see *Royal Bank of Canada v. Poisson* (1977), 103 D.L.R. (3d) 735, 26 O.R. (2d) 717 (Ont. H.C.) (In the absence of actual undue influence, a bank was under no obligation to ensure that a wife who was guaranteeing her husband's debt to the bank received independent legal advice.) Further, even if there is a fiduciary relationship between a mediator and a party to the mediation, the presumption should not arise because the mediator does not make the decision, is not a party to the decision and benefits only indirectly from the decision.

¹⁰⁵ See, L.L. Riskin, Toward New Standards for the Neutral Lawyer in Mediation (1985), 26 Ariz. L. Rev. 329.