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### Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation

Scott R. Peppet

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# Texas Law Review

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## Articles

### Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation

Scott R. Peppet\*

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## I. Introduction

Imagine the following hypothetical. A divorcing couple is well into litigation over the division of their marital property. Although they and their attorneys have attempted settlement at various moments in the two-year dispute, negotiations have failed to resolve their differences. They are about to go to trial when a mutual friend suggests that they attempt mediation. Both parties are skeptical about another attempt at settlement; each has heard unfavorable things about mediation. But each would rather settle than

litigate, if only to minimize their legal bills. As a result, they agree to meet with a mediator.

Prior to their first mediation session, the parties speak with the mediator on a conference call. The divorcing parties have agreed that they will try mediation on the following terms: If the mediation fails to settle their dispute, they will pay the mediator only her expenses for the day—not her daily fee. But if the mediation successfully settles their litigation, they agree to pay the mediator double her regular daily rate. “We want to settle, and we want you to help us settle,” they say. “If you are as good as people say, you’ll be willing to use this fee arrangement.”

Assuming that the mediator is willing to take this offer,<sup>1</sup> should she be permitted to do so? Most mediation ethics codes, court rules, and commentators have categorically rejected such success fees as part of a broader prohibition on all forms of contingent fee mediation (CFM).<sup>2</sup> CFM includes any fee arrangement whereby a mediator’s compensation depends upon some characteristic of the mediated outcome, such as its amount, form, or timing. For example, in addition to success fees, mediators are barred from charging fees based on a percentage of the settlement amount or on a percentage of the costs saved through avoiding litigation.

The logic of this prohibition on CFM is simple: mediators are only able to assist parties if they remain neutral. Mediation ethics codes thus aim to preserve neutrality by imposing strict and categorical requirements on mediators. Such codes generally require that mediators remain both impartial (unbiased as between the parties) and self-disinterested (devoid of personal commitments, beliefs, or interests).<sup>3</sup> CFM seems to conflict with these requirements by biasing the mediator toward settlement or certain types of outcomes. Mediation ethics codes have therefore banned CFM outright.<sup>4</sup>

Under current mediation ethics codes, mediators and disputing parties have little choice but to accept this vision of neutrality and the attendant prohibition on CFM. This regulation raises a difficult question: how much freedom should parties have in nontraditional dispute resolution processes to structure the role of a third party such as a mediator? Self-determination has long been regarded as a basic justification for and benefit of mediation.<sup>5</sup> The mediation process is designed to facilitate the parties’ resolution of their dispute on their own terms. But how far should self-determination go? Should

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1. For a discussion of whether a mediator should want to use such a fee, see *infra* Part V.

2. See *infra* Part II.

3. See *infra* Part III.

4. See *infra* Part II.

5. In Standard I, the Model Standards of Conduct for Mediators begin by stating that “self-determination is the fundamental principle of mediation.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS § 1 (American Arbitration Ass’n, American Bar Ass’n & Soc’y of Prof’ls in Dispute Resolution), at <http://www.abanet.org/dispute/modelstandardsconduct.doc> (last visited Sept. 19, 2003) [hereinafter MODEL STANDARDS OF CONDUCT FOR MEDIATORS].

parties be able to tailor a mediator's most basic obligations and functions to suit their needs, or should certain aspects of a mediator's role, such as the duty to remain neutral, be fixed *ex ante* by mediation ethics codes?

These questions are critical and timely ones for the field of mediation ethics. The field faces a paralyzing dilemma as it attempts to emerge from adolescence. On the one hand, mediation ethics is in shambles. The codes that do exist consist of general and sometimes vague standards that are difficult to apply.<sup>6</sup> A mediator is often subject to several different sets of ethical guidelines, which frequently conflict and seldom offer much real guidance. Enforcement is essentially nonexistent. All of this argues for unifying and strengthening the approach of the mediation profession to ethics and self-regulation.<sup>7</sup> On the other hand, as mediation and other forms of alternative dispute resolution have become more institutionalized over the last decade, scholars and practitioners have increasingly asked whether standardized mediation ethics rules have sacrificed the flexibility that has been the field's hallmark and primary justification.<sup>8</sup> This concern about flexibility argues against more stringent ethics regulations. Strict rules—such as the prohibition on CFM—can seem over-inclusive and unwise.

This Article argues for a new approach to mediation ethics that draws from contractarian law and economics. This approach seeks to resolve the dilemma between standardization and flexibility. In particular, it suggests that rather than employ generalized but vague ethical standards—such as those used currently in most mediation ethics codes—we would do better to turn to rules that more clearly define mediators' obligations. In other words, we *should* strengthen mediation ethics codes. At the same time, to preserve flexibility, these rules should be both tailored by context and altered by party consent. Unlike judges, mediators are creatures of contract. At least in pri-

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6. See, e.g., FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS R. 10.410 (Fla. Supreme Ct. 2000), at <http://www.flcourts.org/osca/divisions/adr/Certrules.htm> (last visited Sept. 19, 2003) ("A mediator shall conduct mediation sessions in an even-handed, balanced manner."); STANDARDS OF ETHICS AND PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS § J (Judicial Council of Va. 2002), at <http://www.courts.state.va.us/soe/soe.htm> (last visited Nov. 21, 2003) ("The mediator may suggest options for the parties to consider, only if the suggestions do not affect the parties' self-determination or the mediator's impartiality.").

7. See, e.g., DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 388–89 (1996) (discussing the need for clear ethical standards in mediation); see *id.* at 428 ("[D]espite significant work on standards, equally significant problems remain in meeting mediators' need for guidance.").

8. See, e.g., Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 4 (2001) ("[T]he original vision of self-determination is giving way to a vision in which the disputing parties play a less central role. The parties . . . are cast in the role of consumers, largely limited to selecting from among the settlement options developed by their attorneys."); Daniel P. Joyce, *The Roles of the Intervenor: A Client-Centered Approach*, 12 MEDIATION Q. 301, 301 (1995) ("It is ironic that a field that professes to value self-determination of parties and client-centered interventions is moving toward standardization of practice.").

vate mediations, the parties create the mediator's role by agreement.<sup>9</sup> Rather than conceive of a mediator's duties as sacred and untouchable, I argue that parties should be able to shape such duties to fit their particular dispute or their goals for settlement. In other words, in some instances, we should employ default—as opposed to immutable—ethics rules that parties and mediators can change by contract.<sup>10</sup>

This approach has its roots in contractarian law and economics, which has had pervasive influence in such contexts as contract law,<sup>11</sup> corporate law,<sup>12</sup> and securities regulation.<sup>13</sup> More recently, this literature has expanded to consider how best to regulate legal ethics—whether and to what extent lawyers and clients should be able to “opt in” to or “opt out” of professional obligations.<sup>14</sup> But, to date, the field of mediation ethics has not been subject to this sort of scrutiny.

In this Article, I begin to develop a contractarian approach to mediation ethics. To accomplish this goal, I focus on one example in depth: the debate about customizing neutrality using contingent fee mediation. Although the topic of CFM goes to the heart of our understanding of mediation ethics—and will thus likely provoke controversy—authors have rarely discussed it in the mediation literature.<sup>15</sup> Contrary to conventional wisdom, I argue that

9. Here I refer to mediations in which two parties privately hire a third party to assist them, as opposed to a court-connected mediation in which a judge might order parties to mediation or appoint a third-party mediator or both.

10. Immutable rules are set *ex ante* and are not changeable by those affected by the rule. Default rules are alterable by contract. *See generally* Ian Ayres & Robert H. Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989); *see also infra* Part II.

11. *See, e.g.*, Ayres & Gertner, *supra* note 10.

12. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989).

13. *See, e.g.*, Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998).

14. *See, e.g.*, Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 728–31 (2001) [hereinafter Painter, *Rules Lawyers Play By*]; Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 326–29 (2000) [hereinafter Painter, *Advance Waiver*]; George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 286–90 (2000); *see also* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1–33 (1998); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 972–79 (1997); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1752–59 (1998).

15. The only discussion of how fee structures impact mediation is a practitioner's note comparing the agency costs created by hourly, contingent, and fixed flat fees. Andrew K. Niebler, *Getting the Most Out of Mediation: Toward a Theory of Optimal Compensation for Mediators*, 4 HARV. NEGOT. L. REV. 167, 184 (1999) (concluding that “contingency fee arrangements should be avoided in the mediation context”). The only other discussion of contingent fee mediation is a very short comment by Professor Roger Fisher advocating the use of CFM to increase the supply of mediators during the early market for mediation services. Roger Fisher, *Why Not Contingent Fee Mediation?*, 2 NEGOT. J. 11, 12–13 (1986) (proposing an arrangement in which the mediator would be paid only if a case settled, at which point the mediator's compensation would be determined through negotiations between the parties and the mediator).

CFM should sometimes not only be permitted, but encouraged. Although I recognize that CFM can make a mediator self-interested vis-à-vis the outcome of a mediation, this consequence should not, in my view, end our analysis of its merits. Instead, a contractarian approach focuses on several relevant questions. The first is whether an immutable rule like the ban on CFM is needed to protect some social or economic interest. In this context, if allowing parties to customize neutrality using CFM endangers some such interest, then a categorical prohibition on CFM may be justified. If not—or if, as I argue, CFM actually serves some social interest—then an immutable prohibition may be unwise. The second question is whether we trust that disputing parties will be able to contract effectively with mediators about CFM or fear that mediators will be able to use CFM to abuse parties. If we fear abuse, banning CFM may be necessary to protect parties. If we believe instead that, in some contexts, parties will be able to bargain effectively with mediators over fee structures, then allowing such contracts may be more efficient.<sup>16</sup>

I conclude that categorical, immutable rules prohibiting CFM are misguided. Both mediators and parties would be better served by a tailored default rule on CFM that takes into account the fact that mediations, mediators, disputing parties, and dispute contexts vary tremendously. I illustrate that, although a mediator must remain impartial as between the parties to be effective, a mediator need not be completely disinterested vis-à-vis the process or outcome of the mediation. Instead, in certain instances, it may be rational for disputing parties to want a mediator with self-interests that align with the parties' joint interests. If the divorcing spouses described above greatly desire settlement, they may want to provide their mediator with incentives to reach resolution. Contingent fee structures for mediator compensation are one means to align the mediator's interests with the parties' goals. In contexts in which sophisticated parties are likely to have information about the nature of their underlying negotiation, there is little reason to prevent CFM.

To develop these arguments, Part II first defines CFM and then analyzes its treatment under current mediation regulations and ethics codes. Part III presents the case against CFM. In particular, I explore the classical conception of mediator neutrality and demonstrate its influence. In Part IV, I argue for CFM. I show that, in some cases, parties may want to customize neutrality and offer a revised understanding of what neutrality they expect from mediators. I argue that CFM does not necessarily undermine a mediator's ability to serve parties and that it can serve party autonomy. Part V then advocates for a context-specific, tailored approach to CFM that

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16. See *infra* Part II.



accounts for the diverse range of situations in which mediators become involved in disputes. I argue for a new ethical rule for mediators that would permit CFM in some circumstances, and I illustrate what sorts of mediations would and would not be appropriate for CFM under such a rule. Finally, I discuss the broader implications of contractarian law and economics for mediation ethics, and I argue that a contractarian approach will best serve the mediation community and disputing parties.

## II. Existing Regulation of CFM

The contractarian law and economics literature has developed a rich taxonomy to describe different types of rules. This Part briefly reviews the contractarian approach to rule formation before exploring existing regulations of CFM.

### A. A Contractarian Taxonomy of Rule Types

1. *An Introduction to Contractarian Economics.*—Contractarian law and economics categorizes duties along several dimensions.<sup>17</sup> The first is whether a given duty or obligation is immutable or default.<sup>18</sup> Immutable duties cannot be altered by contract; they are imposed upon parties regardless of the parties' wishes. For example, the duty to bargain in good faith is an immutable rule of contract law; parties may not contract out of it.<sup>19</sup> Similarly, the Model Rules of Professional Conduct forbid a lawyer from commingling client funds with the lawyer's own, regardless of client consent.<sup>20</sup>

In the mediation context, many ethics rules are immutable. Although various ethics codes regulate the conduct of mediators, the Model Standards of Conduct for Mediators ("Model Standards")<sup>21</sup> are the most prominent. The Model Standards were promulgated by the American Arbitration Association (AAA), the American Bar Association (ABA) Section of Dispute Resolution, and the Society of Professionals in Dispute Resolution (SPIDR).<sup>22</sup> Drafted from 1992 through 1994, the Model Standards were then

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17. For an excellent overview of this taxonomy, see Painter, *Rules Lawyers Play By*, *supra* note 14, at 674–92.

18. See generally Ayres & Gertner, *supra* note 10.

19. *Id.* at 87.

20. See Painter, *Advance Waiver*, *supra* note 14, at 290 (discussing this and other examples of immutable legal ethics rules).

21. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5. The Model Standards are also available in a symposium issue of the *Journal of Dispute Resolution*, 1995 J. DISP. RESOL. 122–28. They are also reprinted in SECTION OF DISPUTE RESOLUTION, AMERICAN BAR ASS'N, *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE* 257–62 (Phyllis Bernard & Bryant Garth eds., 2002).

22. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5.

approved by the AAA, the Litigation Section and Dispute Resolution Section of the ABA, and SPIDR.<sup>23</sup>

The Model Standards often impose immutable obligations on mediators and parties. For example, the Model Standards state that “[i]f at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.”<sup>24</sup> Similarly, the Comments to the Model Standards state that a mediator’s purpose is to “facilitate the parties’ voluntary agreement” and that a mediator should “refrain from providing professional advice.”<sup>25</sup> This essentially requires a mediator to take a “facilitative” as opposed to “evaluative” approach to mediation.<sup>26</sup> Finally, the Model Standards state that “[t]he parties decide when and under what conditions they will reach an agreement or terminate a mediation.”<sup>27</sup> This rule is immutable. Even if the parties tried to vest control over when to terminate the mediation in the mediator, the Model Standards suggest that a mediator would be wrong to honor that attempt.<sup>28</sup>

By contrast to such immutable obligations, parties are free to contract around default duties. Such rules set a baseline in reference to which parties bargain. For example, in contract law, many of the provisions of the UCC are default rules. They are binding “unless otherwise agreed.”<sup>29</sup> Mediation ethics rules are also sometimes default. For example, the Model Standards provide that a mediator must avoid the appearance of a conflict of interest both during and after a mediation and, thus, that “a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.”<sup>30</sup> But a mediator can circumvent these rules with party consent.<sup>31</sup> Thus, so long as the parties consent explicitly through contract, they can opt out of this default obligation.

In addition to whether they are immutable or default, rules and standards vary along a second dimension: the degree to which they are

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23. Section of Dispute Resolution, American Bar Ass’n, ADR Policies, at <http://www.abanet.org/dispute/webpolicy.html> (last visited Oct. 7, 2003).

24. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5, § II.

25. *Id.* § VI cmt.

26. For a general discussion of the role of evaluation in mediation and of state standards on the propriety of evaluation, see Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267 (2001).

27. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5, § VI.

28. See *infra* Part V for a discussion of whether this rule should be changed to a default rule.

29. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 825 n.22 (1992) (giving this example and providing references to specific UCC provisions).

30. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5, § III.

31. *Id.*

tailored versus untailored.<sup>32</sup> A tailored duty is designed for a specific context or a specific set of contracting parties. For example, the Model Standards have a few provisions that apply to court-connected, as opposed to private, mediations.<sup>33</sup> By contrast, an untailored duty applies to most actors in most contexts. It is not designed for a subset; it is designed to apply to all parties affected by the regulation in question. Most of the provisions in the Model Standards are untailored in this way.

Third, a given duty may be either a clear statement; a rule; or a more fuzzy statement, a standard.<sup>34</sup> A rule defines acceptable and prohibited conduct and sets clear requirements. For example, the Model Standards provide that “[a]ny party may withdraw from mediation at any time.”<sup>35</sup> This rule is clear, setting out a well-defined guide for conduct. A standard, by contrast, is more subjective. It relies on precedent or other factors to establish whether a violation has occurred. For example, the Model Standards provide that a mediator shall decline to proceed with a mediation if a conflict of interest “casts serious doubt on the integrity of the process,” even if the parties consent to the mediator’s continued participation.<sup>36</sup> This language “casts doubt on the integrity of the process,” leaving much room for interpretation and argument. Although this is an immutable duty, it is a standard rather than a rule.

In combination, these three dimensions give rise to eight permutations. A given duty may be a tailored immutable rule, a tailored immutable standard, a tailored default rule, a tailored default standard, an untailored immutable rule, an untailored immutable standard, an untailored default rule, or an untailored default standard.<sup>37</sup> The question is which form of duty is most appropriate in a given circumstance.

Immutable rules are appropriate in certain instances.<sup>38</sup> First, immutable rules are useful to protect important social interests. The following are examples of immutable legal ethics rules: a lawyer may not suborn perjury, misrepresent to a tribunal, or assert frivolous claims.<sup>39</sup> Society’s interest in

32. See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 671–72 (1998) (summarizing the arguments for tailored versus untailored default terms).

33. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5, § II cmt. (discussing impartiality in court-appointed mediations and the supervising role of the court administration); see also *id.* § III cmt. (discussing conflicts of interest that may be created by the appointing agency).

34. See, e.g., Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–69 (1992).

35. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5, § I.

36. *Id.* § III.

37. Ian Ayres, *Response to Painter*, 65 FORDHAM L. REV. 201, 205 n.20 (1996).

38. See Ayres & Gertner, *supra* note 10, at 88 (“[I]mmutable rules are justifiable if society wants to protect (1) parties within the contract, or (2) parties outside the contract.”).

39. See Painter, *Rules Lawyers Play By*, *supra* note 14, at 730.

suppressing perjury, misrepresentation, and frivolous litigation is sufficiently important to justify immutable prohibitions on these behaviors.

Second, immutable rules make sense when one party has insufficient information or bargaining power to contract effectively about a given issue. Thus, we do not allow contracting with infants because of paternalistic concern for their well-being. Similarly, as discussed above, we require mediators to withdraw from a mediation if a “conflict of interest casts serious doubt on the integrity of the process”<sup>40</sup> in part because we question whether disputing parties will have sufficient information about the mediation process and a given mediator’s reported conflict to make an adequate determination on their own.

Default rules are appropriate for other reasons. In general, default rules are likely to be more efficient than immutable rules.<sup>41</sup> If parties can contract around a default rule, they will do so to the extent that it creates benefits that outweigh the transaction costs of the required bargaining. A default rule permits parties to make this cost-benefit calculus for themselves. In the absence of reasons to make a rule immutable, many commentators advocate strongly for default rules.<sup>42</sup>

Some default rules are appropriate because most affected parties would bargain for that rule and, therefore, establishing the rule saves transaction costs by saving parties the expense of actually bargaining for the rule. Such rules are called majoritarian default rules.<sup>43</sup> Other default rules—called penalty defaults—are rules that most affected parties would not prefer.<sup>44</sup> Penalty defaults are useful because they force parties to bargain around the default rule, thereby forcing parties to disclose information to each other that might otherwise be kept private. For example, legal ethics rules barring conflicts of interest absent consent by both parties can be considered penalty default rules. Although in practice most parties seem to grant such consent—suggesting that a majoritarian default rule would permit such conflicts—Model Rule 1.7 prohibits such representation without consent.<sup>45</sup> The rule forces lawyers to negotiate with their clients for consent.<sup>46</sup> Penalty defaults may be efficient because they encourage information sharing.

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40. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5, § III.

41. Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 370 (1978).

42. See, e.g., ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 48–51 (1993); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 2–3 (1991).

43. See Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1591 (1999) (contrasting efficient majoritarian default rules with penalty default rules).

44. Ayres & Gertner, *supra* note 10, at 97. Ayres and Gertner discuss penalty default rules in detail and provide examples. See *id.* at 96–101, 106–07.

45. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2002).

46. See Painter, *Rules Lawyers Play By*, *supra* note 14, at 686.

Rules are generally preferable to standards when a rule making body is clear about the rule's desirability and wishes to send a clear message.<sup>47</sup> Standards may be preferable to rules in circumstances in which rulemakers disagree about the relative merit of a given rule.<sup>48</sup> A rulemaking body, for example, might hesitate to impose a clear and immutable rule that parties could neither contract around nor change through the common-law process of interpretation. Instead, such a body would more likely adopt an immutable standard.<sup>49</sup>

2. *The Contractarian Challenge to Mediation Ethics.*—Legal ethics scholars have increasingly used the contractarian taxonomy of rule types to analyze the professional obligations of lawyers.<sup>50</sup> For example, Richard Painter has recently identified several trends in the evolution of legal ethics rules. First, legal ethics rules have evolved from the broad standards of the 1908 Canons of Professional Ethics and the 1969 Model Code of Professional Responsibility toward the more defined rules of the Model Rules of Professional Conduct.<sup>51</sup> In short, the regulation of legal ethics has become more rule-bound. Second, those broad standards that remain are typically found in controversial areas in which rulemakers are unlikely to agree on a precise rule.<sup>52</sup> Third, legal ethics rules have slowly migrated toward default as opposed to immutable rules.<sup>53</sup> As Painter describes, “[t]hese changes reflect a greater willingness to allow lawyers and clients to define contractually their relationship, usually with the proviso that the contract be in writing and that the lawyer consult with her client about the consequence of contracting around the default rule.”<sup>54</sup> Although this migration has been somewhat limited, Painter argues that it should be extended to various areas in which immutable rules remain.<sup>55</sup>

Should *mediation* ethics also evolve in the direction of default rules? I believe that they should. The taxonomy of rule types illustrates the many possibilities for regulating mediation ethics. As seen above, mediation ethics

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47. See *id.* at 690–91 (“[D]efined rules often are used for less controversial subject matter, particularly if enforcement is vigorous and penalties harsh, putting predictability at a premium.”).

48. *Id.* at 690.

49. *Id.*

50. See, e.g., Painter, *Rules Lawyers Play By*, *supra* note 14, at 692–96; Painter, *Advance Waiver*, *supra* note 14, at 326–29; Macey & Miller, *supra* note 14, at 972–79.

51. See Painter, *Rules Lawyers Play By*, *supra* note 14, at 668, 692–94.

52. *Id.* at 668–69.

53. See *id.* at 669, 694–96.

54. *Id.* at 695–96.

55. For example, Painter argues that Model Rule 1.13—dealing with a lawyer's obligations to address a client's corporate fraud—could be amended to provide an opt-out default rule requiring a lawyer to report fraud to a client's board of directors. Clients could opt out of this rule in their corporate bylaws by creating a separate body to which a lawyer should report such conduct. *Id.* at 718–19.

codes contain a mix of rules and standards, some immutable and some default. As a general proposition, however, these codes seem to lean towards immutable untailored rules and standards.<sup>56</sup>

Each instance of such an immutable rule raises questions. Is there some important social interest the rule protects? Would a default rule be viable? Are parties capable of contracting in this context? Could the rule be tailored to better meet its purposes, whether cast as an immutable rule or a default rule? Should it be a rule or a standard?

In many cases, the field of mediation ethics belies its youth by tending towards untailored immutable rules and standards. The existing regulation of CFM illustrates this tendency. The dominant approach has been to prohibit CFM using an untailored immutable rule.<sup>57</sup> As we shall see, CFM presents an interesting example of the need to rethink mediation ethics in light of the contractarian taxonomy of rule types. The next subpart begins our exploration of CFM by defining and giving examples of CFM.

### *B. What Is Contingent Fee Mediation?*

Although rarely discussed, some mediators apparently do take contingent fees. Kenneth Feinberg, the well-known mediator appointed to administer the federal relief fund for victims of the September 11th attacks,<sup>58</sup> is one example. In other mediations, Feinberg has reportedly taken contingent fees, either as part of a fee agreement or as a bonus for successful resolution of a dispute.<sup>59</sup> No empirical evidence exists, however, detailing

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56. There are exceptions. For example, the Model Standards of Practice for Family and Divorce Mediation is a set of standards specifically tailored to the family law context. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (The Symposium on Standards of Practice 2000), <http://www.afccnet.org/pdfs/modelstandards.pdf>.

57. See, e.g., KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 279 (2d ed. 2000) [hereinafter KOVACH, *MEDIATION*] ("Prohibitions against contingency fees are . . . common. This ban is based upon the premise that a mediator cannot have an interest in the outcome of the case."); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 446 (1997) ("[S]ome have suggested that contingent fees should be absolutely prohibited in ADR practice."); Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*, 116 ALTERNATIVES TO HIGH COST LITIG. 129, 130 (1993) (labeling a prohibition on contingent fees a noncontroversial proposition in the ADR field).

58. Diana B. Henriques & David Barstow, *A Nation Challenged: The Special Master; Mediator Named to Run Sept. 11 Fund*, N.Y. TIMES, Nov. 27, 2001, at B1.

59. See Kenneth R. Feinberg, *Billing Reform Initiatives*, 59 ALB. L. REV. 963, 965 (1996) (discussing the use of "mediation alternative billing arrangements such as a flat retainer and success fee" and noting that such fees are "very controversial in some quarters"); see also KOVACH, *MEDIATION*, *supra* note 57, at 279 ("[A] handful of practicing mediators bill on a contingency basis."); MODEL RULES OF PROF'L CONDUCT FOR THE LAWYER AS THIRD PARTY NEUTRAL R. 4.5.5 cmt. 2 (CPR Inst. for Dispute Resolution, Draft 1999) ("It has become relatively common to use contingent fee or bonus compensation schemes to provide an incentive to participate in ADR or to reward the achievement of an effective settlement.").

the sorts of contingent fee structures that mediators have used. Nor do mediation texts describe such fee arrangements. To begin, therefore, we must define what we mean by contingent fee mediation.

In the mediation context, I consider a contingent fee to be compensation that depends in any way—such as amount, form, or timing—upon some characteristic of the mediated outcome. This is a broad definition and one that encompasses many different types of fee arrangement. Consider the following hypothetical examples of mediation fees that are in some way contingent on the mediated outcome. Although Part III will ultimately defend only some of these CFM arrangements, each is, I think, an example of contingent fee mediation defined most broadly.

1. *Percentage-of-Settlement Fee.*—A mediator intervenes in a personal injury case between two strangers involved in a car accident. Plaintiff has sued defendant for compensation for medical expenses, lost wages, and other damages. Unable to agree on the proper valuation of the plaintiff's injuries, the trial judge has ordered the parties into mediation. The mediator's fee agreement bases her compensation on a percentage of the settlement amount.<sup>60</sup> In other words, the greater the value of the final settlement, the greater the mediator's fee. (Alternately, one can imagine this fee arrangement in a private, as opposed to court-connected, mediation.)

2. *Success Fee.*—A corporation is involved in a dispute with one of its managers. The manager's employment agreement contains a mandatory mediation or arbitration clause. The employee is eager to resolve her dispute; she is amenable to mediation. The corporation has retained a large dispute resolution service provider to mediate such disputes. The corporation's agreement with the mediation firm contains a fee clause that conditions payment for any given mediation session on the successful settlement of the mediated dispute. In other words, the dispute resolution firm gets paid only for those cases that it settles successfully.<sup>61</sup> (Alternately, one can imagine this fee arrangement without the long-term contract with the dispute resolution service provider and, instead, as simply part of an individual mediator's fee agreement with the parties.)

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60. Percentage-of-settlement fees may arise by association. For example, imagine that a mediator settles a medical malpractice case. The plaintiff is represented by a law firm operating on a contingency fee. The mediator's spouse is a partner in that law firm. Should that mediator be allowed to mediate that case? See Diane K. Vescovo et al., *Ethical Dilemmas in Mediation*, 31 U. MEM. L. REV. 59, 71 (2000) (arguing that, under Tennessee mediation regulations, the mediator should withdraw "irrespective of the consent of the parties").

61. For an example of such a success fee, see Tom Reavely, Ethical Puzzler, at <http://texasadr.org/ethicalpuzzlers2.cfm> (July 13, 1999) (concluding that a mediator should not accept such a fee arrangement).

3. *Percentage-of-Cost-Savings Fee*.—A mediator intervenes in a complex class action lawsuit involving a defendant pharmaceutical company. The plaintiff class, which is comprised of roughly 2,000 individual plaintiffs, has sued the defendant for compensation arising out of allegedly harmful side effects of the defendant's medication. Although none of the alleged injuries are life-threatening, they vary tremendously. Drawing from prior experience with mass tort and other class action litigation, the mediator is able to help the parties create a compensation schedule that seems fair to both sides, as well as to help them design a ten-year oversight body that will regulate the compensation fund in the future.

The mediator had all parties read and sign a fee agreement prior to the start of the mediation. That agreement set a daily rate for the mediator's services but also indicated that the parties might be asked for a "voluntary bonus or success fee" upon conclusion of the mediation. When the case is settled, the mediator does in fact ask both sides for such a bonus, suggesting that the mediator's assistance, ingenuity, and experience has easily saved them at least \$500,000 in attorneys' fees and other expenses.<sup>62</sup> Defense and class counsel agree to include a \$250,000 bonus for the mediator within the settlement agreement. (One can imagine this out of the class context or with a completely voluntary bonus—a bonus not requested by the mediator. One can also imagine this as a mandatory fee rather than as a voluntary bonus.)

4. *Percentage-of-Value-Created Fee*.—A mediator tries to settle a commercial contract dispute between two companies, one in the Fortune 500. The contract originally obligated Company A to supply parts and materials to Company B. Although the two companies successfully did business together under the contract for more than six years, two years ago B sued A for \$30 million, alleging the materials A had been providing were substandard. Relations have soured as a result of the lawsuit. Company B began purchasing materials elsewhere, and neither company wants to continue to do business with the other. They have retained a mediator to help them resolve their monetary dispute, which is worth at least tens of millions if Company B can prove that Company A is in breach. They assume the mediator will help them end their relationship by determining whether, and how much, compensation is justified.

But as the mediation progresses, the mediator broadens the scope of their discussions, helping them separate their contract dispute from their

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62. A percentage-of-cost-savings hypothetical was posed to a distinguished panel of mediation experts by Professor Stephen Goldberg. Conference on Mediation, World Intellectual Prop. Org., Round Table: Ethical Obligations and Responsibilities of the Mediator and Mediator Immunity, at <http://www.arbiter.wipo.int/events/conferences/1996/discussion6.html> (Mar. 29, 1996). Most on the panel disagreed with such a fee, arguing that a mediator should be "completely neutral." *Id.* (posting remarks by Willy Manfroy).



broader business interests. She creates a working group of business people from both corporations and facilitates their discussion of ways the two companies could make money together (assuming they could get over their contract dispute). After several months of work, the two corporations agree to submit several remaining issues regarding their initial contract dispute to binding arbitration. In addition, they announce a joint venture that takes advantage of previously overlooked synergies between the two companies. They estimate that the joint venture will generate roughly \$500 million in additional revenues for the two corporations over the next ten years. The mediator's fee agreement entitles her to a small percentage (.001 percent) of that new revenue as "unexpected value created as a result of the mediator's efforts." This fee amounts to \$500,000 and is significantly more than she would earn on an hourly or daily basis. (One can instead imagine a voluntary bonus based on value created.)

Each of these examples is a contingent fee according to my definition. Whether based on the total dollar value of the settlement, the fact of successful settlement, a percentage of cost savings, or a fraction of the value created by the mediator, the mediator's fee in each example varies with the mediated outcome. In Part III, I will argue that at least some of these fee arrangements—particularly success fees, percentage-of-cost-savings fees, and percentage-of-value-created fees—should be permitted in some circumstances. Most current mediation regulations, however, prohibit each of these types of CFM.

### *C. Existing Regulation of CFM*

One need not look far to find evidence of the dominant approach to CFM. This subpart reviews the patchwork of ethical guidelines, court rules, state statutes, and other rules that deal with CFM, highlighting the general tendency towards its prohibition.

One preliminary caveat is in order: this array of rules is sometimes confusing. This confusion is not unique to the regulation of CFM; it reflects a more general disorganization in the regulation of mediation. Each state regulates mediation differently, often in decentralized and uncoordinated ways. In a given state, the state's judiciary may or may not have adopted rules to regulate court-connected mediation, and these rules may or may not deal with CFM.<sup>63</sup> (Similarly, the federal courts in that jurisdiction may or

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63. Maryland, for instance, has adopted court rules governing mediation and has expressly forbidden mediators from using contingent fee arrangements. See MARYLAND STANDARDS OF CONDUCT FOR MEDIATORS, ARBITRATORS AND OTHER PRACTITIONERS § VIII cmts. (Md. Mediation and Conflict Resolution Office), at [http://www.courts.state.md.us/macro/rules\\_standards.html](http://www.courts.state.md.us/macro/rules_standards.html) (last modified Jan. 15, 2003) (providing that a "neutral should not enter into a fee arrangement which is contingent upon the result of the process or amount of the settlement"); see also STANDARDS OF ETHICS AND PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS § M(2)

may not have local mediation rules.)<sup>64</sup> The state's private mediation associations may also have ethical guidelines for private (not court-connected) mediations, and those guidelines may or may not address CFM. The local bar association may have guidelines that apply only to attorney-mediators.

These different approaches to regulating mediation often make it difficult to determine how comprehensively a state has dealt with a particular mediation issue, such as CFM. For example, if all of these forms of regulation exist in a given state and all bar CFM, CFM would be completely prohibited in that state. But many states do not have such comprehensive rules. Instead, a given state may have court rules but no ethical rules applicable to private mediations. Although private mediators in such a state may voluntarily follow the judiciary's rules even when not obligated to do so, the potential exists for CFM in a private mediation in such a state. Similarly, a state may have state court rules but no federal court rules, leaving CFM as an option in the mediation of federal litigation but not state litigation.

Rather than obsess about this complexity, this Part simply shows the general tendency to prohibit CFM. It begins by reviewing ethical guidelines related to CFM. It then examines state and federal court rules, mediation association rules, and bar association rules that address contingent fees in mediation.

### *1. Ethical Guidelines Regarding CFM.*

*a. The Model Standards of Conduct for Mediators.*—The Model Standards discourage the use of contingent fees. Although the text of the Model Standards does not mention contingent fees—requiring only that fees be reasonable and that information about fees be provided at the outset of a mediation<sup>65</sup>—the Comments specifically state that “[a] mediator should not

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(Judicial Council of Va. 2002), at <http://www.courts.state.va.us/soe/soe.htm> (June 2002) (“A mediator shall not charge a contingent fee or fee based upon the outcome of the mediation.”). Conversely, Utah has adopted rules regarding mediation but does not speak to the use by mediators of contingent fee arrangements. See UTAH RULES OF COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION R. 104, Canon 1(l) (Utah Judicial Council 2002), at <http://www.utcourts.gov/resources/rules/> (last visited Nov. 2, 2003) (requiring merely that the parties include a description of their fee arrangement in their written agreement to mediate).

64. For example, the District of Utah has adopted local mediation rules while the District of Maryland has not. See Elizabeth Plapinger & Donna Stienstra, ADR AND SETTLEMENT IN FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 152–53, 279–84 (1996) (detailing the alternative dispute resolution programs in each of the federal district courts).

65. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5, § VIII.

enter into a fees agreement which is contingent upon the result of the mediation or amount of the settlement.”<sup>66</sup>

As John Feerick, the chair of the committee that drafted the Model Standards, has explained, the Comments “specifically discourage contingent fee arrangements due to the potential for abuses that can diminish confidence in the process.”<sup>67</sup> The Model Standards forbid CFM to avoid “any incentive for a mediator to coerce settlements.”<sup>68</sup> In addition, Feerick argues that the Model Standards should be understood to mean that “[m]ediators should not directly or indirectly request, solicit or receive gifts or any other type of compensation other than the agreed upon fee.”<sup>69</sup> This understanding bars voluntary bonus arrangements in addition to barring explicit contingent fee agreements.

*b. Local Mediation Association Ethics Standards.*—Many local mediation groups have issued ethical standards for mediators. Because these ethics rules are not jurisdiction-driven, but instead bind all the members of an association, they usually apply both to court-appointed mediations and to private or voluntary mediations. They often ban CFM.<sup>70</sup>

66. *Id.* § VIII cmt. The Model Standards of Practice for Family and Divorce Mediation similarly bar CFM. See MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION § V(C) (The Symposium on Standards of Practice), at <http://www.afccnet.org/pdfs/modelstandards.pdf> (Aug. 2000) (“A mediator should not enter into a fee agreement which is contingent upon the results of the mediation or the amount of the settlement.”). Similarly, the Standards of Practice for family mediators state that “[i]t is inappropriate for a mediator to charge contingent fees or to base fees on the outcome of mediation.” STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION § V(C) (Acad. of Family Mediators), at [http://www.mediationadr.net/mediainformation/MedInfo-Mediators/Ethics\\_AFM.htm](http://www.mediationadr.net/mediainformation/MedInfo-Mediators/Ethics_AFM.htm) (last visited Oct. 14, 2003). See also STANDARDS OF PRACTICE FOR SOCIAL WORK MEDIATORS § 10 (The Nat’l Ass’n of Soc. Workers), at [http://uccr.net/2002Symposium/Keck-Standards of Practice for Social Work Mediators.htm](http://uccr.net/2002Symposium/Keck-Standards%20of%20Practice%20for%20Social%20Work%20Mediators.htm) (last visited Oct. 8, 2003) (“Under no circumstances should the fee structure give the mediator a vested interest in a particular outcome. Fees should therefore not be contingent on the nature of the agreement or even on the achievement of an agreement.”).

67. John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 475 (1997).

68. *Id.* at 476.

69. *Id.*

70. See, e.g., STANDARDS OF PRACTICE § 3 (Cent. Tex. Chapter of the Ass’n of Attorney-Mediators), at <http://www.attorney-mediators-tx.org/ethical.htm> (last visited Oct. 14, 2003) (barring CFM); ALABAMA CODE OF ETHICS FOR MEDIATORS § III(8)(d) (Supreme Court of Ala.), at [http://www.alabamaadr.org/al\\_code\\_ethics.html](http://www.alabamaadr.org/al_code_ethics.html) (June 1, 1997) (barring CFM); REQUIREMENTS FOR THE CONDUCT OF MEDIATION AND MEDIATORS § III(8)(D) (Ark. Alternative Dispute Resolution Comm’n), at [http://courts.state.ar.us/pdf/0516\\_conduct.pdf](http://courts.state.ar.us/pdf/0516_conduct.pdf) (last visited Oct. 14, 2003) (barring CFM); STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS § 6 (Cal. Dispute Resolution Ctr.), at <http://www.mediate.com/articles/cdrstds.cfm> (Aug. 2000) (barring CFM); REVISED CODE OF PROF’L CONDUCT § VIII cmts. (Colo. Council of Mediators), at <http://www.dola.state.co.us/SmartGrowth/ADRMediators/documents/mediatorscode.pdf> (last visited Oct. 14, 2003) (barring CFM); STANDARDS OF PRACTICE FOR IDAHO MEDIATORS § I(8) (Idaho Mediation Ass’n), at [http://www.idahomediation.org/stands\\_of\\_practice.htm](http://www.idahomediation.org/stands_of_practice.htm) (last visited Oct. 14, 2003) (“Mediation is not based on contingency fees or percentages of the outcome of the settlement.”); STANDARDS OF PROF’L CONDUCT § VI (Me. Ass’n of Dispute Resolution Professionals), at

These association standards vary little with regard to CFM. Often based upon language taken from the comments of the Model Standards of Conduct for Mediators, these association standards generally say something to the effect that “[a] mediator shall not charge a contingency fee or base the fee in any manner on the outcome of the mediation process.”<sup>71</sup>

*c. The Association of Attorney-Mediators Ethical Guidelines for Mediators.*—The Ethical Guidelines for Mediators promulgated by the Association of Attorney-Mediators bar contingent fees even more explicitly than do the Model Standards of Conduct for Mediators.<sup>72</sup> The Guidelines require that a mediator explain all fees prior to beginning the mediation and state that “[a] mediator should not charge a contingent fee or a fee based upon the outcome of the mediation.”<sup>73</sup> These Guidelines are often incorporated as standards of practice by local chapters of the Association of Attorney-Mediators. As such, they apply to both court-annexed and voluntary mediations conducted by members of the Association.<sup>74</sup>

*d. Proposed and Existing Legal Ethics Rules and Opinions.*—The bar has traditionally failed to regulate the conduct of lawyers serving as mediators. Neither the Model Code of Professional Responsibility nor the

<http://www.madrp.org/ethics> (last modified Apr. 4, 1999) (“A neutral shall not charge a contingent fee or base a fee in any manner on the outcome of the process.”); STANDARDS OF MEDIATION PRACTICE § VII(B) (Or. Mediation Ass’n), at <http://www.internetmediator.com/pg1031.cfm> (last visited Oct. 14, 2003) (barring CFM); ETHICAL GUIDELINES FOR MEDIATORS § 3 (State Bar of Tex. Alternative Dispute Resolution Section), at <http://www.texasadr.org/ethicalguidelines.cfm> (last modified Dec. 26, 2001) (barring CFM); STANDARDS OF PRACTICE FOR MEDIATORS § VIII cmt. (Wash. Mediation Ass’n), at <http://www.washingtonmediation.org/ethics.html> (last visited Oct. 14, 2003) (barring fees contingent “upon the result of the mediation or the amount of settlement”); ETHICAL GUIDELINES FOR THE PRACTICE OF MEDIATION § 6.2 (Wis. Ass’n of Mediators), at <http://www.wamediators.org/pubs/ethicalguidelines.html> (Apr. 4, 1997) (barring CFM).

71. See, e.g., STANDARDS OF PRACTICE FOR MEDIATORS § III(C)(I) (Mediation Council of Ill.), at <http://www.mediate.com/articles/illstds.cfm> (Aug. 1999) (“A mediator shall not charge a contingency fee or base the fee in any manner on the outcome of the mediation process.”); ETHICS AND STANDARDS OF CONDUCT § L (Pa. Council of Mediators), at <http://www.pamediation.org/ethics.html> (Nov. 6, 1998) (“A mediator shall not charge a contingent fee or a fee based upon the outcome of the mediation.”).

72. ETHICAL GUIDELINES FOR MEDIATORS § 3 (Ass’n of Attorney-Mediators), at <http://www.attorney-mediators.org/ethics.html> (last visited Oct. 14, 2003) (“A mediator should not charge a contingent fee or a fee based upon the outcome of the mediation.”).

73. *Id.*

74. See, e.g., STANDARDS OF PRACTICE § 3 (Cent. Tex. Chapter of the Ass’n of Attorney-Mediators), at <http://www.attorney-mediators-tx.org/ethical.htm> (last visited Oct. 14, 2003) (barring CFM).

1983 version of the Model Rules of Professional Conduct mention lawyers serving in this role.<sup>75</sup>

During the last decades, some state judiciaries and bar associations moved more quickly than the national bar to regulate attorney-mediators. For example, Virginia's Rules of Professional Conduct for attorneys include Rule 2.10, which bars lawyers who are serving as third-party neutrals from charging contingent fees.<sup>76</sup> State bar associations have also issued ethics opinions dealing with lawyers serving as mediators, and occasionally these opinions address CFM. A Florida opinion, for example, permits lawyers to serve as divorce mediators so long as they follow certain precautions, including not taking contingent fees.<sup>77</sup>

The newly enacted revisions to the Model Rules, approved by the ABA in the summer of 2002, update the Rules in this area. The new Rule 2.4 addresses mediation, but in less detail than some of these state codes. Rule 2.4 requires that a lawyer-mediator inform unrepresented parties that the lawyer does not represent them and explain the difference between the lawyer's role as a mediator and a lawyer's role as a partisan advocate.<sup>78</sup> Rule 2.4 does not, however, address CFM or a mediator's fees. Instead, the Rule focuses simply on educating parties about the lawyer's role as a third party. Even with widespread adoption, therefore, the new Rule 2.4 will not directly impact the ability of lawyer-mediators to work on a contingent fee basis.

Rule 2.4 may have, however, an indirect impact on CFM in two ways. First, Rule 2.4 suggests that a lawyer-mediator's conduct may be subject to the strictures of the remaining Model Rules.<sup>79</sup> Thus, Rule 1.5, on fees, may apply to CFM in mediations conducted by an attorney. Rule 1.5 requires that any contingent fee agreement involving a lawyer "shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal."<sup>80</sup> In addition, Rule 1.5 requires that "[u]pon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."<sup>81</sup> Lawyers are barred from accepting contingent fees in any

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75. See MODEL CODE OF PROF'L RESPONSIBILITY (1980); MODEL RULES OF PROF'L CONDUCT (1983) (both failing to mention lawyers serving as mediators).

76. VA. SUP. CT. R. 2.10(g).

77. Fla. State Bar Ass'n, Ethics Op. 86-8 (1986) ("It is inappropriate for a mediator to charge a contingency fee or to base the fee on the outcome of the mediation process.").

78. MODEL RULES OF PROF'L CONDUCT R. 2.4(b) (2002).

79. *Id.* R. 2.4 cmt. 5 ("Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct.").

80. *Id.* R. 1.5(c).

81. *Id.*

“domestic relations matter”<sup>82</sup> or in representing a criminal defendant.<sup>83</sup> Although these rules were not drafted to govern lawyer-mediators and Rule 1.5 does not bar CFM, it could be construed to apply to and constrain contingent fee mediation.

Second, although the new Model Rule 2.4, as adopted by the ABA, does not address CFM, the national bar certainly considered reform proposals that did touch upon this issue. In the process of drafting the recent revision to the Model Rules, various mediation-related organizations put forth proposals for regulating mediators. The most prominent example was drafted by the Commission on Ethics and Standards in ADR (sponsored by Georgetown University and the CPR Institute for Dispute Resolution—a nonprofit initiative of more than 500 general counsels of major corporations, members of leading law firms, and legal academics interested in alternative dispute resolution).<sup>84</sup> The Commission submitted a Proposed Model Rule of Professional Conduct for The Neutral Lawyer. This proposed Rule 4.5.5, although not adopted, stated in part that:

A third party neutral who charges a fee contingent on the settlement or other specific resolution of the matter should explain to the parties that such an arrangement gives the third party neutral a direct financial interest in settlement that may conflict with the parties’ possible interest in terminating the proceedings without reaching settlement. The third party neutral should consider whether such a fee arrangement creates an appearance or actuality of partiality, inconsistent with the requirements of Rule 4.5.3 [on impartiality].<sup>85</sup>

Although it was not incorporated into the final Model Rule 2.4, such proposals may have an impact on state judiciaries and bar associations as they consider revising or expanding the new Model Rules for local adoption. The proposal contemplates CFM and permits it so long as the mediator discusses the contingent fee and its consequences with the parties.

This proposed rule could have been a step in the right direction. Unfortunately, the proposed rule is both general and somewhat vague. It fails to set out clear guidelines for mediators or parties considering CFM. For example, the proposed rule does not require party consent to a contingent fee arrangement nor does it require other safeguards on mediator abuse of CFM. Moreover, the requirement that a “third party neutral should consider

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82. *Id.* R. 1.5(d)(1).

83. *Id.* R. 1.5(d)(2).

84. PROPOSED MODEL RULE OF PROF’L CONDUCT FOR THE NEUTRAL LAWYER (CPR-Georgetown Comm’n on Ethics and Standards in ADR), at <http://www.abanet.org/cpr/e2k/meadow.html> (last visited Oct. 14, 2003).

85. *Id.* R. 4.5.5(3).

whether such a fee arrangement creates an appearance or actuality of partiality”<sup>86</sup> is vague. Does this mean that a contingent fee is forbidden if it does create such partiality? Or is some partiality acceptable? How is a mediator to distinguish between acceptable and unacceptable CFM?

#### *D. Court Rules Regarding CFM*

Many state and federal courts<sup>87</sup> have issued court rules to regulate mediation. These rules generally apply to the mediation of disputes within the court system—court-appointed or court-connected mediation.<sup>88</sup> Sometimes these regulations are extensive, and, in other cases, they are quite sparse. Many of them touch on—and prohibit—CFM, but the fact remains that many do not leave open the possibility of unregulated contingent fee mediation.<sup>89</sup> This subpart reviews these various rules.

*1. The Categorical Approach: Banning or Ignoring CFM.*—Of those states that have addressed CFM by court rule, Florida provides a typical example. The Florida Rules for Certified and Court-Appointed Mediators provide that “[a] mediator shall not charge a contingent fee or base a fee on the outcome of the process.”<sup>90</sup> Various other states have taken a similar approach, clearly prohibiting CFM in court-connected mediations.<sup>91</sup> Some

86. *Id.*

87. Some federal courts have issued local mediation rules without addressing contingent fees. *See, e.g.*, MEDIATION PROGRAM PROCEDURES R. (i) (U.S. Dist. Court for the Dist. of Idaho), at <http://www.id.uscourts.gov/docs/GENOR130.pdf> (Nov. 13, 1996) (stating that “[m]ediators shall be compensated at their regular fees and expenses,” but not discussing CFM). Others have prohibited CFM. For example, the U.S. District Court for the Southern District of Indiana has issued Local Rules on Alternative Dispute Resolution. They state that “[a] Mediator may not give or receive any commission, rebate, contingent fee, or similar remuneration for referring any person to mediation or for serving as a Mediator.” LOCAL RULES OF ALTERNATIVE DISPUTE RESOLUTION R. 2.5(b) (U.S. Dist. Court for the S. Dist. of Ind.), at <http://www.insd.uscourts.gov/rules/ADRRules2003.pdf> (Apr. 16, 2003). Although a comprehensive survey of the various federal rules is beyond the scope of this Article, these examples illustrate the variation that is almost certainly present across the federal circuits.

88. Some state court rules bar CFM in both court-connected and private mediation. *See, e.g.*, ALABAMA CODE OF ETHICS FOR MEDIATORS § II(a) (Supreme Court of Ala.), at [http://www.alabamadr.org/al\\_code\\_ethics.html](http://www.alabamadr.org/al_code_ethics.html) (June 1, 1997) (extending the Code to the mediation of cases pending in the state courts and to private mediation by mediators listed on the roster of the Alabama Center for Dispute Resolution); THE REQUIREMENTS FOR THE CONDUCT OF MEDIATION AND MEDIATORS § III(8)(d) (Ark. Alternative Dispute Resolution Comm’n), at [http://courts.state.ar.us/pdf/0516\\_conduct.pdf](http://courts.state.ar.us/pdf/0516_conduct.pdf) (last visited Oct. 14, 2003) (banning contingent fees and urging application to both contexts).

89. *See, e.g.*, MEDIATION PROGRAM PROCEDURES R. (i) (U.S. Dist. Court for the Dist. of Idaho), at <http://www.id.uscourts.gov/docs/GENOR130.pdf> (Nov. 13, 1996).

90. FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS R. 10.380(f) (Supreme Court of Fla.), at <http://www.flcourts.org/osca/divisions/adr/Certrules.htm> (last visited Oct. 14, 2003).

91. *See* CAL. CT. R. 1620.9(c) (“The amount or nature of a mediator’s fees must not be made contingent upon the outcome of the mediation.”); ALTERNATIVE DISPUTE RESOLUTION RULES App. C, Ch. 1, § A(V) (Ga. Comm’n on Dispute Resolution), at <http://www.state.ga.us/gadr/>

states and federal district courts have also barred contingent fees in specific mediation contexts—such as divorce mediation—or have barred giving a mediator a gift, even if they do not otherwise explicitly address the question of contingent fee mediation.<sup>92</sup>

It is important to note, however, that at least half of the state judiciaries seem not to have regulated CFM (or, in some cases, to have regulated mediation at all). The lack of regulation leaves open the possibility that a mediator who belonged to no association with ethics rules barring CFM could use a contingent fee in a court-connected mediation.<sup>93</sup> Sometimes

appendxc.html (Sept. 20, 2000) (“Fees may never be contingent upon a specific result. It is imperative that the mediator have no ‘stake’ in the outcome.”); INDIANA ALTERNATIVE DISPUTE RESOLUTION RULES R. 2.6 (Ind. Supreme Court 2003), at <http://www.in.gov/judiciary/rules/adr/index.html> (Aug. 1, 2003) (setting hourly fees in mediation); *id.* R. 7.7(A) (barring contingency fees in all court-connected ADR processes); KAN. SUP. CT. R. 903(h) cmt., at <http://www.kscourts.org/ctruls/adrruls.htm> (last modified May 2002) (barring contingency fees); STANDARDS OF ETHICS AND PROF’L RESPONSIBILITY FOR CERTIFIED MEDIATORS § M(3) (Judicial Council of Va. 2002), at <http://www.courts.state.va.us/soe/soe.htm> (June 2002) (“A mediator shall not give or receive any commission or other monetary or non-monetary form of consideration in return for referral of clients for mediation services.”); *id.* § M(2) (“A mediator shall not charge a contingent fee or a fee based upon the outcome of the mediation.”); MARYLAND STANDARDS OF CONDUCT FOR MEDIATORS, ARBITRATORS AND OTHER ADR PRACTITIONERS § VIII cmt. (Md. Mediation and Conflict Resolution Office), at <http://www.courts.state.md.us/macro/standardsfinal.pdf> (last modified Sept. 9, 2003) (“A neutral should not enter into a fee agreement which is contingent upon the result of the process or amount of the settlement.”); MASS. SUP. JUD. CT. R. 1:18 (“Fee agreements may not be contingent upon the result of the dispute resolution process or amount of the settlement.”); MINN. GEN. DIST. CT. PRACTICE R. 114 (barring CFM); COURT ANNEXED MEDIATION RULES FOR CIVIL LITIGATION § XV(H) cmt. (Miss. Supreme Court), at <http://www.mssc.state.ms.us/rules/AllRulesText.asp?IDNum=37> (June 27, 2002) (barring CFM); STANDARDS OF CONDUCT FOR MEDIATORS IN COURT-CONNECTED PROGRAMS § VII(C) (Supreme Court of N.J.), at <http://www.judiciary.state.nj.us/notices/n000216a.htm> (last visited Oct. 14, 2003) (“A mediator shall not enter into a fee agreement in which the amount of the fee is contingent upon the result of the mediation or the financial amount of the settlement.”); NORTH CAROLINA STANDARDS OF PROF’L CONDUCT FOR SUPERIOR COURT MEDIATORS § VII(D) (N.C. Dispute Resolution Comm.), at <http://www.nccourts.org/Courts/CRS/councils/DRC/Standards/Conduct.asp> (last modified Oct. 22, 2002) (“A mediator shall not charge a contingent fee or a fee based on the outcome of the litigation.”); STANDARDS OF PROF’L CONDUCT FOR RULE 31 NEUTRALS R. 25, App. A, § 9(d) (Tenn. Supreme Court), at [http://www.tsc.state.tn.us/opinions/tsc/rules/TNrulesofcourt/06supt25\\_end.htm](http://www.tsc.state.tn.us/opinions/tsc/rules/TNrulesofcourt/06supt25_end.htm) (Jan. 28, 1981) (“A mediator shall not charge a contingent fee or base a fee in any manner on the outcome of the process.”).

92. *See, e.g.*, LOCAL RULES FOR ALTERNATIVE DISPUTE RESOLUTION R. 6-3(b) (U.S. Dist. Ct. for the N. Dist. of Cal. 2000), at [http://www.adr.cand.uscourts.gov/adr/adrdocs.nsf/156691e4d829edc3882564e900738ec7/\\$FILE/Adr300.pdf](http://www.adr.cand.uscourts.gov/adr/adrdocs.nsf/156691e4d829edc3882564e900738ec7/$FILE/Adr300.pdf) (“No party may offer or give the mediator any gift.”). This is also true of local ethics standards promulgated by mediation associations. *See, e.g.*, STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS § 6 (Cal. Dispute Resolution Council 2000), at <http://www.mediate.com/articles/cdrstds.cfm> (“[A] Mediator must not solicit, accept, or exchange any fee, gift, or favor of significant value with any participant . . . in any pending, scheduled or concluded mediation for a reasonable time.”).

93. Because of the many ways in which states and local groups regulate mediation—through statutes, court rules, ethics rules, etc.—it is difficult to prove for certain that a given state has not barred CFM. Nevertheless, my research into the various approaches to CFM suggests that the following state judiciaries do not currently prohibit contingent fees in mediation: Alaska, *see*



variation exists even within a state judiciary. Illinois, for example, authorizes its judicial circuits to undertake mediation programs and establish rules of conduct for those programs.<sup>94</sup> Although some such circuits have prohibited CFM, others have not.<sup>95</sup>

2. *A Minority Approach: Tailored CFM Standards in the State of Hawaii.*—Only one state judiciary seems to have reconsidered the wisdom of the majority approach. On July 11, 2002, the Hawaii State Judiciary adopted new Guidelines for Hawaii Mediators (the “Hawaii Guidelines”).<sup>96</sup> The Hawaii Guidelines explicitly address the question of contingent fees but take a more nuanced approach than other states. The Hawaii Guidelines require that mediators explain their fees to the parties and create a written fee agreement before commencing mediation.<sup>97</sup> In addition, the Hawaii Guidelines list three “possibilities” regarding fee structures.

The first possibility is the standard ban on contingent fees: “Neither mediators nor their agencies should charge contingent fees or base fees on

ALASKA CT. CIV. R. 100 (permitting mediation, but not mentioning fees); Arizona, *see* ARIZ. STANDARDS & GUIDELINES FOR COURT-CONNECTED MEDIATION PROGRAMS (Ariz. Supreme Court), at <http://www.supreme.state.az.us/orders/admorder/orders99/pdf96/9636.pdf> (July 31, 1996) (establishing mediation, but not mentioning contingent fees); Connecticut, *see* CONN. GEN. STAT. ANN. § 13-91 (West 1991 & Supp. 2003) (permitting mediation, but not mentioning fees); Delaware, *see* DEL. SUPER. CT. R. CIV. P. 16.1(i) (allowing mediator and parties to set fee structure); Idaho, *see* IDAHO R. CIV. P. 16(k)(8) (allowing mediators to charge their regular fees); Kentucky, *see* KY. SUP. CT. R. 3.815 (permitting mediation but not establishing fee structure); Louisiana, *see* LA. REV. STAT. ANN. § 9:4201 (West 1997 & Supp. 2003) (allowing mediators and parties to set fee structure); Montana, *see* MONT. CODE ANN. § 25-21 R. 54 (allowing mediation but not addressing fee structure); Nebraska, *see* NEB. REV. STAT. § 25-2913 (allowing mediation but not addressing fee structure); New Hampshire, *see* N.H. SUPER. CT. R. 170(G)(1)(g) (allowing mediation but not addressing fee structure); North Dakota, *see* N.D. CT. R. 8.8 (allowing mediation but not setting fee structure for non-domestic civil disputes); Ohio, *see* OHIO SUP. CT. R. XIV § 6 (establishing court-ordered settlement conferences but failing to provide the structure of the mediator’s fees); South Carolina, *see* S.C. CIR. CT. ADR R. 10(a) (allowing parties who choose a mediator to set fee structure); Utah, *see* UTAH JUD. ADMIN. R. 4-510 (establishing court-annexed mediation but not addressing fee structure); Vermont, *see* VT. R. CIV. P. 16.3(e)(1)(A) (allowing mediator and parties to set fee structure); West Virginia, *see* W. VA. TRIAL CT. R. 25.06 (allowing mediator and parties to determine compensation); Wyoming, *see* WYO. R. CIV. P. 40(d) (allowing mediator and parties to determine compensation).

94. ILL. SUP. CT. R. 99.

95. *Compare* ILL. 18TH CIR. CT. R. 14.17, at [http://www.dupageco.org/circuitcourt/generic.cfm?doc\\_id=592](http://www.dupageco.org/circuitcourt/generic.cfm?doc_id=592) (last visited Oct. 19, 2003) (allowing the parties and the mediator to set the mediator’s compensation when the parties chose the mediator but setting an hourly rate for mediators chosen by the court), *with* ILL. 19TH CIR. CT. R. 20.03(b), at <http://19thcircuitcourt.state.il.us/rules/rules20.htm> (last visited Oct. 19, 2003) (allowing the parties and the mediator to set the mediator’s compensation for any court-annexed mediation).

96. GUIDELINES FOR HAWAII MEDIATORS (Haw. Supreme Court), at <http://www.courts.state.hi.us/attachment/3D52C4AB783B29B7EC64289CC8/guidelines.pdf> (July 11, 2002) [hereinafter GUIDELINES FOR HAWAII MEDIATORS].

97. *Id.* § 1V(1).

the outcome of mediation.”<sup>98</sup> The second possibility is a modified ban on CFM: “Neither mediators nor their agencies should charge contingent fees or base fees on the outcome of mediation *unless special precautions are taken to minimize potential conflicts associated with the fee arrangement.*”<sup>99</sup> Finally, the Hawaii Guidelines list a third possibility: “Charging contingent fees or fees based on the outcome is normally discouraged, *although in special situations with competent advice, both participants may agree to such arrangements.*”<sup>100</sup>

The Reporter’s Notes to the Hawaii Guidelines state that although “[v]irtually all standards which have considered this issue have categorically disallowed such fees,” the Hawaii Guidelines revision project experienced “unresolved discussions about whether contingency fees should be allowed.”<sup>101</sup> Apparently the Supreme Court of Hawaii determined that leaving mediators and parties a choice fit most comfortably with the mediation community in their state. Rather than choose between these three mutually exclusive “possibilities,” it left each intact when adopting the Guidelines.

The Reporter’s Notes indicate hesitation to ban CFM because “sophisticated participants who desire and use this type of fee arrangement would be prevented from using it.”<sup>102</sup> In addition, the Hawaii Guidelines are designed as voluntary guides to behavior, not mandatory standards. As the Supreme Court of Hawaii stated in promulgating the Guidelines, “this court . . . encourages all mediators to make thoughtful use of the Guidelines. . . . The Guidelines are not promulgated as binding rules, and they are not intended to regulate the work of mediators.”<sup>103</sup>

Like the proposed Rule 4.5.5 submitted to the ABA by the Commission on Ethics and Standards in ADR,<sup>104</sup> the approach taken in Hawaii, although somewhat confusing, is promising in several ways. First, it shows that some mediators are beginning to reconsider the accepted understanding that CFM is *per se* problematic. The Hawaii Guidelines were developed by the state’s judiciary in conjunction with the local chapter of the Association of Conflict Resolution (ACR), a leading national association of mediators.<sup>105</sup> This collaboration suggests that at least part of the mediation community is open to the possibility of CFM. Second, the Hawaii approach suggests a direction

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98. *Id.* § IV(2)(1).

99. *Id.* § IV(2)(2) (emphasis added).

100. *Id.* § IV(2)(3) (emphasis added).

101. *Id.* § IV(2) cmt.

102. *Id.*

103. *In re* Guidelines for Haw. Mediators (Haw. July 11, 2002), at <http://www.courts.state.hi.us/attachment/3D52C4AB783B29B7EC64289CC8/guidelines.pdf>.

104. See *supra* note 85 and accompanying text.

105. GUIDELINES FOR HAWAII MEDIATORS, *supra* note 96.

for exploration—a tailored, as opposed to categorical, rule that allows parties to contract for CFM. By requiring “competent advice,” for example, the Guidelines attempt to tailor the third possibility to sophisticated parties with counsel.<sup>106</sup> As I argue in Part IV, such a tailored approach is more promising than current prohibitions on CFM. Although the Hawaii Guidelines offer insufficient guidance to mediators and parties considering CFM, the Guidelines are, in my opinion, a promising beginning.

#### *E. Institutional Rules Regarding CFM*

Various mediation and dispute resolution organizations regulate the conduct of mediators working under their auspices.<sup>107</sup> Unlike the ethics standards promulgated by mediation associations, these institutional rules apply not to any particular group of mediators, but rather to mediations in general.<sup>108</sup> If a contractual dispute resolution clause indicates that disputes regarding the contract will be mediated in accordance with the procedures and rules of a given mediation organization, then that organization’s rules apply regardless of the mediator used.

A few mediation and dispute resolution associations ban CFM.<sup>109</sup> The Mediation Rules and Procedures of the United States Arbitration and Mediation office, for example, state that “[m]ediation services are not provided on a contingent fee basis.”<sup>110</sup> Many other organizations have not dealt with the CFM issue explicitly.<sup>111</sup> For example, the Mediation Procedures of the CPR Institute for Dispute Resolution in New York—one of the most prominent mediation organizations in the United States—do not address contingent fees. The Procedures require that a mediator’s compensation be determined before the mediation begins and state that the mediator’s compensation will be borne equally by the parties, unless they agree otherwise.<sup>112</sup> Similarly, the American Arbitration Association’s Commercial Dispute Resolution Procedures, as amended on July 1, 2003, provide that all expenses of the mediation shall be borne equally by the

106. *Id.* § IV(2)(3).

107. See, e.g., COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (American Arbitration Ass’n), at [http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules\\_Procedures\National\\_International\...\focusArea\commercial\AAA235current.htm](http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\...\focusArea\commercial\AAA235current.htm) (July 1, 2003) [hereinafter COMMERCIAL ARBITRATION RULES].

108. See *id.* INTRODUCTION (“Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures.”).

109. E.g., WAMS MEDIATION RULES AND PROCEDURES § 11 (Wash. Arbitration and Mediation Serv.), at [http://www.usamwa.com/med\\_procedures.html](http://www.usamwa.com/med_procedures.html) (last modified Feb. 18, 2003).

110. USA&M MEDIATION RULES AND PROCEDURES R. 11 (U.S. Arbitration and Mediation), at [http://www.usam.com/services/med\\_procedures.shtml](http://www.usam.com/services/med_procedures.shtml) (last visited Sept. 19, 2003).

111. See, e.g., JAMS ETHICS GUIDELINES FOR MEDIATORS (JAMS), at [http://www.jamsadr.com/ETHICS\\_for\\_mediators.asp](http://www.jamsadr.com/ETHICS_for_mediators.asp) (last visited Oct. 19, 2003) (failing to mention requirements for compensation).

112. THE CPR MEDIATION PROCEDURE § 2 (CPR Inst. for Dispute Resolution), at [http://www.cpradr.org/m\\_proced.htm#selecting](http://www.cpradr.org/m_proced.htm#selecting) (Apr. 1, 1998).

parties, unless they agree otherwise.<sup>113</sup> Whereas previous versions of the Commercial Mediation Rules (now incorporated in the Commercial Dispute Resolution Procedures) stated that a mediator shall be paid “based on the number of hours of mediator time,”<sup>114</sup> the current rules state that “the parties are responsible for compensating the mediator at his or her published rate . . . (hourly or per diem).”<sup>115</sup> Although the current rules suggest that only hourly or per diem fees are permitted, they leave the status of CFM somewhat unclear. The Mediation and Arbitration Rules of the Commercial Arbitration and Mediation Center for the Americas likewise state simply that all expenses of the mediator shall be borne equally by the parties, unless they agree otherwise.<sup>116</sup> This language leaves open the possibility of contingent fees.

#### *F. Summary*

In summary, this Part demonstrates three things that are troubling in combination. First, many types of rules could be used to regulate CFM. The contractarian taxonomy of rule types illustrates that broad immutable rules are not the only regulatory option. Second, there are potentially many types of CFM. A mediator’s fee could be based on the amount of settlement, the fact of settlement, the costs saved, or the extent to which a mediator can help the parties find otherwise overlooked opportunities to create value. Third, despite this variety, existing regulations generally ban CFM using an untailored, immutable rule. Many court rules and ethical guidelines bar any sort of contingent fee without consideration as to the type or circumstances of the fee arrangement. (Others ignore CFM, thus accepting it uncritically.)

The various rules prohibiting CFM would ban each of the four examples discussed above. Percentage-of-settlement fees clearly are contingent on the “amount of the settlement”—the greater the plaintiff’s recovery, the greater the mediator’s fee.<sup>117</sup> Success fees are contingent on the “result of the mediation,”<sup>118</sup> or on the “outcome of the process.”<sup>119</sup> Similarly, percentage-of-cost-savings compensation and fees based on a percentage of value

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113. COMMERCIAL ARBITRATION RULES, *supra* note 107, at M-17 (requiring that all expenses of the mediation, other than witnesses for one side, be shared equally by the parties unless they agree otherwise).

114. COMMERCIAL MEDIATION RULES R. 17 (American Arbitration Ass’n 1999), *reprinted in* JOHN W. COOLEY, THE MEDIATOR’S HANDBOOK, ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION app. F-1 (2000).

115. COMMERCIAL ARBITRATION RULES, *supra* note 107, at M-17.

116. CAMCA MEDIATION AND ARBITRATION RULES Art. 18 (Commercial Arbitration and Mediation Ctr. for the Americas), at <http://www.sice.oas.org/dispute/comarb/camca/cammar1e.asp#a18> (Mar. 15, 1996).

117. *See supra* note 5 and accompanying text.

118. *Id.*

119. *See supra* notes 90–95 and accompanying text (discussing various court rules employing this language or language like it, such as “outcome of the mediation”).

created turn on the outcome of the mediation process; they are contingent on the outcome of that process. Conversely, in states without CFM-related regulations, each of these four examples would be permitted.

This untailored approach, whether restrictive or permissive, fails to take into account the range of fee agreements that could potentially be considered "contingent fees" in the mediation context or their different advantages and disadvantages. Before arguing for such a tailored approach to CFM, Part II lays the foundation for further analysis by making the case *against* CFM.

### III. The Case Against CFM

Although CFM has rarely been discussed in the ADR literature,<sup>120</sup> examples from state and local regulations indicate that many practitioners, judges, and mediation associations consider the practice improper.<sup>121</sup> But is an untailored immutable ban on CFM justified? Are there social interests at stake that must be protected using such a rule? Would allowing CFM in some circumstances necessarily be inconsistent with the values fundamental to mediation ethics? Although I ultimately argue in Part III that CFM should be permitted in some circumstances, this Part makes the argument against CFM—in some places, drawing upon existing treatments of the subject and, in other areas, constructing the most plausible objections to the use of contingent fees.

#### A. Bias

Critics charge that CFM will bias a mediator and undermine neutrality. There is some merit to this claim. Like other agents, a mediator's incentives differ from those of her clients, the parties to the mediation.<sup>122</sup> To the extent that a mediator's fee structure exacerbates those differences, it may lead the mediator to act against the parties' best interests.

The question, of course, is what one means by such words as neutrality or bias. This subpart briefly describes the mediation profession's traditional approach to neutrality. It is this classical conception of what neutrality requires that provides the primary objection to CFM.

1. *The Classical Conception of Mediator Neutrality.*—Neutrality is generally considered the sine qua non of mediation.<sup>123</sup> Given its importance,

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120. See *supra* note 15.

121. See *supra* notes 66–67, 70–71, 73, 76–77, 87–91.

122. On principal-agent problems in mediation, see Michael Watkins & Kim Winters, *Intervenor with Interests and Power*, 13 NEGOT. J. 119, 137 (1997). On the principal-agent problem generally, see PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 1–35 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

123. KOVACH, *MEDIATION*, *supra* note 57, at 123 (citing Barbara Filner & Michael Jenkins, *Performance Based Evaluation of Mediators: The San Diego Mediation Center's Experience*, 30 U.S.F. L. REV. 649 (1996)).

however, few scholars have discussed what neutrality requires.<sup>124</sup> Text after text exhorts mediators to remain neutral but offers little guidance on how to accomplish this goal. One recent book states forcefully that “neutrality and impartiality are the most important qualities of a mediator”<sup>125</sup> but then offers only half a page of discussion on what constitutes neutrality.<sup>126</sup> The advice given is brief: “Don’t engage in behaviors indicating prejudgment . . . . Refrain from commenting favorably or unfavorably regarding the statements of any party.”<sup>127</sup>

Despite this shortage of analysis, one can discern a traditional conception of neutrality in the mediation literature. Most define mediator

124. *Id.* See Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 *MEDIATION Q.* 215, 217 (1997) [hereinafter Taylor, *Concepts of Neutrality*] (noting a “dearth of writings” on neutrality). The best writings in this area are Sarah Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 *LAW & SOC. INQUIRY* 35 (1991) [hereinafter Cobb & Rifkin, *Deconstructing Neutrality*] (advocating the adoption of a poststructural perspective of neutrality as a practice in discourse); Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 *GEO. J. LEGAL ETHICS* 503, 505–08 (1991) (contemplating the relationship between mediator neutrality and mediator accountability); and Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 *MEDIATION Q.* 61, 65–66 (1984) (discussing neutrality as a settlement strategy for divorce mediators).

For a critique of the classical conception of neutrality, see David Dyck, *The Mediator as Nonviolent Advocate: Revisiting the Question of Mediator Neutrality*, 18 *MEDIATION Q.* 129, 139 (2000) (“[T]his guiding notion [of neutrality] is essentially illusory. In the very act of promoting the collaborative process that is intrinsic to mediation, the mediator becomes an advocate for a particular process and against other types of processes (and of the outcomes that would naturally result from those processes).”); Matthew A. Levitt, *Kilometer 101: Oasis or Mirage? An Analysis of Third-Party Self-Interest in International Mediation*, 15 *MEDIATION Q.* 155, 155 (1997) (“In reality, the myth of the scrupulously neutral mediator is just that—a myth.”); and Christopher Honeyman, *Bias and Mediators’ Ethics*, 2 *NEGOT. J.* 175, 175–77 (1986) (arguing that traditional mediation theory “creates a false image” of the neutrality of mediators and that accepting and disclosing inevitable biases is needed). See also CONNIE J.A. BECK & BRUCE D. SALES, *FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS* 42–45, 50–51 (2001) (arguing that no mediator can really be unbiased); Susan S. Silbey, *Mediation Mythology*, 9 *NEGOT. J.* 349, 351 (1993) (contending that mediators cannot be normatively and procedurally neutral).

For the argument that overly formal conceptions of neutrality restrict mediators from correcting power imbalances, see Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 *J. DISP. RESOL.* 55, 80–81 (1995) (criticizing conceptions of neutrality that forbid intervention to defeat the influence of negative cultural myths in the mediation process) and Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441, 515 (1992) (complaining that the ethic of neutrality precludes intervention by mediators into the substance of financial agreements between parties to divorce). See also Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 1990 (1999) (“[T]he notion of impartiality should compel judges and mediators to assist unrepresented parties, rather than prevent them from doing so.”); Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 *J. DISP. RESOL.* 347, 358 (1990) (“Unless mediation practice departs from the absolute commitment to neutrality it may coerce settlement seriously at odds with societal norms.”).

125. JOHN W. COOLEY, *THE MEDIATOR’S HANDBOOK* 28 (2000).

126. *Id.*

127. *Id.*

neutrality as treating the disputing parties equally. For example, many mediation organizations focus on whether the mediator gives “scrupulous attention to doing exactly equal to and for each disputant.”<sup>128</sup> This is neutrality defined as impartiality—the mediator must be even-handed and free from bias.<sup>129</sup> Similarly, the Model Standards of Conduct for Mediators require that a mediator act as an “impartial third party.”<sup>130</sup> Commentators note that achieving impartiality generally requires that mediators avoid “displays of bias, favoritism, or prejudice.”<sup>131</sup> The Ethical Guidelines for Mediators, published by the Association of Attorney-Mediators, define impartiality as “freedom from favoritism or bias in word, action, and appearance[;] it implies a commitment to aid all parties in reaching a settlement.”<sup>132</sup>

Impartiality is seen as important for several reasons. First, impartiality is pragmatically necessary to make mediation effective. If a mediator is biased towards one party, the other party may distrust the mediator. The favored party may feel strengthened in its position by the mediator’s assistance or alliance, and that party may refuse to concede or to negotiate. The disfavored party may similarly dig in, either because it feels slighted or in order to counter the mediator’s efforts on behalf of the favored party. In addition, one or both parties may be reluctant to share information with the mediator, for fear that the mediator will use that information against them.<sup>133</sup> Such distrust and recalcitrance may lead to a bargaining impasse, making the dispute more, rather than less, difficult to resolve.

Second, impartiality towards the parties’ perspectives and concerns allows the mediator to add value to the parties’ negotiation process. Disputing parties are often subject to various emotions and cognitive and social psychological biases that distort their thinking and entrench them in their positions.<sup>134</sup> A mediator, by contrast, can often escape such biases. Because the mediator is not advocating for one side or the other, the mediator

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128. Taylor, *Concepts of Neutrality*, *supra* note 124, at 218.

129. See KOVACH, *MEDIATION*, *supra* note 57, at 124–25 (discussing various definitions of neutrality and impartiality). But see JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* 37 (1987) (listing separately and thus implicitly distinguishing the definitions of impartiality—“treat[ing] all parties in comparable ways, both procedurally and substantively”—and neutrality—“hav[ing] no personal preference that the dispute be resolved in one way rather than another”).

130. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5, ¶ 4.

131. Claudia L. Hale & Chris Nix, *Achieving Neutrality and Impartiality: The Ultimate Communication Challenge for Peer Mediators*, 14 *MEDIATION Q.* 337, 340 (1997).

132. ETHICAL GUIDELINES FOR MEDIATORS § 3 (Ass’n of Attorney-Mediators), at <http://www.attorney-mediators.org/ethics.html> (last visited Oct. 14, 2003). The Center for Dispute Resolution’s Code of Professional Conduct for Mediators similarly defines impartiality as “freedom from bias or favoritism either in word or action.” CODE OF PROF’L CONDUCT FOR MEDIATORS § 2 (Ctr. for Dispute Resolution 1982), reprinted in JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 349, 351 (1984).

133. See generally Watkins & Winters, *supra* note 122, at 130 (noting the importance of perceived impartiality in eliciting trust from the parties).

134. See *infra* notes 157–62 and accompanying text.

may be more objective and rational in her thinking than the parties. By virtue of the mediator's third-party perspective, the mediator may be able to see solutions that the parties cannot. If the mediator relinquishes her neutrality, she may forgo these advantages and be less able to assist the parties.

Third, neutrality is considered fundamental to the self-determination for which mediation strives. To the extent that a mediator is biased towards one party, the mediator may undermine the parties' ability to craft their own solution to their problem. Unless the parties primarily shape the mediation process, it may be used to impose an outcome upon them that conflicts with their own vision of how their dispute should best be handled.

This concern for self-determination is in tension, of course, with the mediator's own normative judgments about the parties' decisions. In certain contexts, such as divorce mediation, this tension may lead a mediator to want to intervene on behalf of a less powerful party to ensure a fair outcome or to balance power between the disputants. But the classical conception assumes that mediators will remain "neutral" to permit parties to determine for themselves what outcome they desire. In other words, the classical conception assumes a second type of neutrality that augments neutrality as impartiality; this type of neutrality requires that a mediator suppress her own preferences and point of view in order to remain neutral vis-à-vis the parties and their interests.<sup>135</sup> In perhaps the most comprehensive treatment of neutrality to date, Cobb and Rifkin argue that the traditional view of impartiality requires the "absence of feelings, values, or agendas."<sup>136</sup>

In many instances, these two sorts of neutrality are coextensive; a mediator's preferences inherently bias the mediator toward one party or the other.<sup>137</sup> In such instances, the mediator has what I will call a "biasing interest," an interest that inherently leads to partiality toward one party. If a mediator has a prior relationship with one party, for example, she may sympathize with that party and thus begin to favor it in the mediation. Neutrality as self-disinterest requires the mediator to keep those sympathies in check in order to remain impartial.

In other instances, neutrality as impartiality and neutrality as self-disinterest may not be so intertwined. For example, a mediator might be self-interested vis-à-vis the outcome of the mediation because she wants the dis-

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135. Cf. William P. Smith, *Effectiveness of the Biased Mediator*, 1 NEGOT. J. 363, 364 (1985) (discussing the importance of perceived mediator "[i]ndifference toward the parties' positions").

136. Cobb & Rifkin, *Deconstructing Neutrality*, *supra* note 124, at 42.

137. Cf. Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties From the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 81-82 (1997) (defining objective neutrality as the "mediator's obligation not to permit her own biases and feelings towards either of the disputants to affect her ability to act in a fair, impartial manner during the mediation").



pute to settle to increase her settlement rate and thereby bolster her reputation. She is not neutral in the sense of being purely self-disinterested. At the same time, her self-interest may not inherently bias her toward one party or the other. She may be impartial as between their interests. She simply wants the case to settle, but she does not care whether either party benefits more because of settlement. In such a case, the mediator has no biasing interest even though she is not purely self-disinterested.

2. *The Conflict Between CFM and the Classical Conception.*—Mediators are scrutinized for several indicators of biasing interests. For example, most mediation ethics codes require that a mediator be free from traditional conflicts of interest, such as a prior relationship with one of the disputing parties.<sup>138</sup> Similarly, the profession assumes that a financial stake in the outcome of a mediation will create a biasing interest that undermines impartiality.<sup>139</sup>

This brings us back to the common prohibition on CFM. According to the classical conception of neutrality, contingent fees should be prohibited because of the threat they pose to *both* types of neutrality. A contingent fee will undermine neutrality as self-disinterest because it gives the mediator an incentive to settle the parties' case on certain terms. The assumption is that

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138. See CARRIE MENKEL-MEADOW & ELIZABETH PLAPINGER, CPR INSTITUTE FOR DISPUTE RESOLUTION, PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT FOR THE LAWYER AS THIRD PARTY NEUTRAL § 4.5.3 (b)(1)(ii), at <http://www.cpradr.org/> (last visited Nov. 12, 2003), reprinted in COOLEY, *supra* note 125, app. 1, at 16 (recommending that mediators begin mediations by confirming the lack of any prior relationship with either party). The requirement that a mediator disclose all prior business relationships is also commonly used in the arbitration arena to determine whether an arbitrator is biased. See Jennifer C. Bailey, Note, *The Search to Clarify an Elusive Standard: What Relationships Between Arbitrator and Party Demonstrate Evident Partiality?*, 2000 J. DISP. RESOL. 153, 158 (2000) (discussing this common requirement); see also Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 37, 49–57 (1996) (reviewing common restrictions on prior relationships).

Some have gone farther to argue that, even without an established prior relationship, a mediator sometimes shares a class or group identification with one of the parties or, that the mediator may experience antipathy or sympathy for one of the parties. See, e.g., Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 12 (1994). This may make it difficult for the mediator to remain impartial and may lead the other party to question the mediator's neutrality. Some ethics codes have thus prohibited such conflicts. The Code of Professional Conduct for Mediators adopted by the Center for Dispute Resolution, for example, defines neutrality as requiring that a mediator "reveal all monetary, psychological, emotional, associational, or authoritative affiliations that he or she has with any of the parties to a dispute that might cause a conflict of interest or affect the perceived or actual neutrality of the professional in the performance of duties." CODE OF PROF'L CONDUCT FOR MEDIATORS § 2 (Ctr. for Dispute Resolution 1982), reprinted in JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 349, 350 (1984).

139. MENKEL-MEADOW & PLAPINGER, *supra* note 138, § 4.5.3 (b)(1)(i). This is also true in arbitration. In reviewing arbitral awards for partiality, courts often examine whether the arbitrator had a financial stake in the outcome. See Elizabeth A. Murphy, *Standards of Arbitrator Impartiality: How Impartial Must They Be?*, 1996 J. DISP. RESOL. 463, 470 (1996).

CFM also creates a biasing interest that the mediator cannot be expected, or trusted, to control. This interest will compromise neutrality as impartiality because the mediator's stake in the outcome will lead her to favor one party or the other to achieve greater financial gain. This logic dictates that CFM should be categorically banned.

Consider a percentage-of-settlement contingent fee. If a mediator were to intervene in settling a personal injury suit using a percentage-of-settlement fee (such that the higher the settlement, the greater the mediator's compensation), the percentage fee would undermine the mediator's commitment to neutrality. Rather than seek the best possible agreement for the parties or merely facilitate the parties' resolution of their dispute, the mediator would be biased towards those agreements that secure the mediator a greater fee—which would necessarily be those favoring the plaintiff. As Andrew Niebler has commented, “[c]ontingent fees may . . . be offensive to the very notion of a third party *neutral*.”<sup>140</sup>

In this personal injury example, the mediator's fee is based directly on the amount of settlement. The mediator thus has obvious reason to inflate the settlement amount or ally with the plaintiff in such inflation. Such bias toward one party to the other party's detriment conflicts with neutrality as impartiality and inherently gives rise to a biasing interest.

I will argue below, however, that in some cases the classical conception has assumed that CFM will create biasing interests when it may not. The traditional approach has conflated neutrality as impartiality with neutrality as self-disinterest, assuming that one can only be truly impartial if one is also completely self-disinterested. I will contend that in some instances a mediator can be self-interested—he can have strong beliefs about the outcome and even a financial stake in the outcome—without sacrificing impartiality.

### *B. Other Concerns About CFM*

In addition to worrying that CFM will undermine a mediator's neutrality, critics have raised several other concerns. These include concern that contingent fees will distort the mediation process, weaken party self-determination, and create an appearance of impropriety.<sup>141</sup>

1. *Process Distortion.*—In addition to biasing a mediator toward one party, CFM may distort the mediation process in harmful ways. For example, many mediators take an interest-based approach to mediation, attempting to help the parties find a resolution that addresses their interests

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140. Niebler, *Optimal Compensation*, *supra* note 15, at 180.

141. Some may also be concerned that CFM exposes mediators to exploitation by unscrupulous parties. I address this issue later. *See infra* Part V.

and needs as conceived broadly.<sup>142</sup> This examination of the parties' underlying concerns can sometimes uncover creative solutions the parties might otherwise overlook. Mediation can help the parties to overcome impasses and to find value-creating resolutions to their dispute.<sup>143</sup>

If a mediator is paid on a contingent fee basis, the mediator may have less concern for such a broad examination of the parties' interests. Instead, the mediator may focus narrowly on the monetary issues at stake.<sup>144</sup> If the contingent fee compensates the mediator based on the amount of settlement, the mediator may not attend to intangible interests (such as hurt feelings) and resolution devices (such as apology) that address them.<sup>145</sup>

As indicated in the above hypotheticals, CFM need not necessarily tie the mediator's compensation to the settlement amount. For example, a bonus for successful settlement might increase the mediator's fee so long as some settlement occurred. Even in such cases, however, CFM might distort the mediation process. A mediator working under such a fee arrangement might be more aggressive than she would otherwise be. The mediator might push for settlement even when settlement is not in the parties' best interests. She might send the parties unjustifiably optimistic signals about the chances of settling their case, in hopes of prolonging the mediation and providing additional opportunities to settle.<sup>146</sup>

Similarly, if a contingent fee were tied to the cost savings created by mediation, the mediator might be overly eager to reduce such costs. The mediator might try to force early settlement. To do so, the mediator might become more evaluative than she would otherwise become, again forgoing in-depth exploration of the parties' interests in favor of a quick resolution of their dispute.<sup>147</sup>

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142. See, e.g., Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 19–23 (1996) [hereinafter Riskin, *Understanding Mediators' Orientations*].

143. On problem solving in dispute resolution, see generally ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 97–126 (2000) [hereinafter MNOOKIN ET AL., *BEYOND WINNING*].

144. Various scholars have also noted that, when attorneys participating in a mediation are working on a contingent fee, those attorneys may advocate for monetary settlement terms and against nonmonetary, but potentially integrative, terms. See, e.g., Dwight Golann, *Is Legal Mediation a Process of Repair—or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 330 (2002) (reporting empirical findings where mediators claimed that fee arrangements influence lawyers in mediation and that “lawyers are more likely to obstruct relationship-based solutions if they are working under a contingency fee agreement”).

145. On the role of apology in litigation and mediation, see Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1036–39 (1999) (exploring the complexities of apology and arguing that mediation can allow parties to reach this often valuable solution).

146. On the problem of sending such false signals for personal gain, see Michael L. Moffitt, *Will This Case Settle? An Exploration of Mediators' Predictions*, 16 OHIO ST. J. ON DISP. RESOL. 39, 70 (2000) (considering situations in which a mediator might “make misrepresentations to the parties in order to advance her own personal interests at the expense of the parties' interests”).

147. See Niebler, *Optimal Compensation*, *supra* note 15, at 179.

2. *Weakened Party Self-Determination.*—CFM can also be attacked for undermining party self-determination. Mediation proponents have long advocated the process for promoting self-determination by allowing parties to work through their problems on their own terms. Unlike adjudication, mediation—particularly if the mediator is more facilitative than directive—gives the parties control over the process they use and the outcome at which they arrive. The mediator theoretically has neither authority to impose a particular settlement nor any interest that would bias the mediator to do so.

A contingent fee changes that to some degree. As Carrie Menkel-Meadow has noted, “[t]o the extent that mediators have an ‘interest’ in settling a dispute, settlement, rather than what is fair or just, may become the mediator’s goal and parties may not be fully apprised of the consequences of their conclusions, and ‘consent’ to settlement may not be real.”<sup>148</sup> This outcome is certainly plausible. If a mediator takes a stake in a dispute through a percentage-of-settlement fee or a success fee, the mediator may be so motivated to push the parties in a particular direction that the mediated outcome can no longer be considered party-driven or self-determined. Instead, the mediator’s own interests may drive the process, as described above. This may weaken party self-determination and thereby weaken the mediator’s claim to legitimacy.

3. *Appearance of Impropriety.*—Finally, CFM may create an appearance of impropriety, even if it does not so bias a mediator as to lead to the undesirable consequences described in the previous subparts. Many of the ethics codes for mediators described in Part I contain injunctions to avoid creating an appearance of impropriety or bias.<sup>149</sup> Beyond merely avoiding bias or conflicts of interest, a mediator must maintain the profession’s reputation by appearing neutral at all times.<sup>150</sup>

The “appearance of impropriety” standard is applied most commonly in court-connected mediations in which a mediator serves as an officer of the court. One can certainly imagine the standard applying to private dispute resolution as well. CFM may cast a shadow on the mediation process,

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148. Menkel-Meadow, *supra* note 57, at 446.

149. See, e.g., ETHICAL GUIDELINES FOR MEDIATORS § 3 cmt. a (State Bar of Tex. Alternative Dispute Resolution Section), at <http://www.texasadr.org/ethicalguidelines.cfm> (last modified Dec. 26, 2001) (noting that mediators should avoid the appearance of impropriety regarding fees “in court-ordered mediations”).

150. See Kurtzberg & Henikoff, *supra* note 137, at 81–82 (referring to “subjective neutrality” as the parties’ perception of the mediator’s neutrality); see also Matthew David Disco, Note, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113, 136–37 (1993) (discussing the California standards regarding the appearance of neutrality for contractual arbitrators).

making parties and observers question the mediator's ability to serve as an impartial facilitator of the parties' attempts to resolve their dispute.

#### IV. The Case for CFM

Parts I and II illustrate the tendency for those within the mediation profession to assume that contingent fee mediation is a contradiction in terms; if a third party is compensated in a contingent fashion, the third party can no longer be sufficiently neutral to be considered a true mediator. Most mediation guidelines incorporate this assumption and bar CFM.<sup>151</sup> Although there are many states in which CFM remains unregulated, the lack of regulation is generally due to immaturity in mediation regulation rather than to a considered decision that CFM is worthwhile.

The primary case for an immutable prohibition of CFM rests on the argument that CFM will undermine a mediator's neutrality and hurt the mediation process. To argue for CFM, therefore, requires answering several questions. First, what is it about neutrality that we value and must protect? Put differently, what function does neutrality serve in mediation? Second, does CFM actually conflict with this understanding of neutrality? And finally, does CFM serve any independent purpose of its own? This Part explores these questions in turn.

##### *A. Reconsidering the Classical Conception of Neutrality*

The classical conception of neutrality requires both impartiality and self-disinterest. In extreme form, it imagines a mediator almost empty of belief or commitment. Is this extreme necessary? To answer this question, we must reconsider what basic social interest we seek to protect by requiring mediators to remain neutral. The answer, as indicated in Part II's discussion of the classical conception of neutrality, is that neutrality is seen as necessary to make mediation possible. Without it, parties will not share information with a mediator or turn to a mediator for help in overcoming barriers to settlement.

This justification for neutrality is functional. It rests on an asserted need to protect the critical functions of a mediator. But most discussions of neutrality have not explored the functional connection between neutrality and mediation.<sup>152</sup> Is the classical conception necessary to protect the core functions of a mediator? Taking the classical conception on its own terms, does a functional analysis necessarily lead to the conclusion that CFM is harmful?

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151. See, e.g., ETHICAL GUIDELINES FOR MEDIATORS § 3 (State Bar of Tex. Alternative Dispute Resolution Section), at <http://www.texasadr.org/ethicalguidelines.cfm> (last modified Dec. 26, 2001) ("A mediator shall not charge a contingent fee or a fee based upon the outcome of the mediation.").

152. See KOVACH, MEDIATION, *supra* note 57, at 99 ("Neutrality remains primarily unresearched in the scholarly literature.").

My answer is simple: it does not. To make this argument, this Part asks two sets of questions. First, how does a mediator add value to two-party bargaining? Put differently, what does a mediator do that negotiating parties cannot do for themselves; what are a mediator's core functions? Second, what sort of neutrality is required to permit a mediator to perform such functions? In other words, how impartial and self-disinterested must a mediator be to help parties negotiate?

*1. The Mediator's Bargaining Functions.*—The first question explores how a third-party mediator adds value to direct, party-to-party, unassisted bargaining. What is it that a mediator does, and why are disputing parties better off with a mediator than without one? This question is difficult, and I have taken it up in detail elsewhere.<sup>153</sup> For brevity's sake, I will answer it as follows; mediators add value to parties' bargaining in at least three ways: by discovering whether settlement is possible, by optimizing settlement, and by helping to manage psychological, emotional, and relational barriers to settlement.

First, a mediator can compare private information and determine whether settlement is possible. Negotiation failures often result from information asymmetries between the parties. Neither party knows on what terms the other is willing to settle. As a result, each makes extreme offers and demands to avoid being "taken." Such extremism may lead to bargaining breakdown.<sup>154</sup> The parties may never discover that a deal is possible—that a bargaining zone exists in which the defendant, for example, is willing to pay more than the minimum amount that the plaintiff demands. A mediator can help the parties to overcome these information asymmetries.<sup>155</sup> The mediator can receive confidential information from each party and compare offers and demands to determine whether settlement is possible. If each side can trust that the mediator will not share their confidences with the other party, each side can make unobservable concessions to test the water. This sharing gives the mediator enough information to determine whether settlement is possible without revealing either parties' cards to the other side. The mediator can thus add value to the parties' bargaining.

Second, assuming some settlement is possible, a mediator can uncover and compare information to help the parties optimize their settlement. The

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153. See Scott R. Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?* 19 OHIO ST. J. ON DISP. RESOL. (forthcoming 2003). See generally RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 343–56 (2002); HOWARD RAIFFA ET AL., *NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING* 317–19 (2002).

154. See MNOOKIN ET AL., *BEYOND WINNING*, *supra* note 143, at 112–18; Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 336–40 (1994) [hereinafter Brown & Ayres, *Economic Rationales*].

155. Brown & Ayres, *Economic Rationales*, *supra* note 154, at 394.

basic problem is simple; sometimes parties reach an agreement, but the agreement is inefficient because it leaves possible gains from trade undiscovered.<sup>156</sup> A divorcing couple might, for example, agree to share custody of their children using a traditional visitation arrangement whereby each parent has the children every other Thanksgiving or every other winter holiday. This arrangement might be better than reaching no agreement at all, but it might not be as good for either party as a more tailored custody decree that permitted the father to keep the children each Christmas (which he would value because of his family's long-standing tradition of celebrating Christmas together) and the mother to vacation with the kids for two weeks every summer at their father's ranch.

A mediator can help the parties optimize their settlement by again comparing information the parties might not disclose to each other but may reveal to the mediator. Whereas each parent in this example might be reluctant to reveal his or her true interests for fear of exploitation by the other side, it would be rational for each to tell the mediator in hopes that the mediator could use the information to make each better off. By interviewing each party in private and looking for trades, a mediator can find efficient options for settlement.

Third, a mediator can add value by managing psychological, emotional, and relational barriers to settlement. For example, scholars have identified various cognitive and social psychological biases that complicate dispute resolution.<sup>157</sup> Disputing parties often have self-serving assessments of fairness;<sup>158</sup> they may suffer from "reactive devaluation" and devalue an opponent's offer merely because the offer comes from the opponent (as opposed to a third party).<sup>159</sup> Their judgments may be biased by framing effects and a preference for the status quo.<sup>160</sup> Others have reviewed these psychological phenomena in detail and suggested that a mediator might help

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156. An agreement is Pareto efficient if there is no other possible agreement that can make one party better off without making another party worse off. See, e.g., HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 139, 156–64 (1982).

157. See MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 2 (1992) (listing seven decisionmaking biases that stifle negotiations); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 20 (Daniel Kahneman et al. eds., 1982) (explaining various heuristics that apply to conflict resolution); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 160–64 (1994) (examining various psychological barriers and concluding that "avoiding psychological barriers ex post is quite difficult").

158. See, e.g., Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 119 (1997) (discussing several studies in labor negotiation and arbitration and concluding that "when there are numerous potential comparison groups to assess fairness, the parties focus on those that favor themselves").

159. See, e.g., Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 26, 34 (Kenneth J. Arrow et al. eds., 1995).

160. See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1104–13 (2000).

parties to manage them.<sup>161</sup> For our purposes, the point is that sometimes parties are myopic; they cannot resolve their dispute unassisted because of psychological and emotional issues that are fueling their conflict. A mediator can help to manage these issues by providing a detached perspective on the dispute and helping the parties to examine their thinking and assumptions. Sometimes a mediator can help the parties to rebuild or re-analyze their relationship and to overcome hostilities, misperceptions, and resentments that may have fueled their conflict.<sup>162</sup>

2. *Redefining Neutrality.*—Given these basic functions, a second question follows naturally: what sort of neutrality is required to permit a mediator to serve parties in these ways? For example, how must a mediator be neutral in order to help parties discover if settlement is possible? How must a mediator be neutral in order to help parties optimize their settlement? How must a mediator be neutral in order to help parties overcome psychological and emotional barriers to agreement?

The first point is that a mediator needs to remain impartial to be able to fulfill her role. Each of these three functions—discovering settlement, optimizing settlement, and overcoming psychological and emotional barriers—requires that the parties trust the mediator to keep information private if necessary. The mediator can only benefit the parties as an information conduit if the parties give her more information than they would give each other. They will do so only to the extent that they trust her impartiality and know that the mediator will not use the information against them.<sup>163</sup> Similarly, parties will only accept a mediator's perspective on their dispute as more objective than their own, and thus use the mediator to overcome psychological and emotional barriers to settlement, if they trust that the mediator is impartial.<sup>164</sup> Therefore, I agree with the classical conception of neutrality to the extent that it recognizes the importance of impartiality.

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161. E.g., Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 49 (1999) (suggesting that a mediator can help parties overcome psychological barriers to settlement).

162. The transformational mediation literature has elevated this aspect of mediation to primary importance. E.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 81–188 (1994). Although I do not place quite as much importance on this aspect of a mediator's role, I do think that relationship management is one of a mediator's core functions. For a more in-depth discussion of the relational issues that mediators can help to manage, see Scott R. Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?* (forthcoming 2003).

163. Michelle D. Gaines, *A Proposed Conflict of Interest Rule for Attorney-Mediators*, 73 WASH. L. REV. 699, 702–03 (1998).

164. Jean R. Sternlight, *Lawyer's Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 274, 336–39 (1999).



This requirement of impartiality does not mean that a mediator must treat each party identically. The mediator is not obligated to share all or the same information with each party. Indeed, as discussed above, this restriction would end the mediator's role as a manager of information exchange. Nor does it mean that the mediator must necessarily give each party equal air time, equal time in caucus, or follow any other mechanical rule to ensure equal treatment. Instead, the mediator must strive to avoid partiality in order to maintain sufficient trust to be able to perform the three core functions of discovering settlement, optimizing settlement, and overcoming psychological barriers to settlement.

This standard is necessarily somewhat amorphous, but it is not completely without bite. It requires that a mediator avoid biasing interests—those interests, beliefs, or commitments that will inherently compromise impartiality and erode trust.

Put differently, a mediator must do only those things that neither party could reasonably reject—those things that are in the parties' joint interests.<sup>165</sup> Thus, a mediator's impartiality is not compromised by sharing information selectively or even by agreeing to keep certain information completely confidential as between the parties because selective disclosure may be necessary to permit the mediator to determine whether a settlement is possible. A mediator should also be able to work with one party for a longer time, or more intensively, to discover that party's interests, preferences, and priorities, if additional time will result in the disclosure of sufficient information to the mediator to permit settlement optimization. Finally, a mediator should be allowed to "sanitize" information flow between the parties to dampen emotional conflict or to "reality test" one party to help that party consider whether its fairness assessments are unduly self-serving.<sup>166</sup> Each of these actions may be necessary to fulfill the mediator's core functions—functions that serve both parties.

The second, and critical, point is that a mediator need not be completely disinterested vis-à-vis these basic functions. Impartiality is not sacrificed merely because the parties know that the mediator is seeking to discover if settlement is possible, nor because the mediator is committed to finding an optimal or efficient settlement. That the mediator has interests and beliefs

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165. I loosely borrow this formulation from Thomas Scanlon. See T.M. SCANLON, WHAT WE OWE TO EACH OTHER 189–97 (1998) (using the "reasonably reject" formulation as part of his contractualist approach to moral theory). I hesitate to even cite to Scanlon's contractualism, however, for fear that readers will unknowingly conflate it with the contractarian economic approach to mediation and legal ethics I am advocating here. There are, I think, connections between the two, and it is a provocative question to consider their interplay. That, however, is a topic for another day.

166. See generally CRISTINA CASANOVA, MEDIATION FOR SCHOOL COUNSELORS (PART XIV): THE PROCESS OF MEDIATION II, at <http://www.guidancechannel.com/detail.asp?index=907%20&cat=19> (last visited Oct. 8, 2003) (advising mediators to "[s]anitize the [parties'] language so that negative comments are translated into general neutral comments"); KOVACH, MEDIATION, *supra* note 57, at 33 (discussing the mediator's function of "reality testing" the parties' positions).

regarding these three core mediative functions does not conflict with neutrality as I conceive of it. Indeed, I make the normative claim that mediators should seek to help parties discover whether settlement is possible, find efficient or optimizing settlements, and manage relational and psychological barriers to settlement.

A normative commitment to these three core functions seems legitimate to me for two reasons. First, because the parties cannot do these things for themselves, no paternalism is involved in assisting the parties in these ways. The mediator furthers these goals because the parties cannot achieve them without third-party assistance. This thought is tied to the second source of legitimacy: the parties' consent to the mediation process. The mediator seeks to fulfill these three functions because that is what the parties have hired the mediator to do. Each of these three functions generally cannot be accomplished without a mediator. Thus, although the mediator is not completely self-disinterested—she has normative commitments to fulfilling these three core functions—her commitments are grounded in the parties' needs.

Parties might need or consent to third-party assistance that goes beyond these three core services. For example, two disputing parties might want a mediator's assistance addressing power imbalances or fairness concerns. The parties might, *ex ante*, know that without third-party assistance they could arrive at a lopsided outcome, and they may fear that such a resolution of their dispute will be short-lived and subject to criticism. They might thus enlist the mediator's help as a fairness monitor, authorizing the mediator to redress fairness concerns throughout the process. But disputing parties do not necessarily need an impartial mediator to manage power imbalances. They could just as easily seek assistance from partisan advisors, such as counsel, in order to ensure that their settlement is in line with legal or community standards. Although this role is one that a mediator can play, it is not a role that only a mediator can play.<sup>167</sup>

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167. Disputing parties might similarly seek evaluation of their claim by their mediator. Similar to the debate over whether a mediator should intervene to redress power imbalances, some have questioned whether neutrality requires that a mediator suppress her own views about the value of the parties' dispute or how best to resolve it. For example, adherents to the classical conception have argued that an "evaluative" mediation approach, in which the mediator offers her opinion on the value of the parties' litigation, sacrifices neutrality as impartiality. See Levin, *supra* note 26, at 277 ("[O]ne may ponder the propriety of the practice of evaluative mediation in regard to an impartiality standard."). Others have argued that it does not. See James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 796 (1997) ("To my mind, the mediator who provides the parties the same access to legal information and advice—without favoritism or bias, and without regard for the potential effect of the information on the prospects for settlement—is being impartial, in the truest sense of the word."). This rebuttal argues that so long as the mediator remains neutral vis-à-vis the parties—providing both sides with the same information, for example—the mediator has in no way abandoned neutrality by offering her own opinion of the value of the parties' cases. *Id.*

Without explicit consent to such assistance, therefore, I believe that a mediator should pause before intervening in these ways out of her own concerns or beliefs about the parties' best interests.<sup>168</sup> The threat of paternalism looms large. The mediator should ask herself whether both parties would be likely to consent to the mediator's action were they fully informed about that action and its intention. If no such consent would likely be forthcoming from the parties, the mediator should recognize that such an intervention would likely sacrifice impartiality and trust.<sup>169</sup>

In some ways, my approach is closest to that of Gibson, Thompson, and Bazerman.<sup>170</sup> These authors, writing from a perspective derived from the negotiation analytics of Howard Raiffa, argue that "[i]nappropriate agreements are frequently achieved as a result of mediator preoccupation with neutrality."<sup>171</sup> Dismissing the traditional assumption that mediators must completely suppress their opinions about the relative merits of various proposed settlements, Gibson, Thompson, and Bazerman argue for an approach based on "symmetric prescriptive advice" or SPA. This approach requires the neutral to be active and to serve both parties' interests.<sup>172</sup>

These authors likewise argue that a mediator should be committed to three basic propositions. First, the parties should reach agreement only if both can be better off through agreement than through nonagreement. Second, agreements should be maximally efficient. Third, the parties should fully consider issues of distributional fairness.<sup>173</sup> They argue that "mediators should not be neutral, in the sense of being value free . . . . [W]e advocate,

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My approach to this question differs from either of these; it turns on the reason for the evaluation. If the parties have shared information fully and could evaluate their case themselves—or have their lawyers do so—then there is no reason for a mediator to offer her opinion. If, however, the parties cannot evaluate the case themselves because they refuse to share sufficient information about the facts of the case to make evaluation meaningful, then a mediator may be necessary for evaluation. This is merely a subset of the ways in which a mediator can help parties overcome information asymmetries and discover whether settlement is possible.

168. My approach thus differs from some critics of the classical conception who have called for mediator intervention to address power imbalances. See sources cited *supra* note 124.

169. Lea Brilmayer of the Yale Law School has similarly discussed the problems of mediator interventionism and self-interest. Like my argument, Professor Brilmayer concludes that the solution to these problems is mediation's voluntary nature. The fact that mediation is voluntary and consensual reduces the moral load upon it—the mediator may act out of self-interest, at least in part, but the parties' consent to the mediation process and its outcome sanitizes the end result. See Lea Brilmayer, *America: The World's Mediator?*, 51 ALA. L. REV. 715, 725 (2000).

170. Kevin Gibson, Leigh Thompson & Max H. Bazerman, *Shortcomings of Neutrality in Mediation: Solutions Based on Rationality*, 12 NEGOT. J. 69 (1996).

171. *Id.* at 69.

172. *Id.* at 70 ("The SPA approach means that the mediator will remain impartial, but may no longer claim to be completely neutral.").

173. *Id.* at 72–73.

instead, . . . that mediators assist negotiators in reaching rational [i.e., efficient] outcomes.”<sup>174</sup> According to Gibson, Thompson, and Bazerman,

the practice of mediation is currently obstructed by a herd of sacred cows, in the guise of ‘mediator neutrality’ . . . . We propose that mediators should be acknowledged as impartial interveners in disputes, and that their intervention is aimed at promoting rational outcomes by, among other things, reducing bias and promoting optimal settlements.<sup>175</sup>

I obviously agree that mediators should make normative commitments along the lines of those that Gibson, Thompson, and Bazerman describe. Their argument, however, stops short because they do not provide an argument for the legitimacy of their three propositions. My approach differs from theirs because it focuses on how a mediator can help parties in ways they cannot help themselves. This criterion separates permissible mediator commitments from paternalistic ones. Although substantively I agree with the three propositions they put forth,<sup>176</sup> I am as concerned with explaining why a mediator is justified in having these commitments as I am about their content.

A third question raised by this approach concerns the sort of party consent that justifies a mediator’s violation of the classical conception of neutrality as strict self-disinterest and impartiality.

I have assumed to this point that, going into a mediation, the parties understand that these three core functions are what allow a mediator to add value above and beyond the parties’ unassisted bargaining process. In other words, I have assumed that the fact that two parties consent to mediation means that they have consented to the mediator fulfilling these three functions, rather than the mediator staying completely devoid of commitment or purpose. This assumption is, of course, a fiction: many parties will

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174. Kevin Gibson, Leigh Thompson & Max H. Bazerman, *Biases and Rationality in the Mediation Process*, in APPLICATIONS OF HEURISTICS AND BIASES TO SOCIAL ISSUES 163, 166 (Linda Heath et al. eds., 1994). See also *id.* at 179 (arguing that although mediators “can strive for even-handedness in their dealings, . . . we believe they should also endorse efficient outcomes”).

175. *Id.* at 180. See also John Forester & David Stitzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts*, 5 NEGOT. J. 251, 261 (1989) (“Properly understood, theoretically and practically, mediation promises not neutrality but ‘both gain’ outcomes for disputing parties.”).

176. Their first two propositions parallel mine. Their third proposition—regarding fairness—differs, but it can be incorporated within my third function of managing psychological barriers to resolution. As discussed above, see *supra* note 158 and accompanying text, much research indicates that parties are often unable to make objective assessments of fairness. A mediator can thus serve a useful role as a check on self-serving fairness judgments. This purpose is somewhat different than the activism critique’s desire for mediators to intervene to redress power imbalances; here the focus is on intervention to address self-serving (and often unintentional) psychological biases (as opposed to self-serving—but intentional—strategic moves).

consent to mediation—or be ordered into it—without having even minimal understanding of the mediator's role or function.

The mediator faces a choice. One option is to seek actual party consent to this approach to neutrality. Before each mediation, a mediator could explain the ways in which she works and the ways in which she might help the parties. She could explain that the parties should not expect strict equality, nor even self-disinterest. Instead, she could explain that she would be working in the parties' joint interest to discover settlement, optimize settlement, and help the parties manage psychological and relational barriers to settlement. With this framework established, the mediator could seek consent to stray from the classical conception of neutrality if necessary to play these three roles.

As a general matter, I favor such consent-seeking. Explicit consent is, however, unlikely in this context. Many mediators are unlikely to want to try to draw these distinctions with parties before the parties have any experience with mediation. Doing so would take time, effort, and patience and would likely be frustrating for both the mediator and the parties. In addition, explaining that "I'll be neutral, but it's complicated," is a rather unappealing opening to a mediation. Mediators are likely to resist any requirement of explicit consent.

A second option, therefore, is to rely upon constructive consent by the parties to the mediator performing these core mediation functions. The standard, again, should be whether either party could reasonably reject the mediator's proposed intervention if that party had full information about the mediator's proposed actions and intentions. If a mediator is satisfied that her actions could not reasonably be rejected by either party were the parties fully informed, the mediator should feel comfortable going through with those actions even if the parties are not so informed. She has a check on her self-interest; her commitments to information exchange, optimizing, and reaching a settlement are tempered by the understanding that neither party could reasonably reject the actions she undertakes to enact those commitments. Neutrality as impartiality is thus preserved, even as a strict conception of neutrality as self-disinterest is abandoned.

### *B. Not All CFM Leads to Biasing Interests*

With this framework in place, the remaining question is whether CFM necessarily undermines neutrality. From this functional perspective on neutrality, one must determine which contingent fee structures create biasing interests and which merely affirm permissible mediator beliefs and commitments.

Self-interest may not always create partiality or a biasing interest. One must draw distinctions regarding towards what, exactly, a contingent fee

makes the mediator partial.<sup>177</sup> Consider the hypothetical posed in the Introduction—the divorcing couple that proposes a success fee to the mediator if their case settles. This sort of success fee removes any claim to strict self-disinterest. The mediator has what I call a “settlement bias” because she is no longer neutral vis-à-vis whether or not the dispute settles.<sup>178</sup> Per the critique of CFM, she may thus have a “process bias”; she may favor those mediation processes or techniques that are most likely to encourage settlement and disfavor aspects of mediation that are unlikely to lead to a firm resolution. For example, she might become more focused on the dollars and cents of the parties’ dispute and less focused on transforming their relationship (assuming she did not see such transformation as necessary to settlement).<sup>179</sup> But the success fee will not inherently create what I will call an “outcome bias.” The mediator is not necessarily biased towards a given outcome within the set of possible settlements; she is merely biased towards settlement.

Will this settlement bias and process bias undermine impartiality, thereby making it impossible for the mediator to fulfill her core functions? I think not. These parties are attempting to align the mediator’s self-interest with their own desire to settle. Although the success fee creates a settlement bias, it does not necessarily make the mediator partial to one side or the other. Instead, it makes the mediator partial towards settlement—something that the parties have explicitly stated is in their joint interest.

Moreover, this settlement bias does not undermine the mediator’s three core functions. First, because the parties have no less incentive to share such information with the mediator, the mediator continues to be able to compare private information to discover whether their settlement is feasible. Indeed, this fee encourages the mediator to fulfill this function. Second, the mediator continues to be able to optimize settlement by comparing information and looking for trades. Often, finding creative options or trades opens up the possibility of settlements that the parties had previously overlooked. In this scenario, the mediator is likely to have to search for optimizing trades to make settlement possible. Again, the success fee bolsters, rather than undermines, this core mediative function. Finally, the success fee does not

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177. For a brief discussion that makes some similar distinctions, see Silbey, *supra* note 124, at 351 (noting that a mediator may or may not be disinterested vis-à-vis the parties, their claims, the importance of resolving their dispute, or the process).

178. Research has called into question whether individuals can ever remain neutral in this way. Bazerman and others have shown what they call an “agreement-is-good” bias: People tend to see agreement as good regardless of whether there is in fact the possibility of a mutually-beneficial settlement. See Max Bazerman et al., *When and Why Do Negotiators Outperform Game Theory?*, in *THE ROLE OF NONRATIONALITY IN ORGANIZATION DECISION MAKING: CURRENT RESEARCH INTO THE NATURE AND PROCESSES OF THE INFORMAL ORGANIZATION* (Stern & Halpern, eds., 1993).

179. The transformational mediation literature has elevated this aspect of mediation to primary importance. See BUSH & FOLGER, *supra* note 162, at 81–84.

inhibit the mediator's ability to resolve psychological or emotional issues in the mediation. Both parties will know the mediator wants settlement, but they will also know she is impartial as between the parties. The parties are as likely to seek help with biases and emotions under this success fee arrangement as they would be under a traditional hourly or daily rate.

This analysis does not mean that all success fees are per se acceptable. Instead, it highlights the importance of high-quality consent to such a fee. A success fee inherently creates a process bias; the mediator will do those things most likely to produce settlement. If the mediator believes that economics drive settlement decisions, she may focus on the dollars and cents of the parties' dispute. If she believes that relational issues are key to settlement, she may focus her energies there. Regardless, the success fee will exacerbate the mediator's natural tendencies and style. This bias makes informed consent by the parties critical. Only if we trust that the parties understand the tradeoffs they are making in using the success fee should we be comfortable with the settlement and process biases it creates. (As we will see in Part IV, a tailored default rule can and should provide safeguards to require such strong consent.)

Contrast this divorcing couple's success fee with the success fee described in subpart 1(B).<sup>180</sup> In that example, a mediator worked for a large dispute resolution service provider. The service provider was under contract with a corporation to handle the corporation's employment-related disputes. Per the ADR firm's contract, the mediator would be paid only for those cases that settled.

This service provider's success fee differs in several respects from the divorcing couple's success fee. First, a long-term relationship exists with one party—the corporate employer. Second, the employer is paying the full amount of the fee, assuming some fee is paid.<sup>181</sup> Third, a settlement bias in this instance inherently accrues to the benefit of the employer. The employer has sought the help of the ADR service provider because it wants to keep its employment disputes out of court. It apparently has a vested interest in high

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180. See *supra* note 61 and accompanying text.

181. I do not believe that such one-side-pays arrangements are inherently biasing. In some cases, mediators report allowing one party to pay the mediator's entire fee if the other party refuses to contribute. Professor Stephen Goldberg, for example, has mediated in this fashion. According to him, at least, he suffered no damage to his ability to remain neutral:

In neither of the cases in which the mediator's fees were paid by one party was I aware of any lack of trust in the mediator on the part of the nonpaying party. The nonpaying party participated in the selection of the mediator to the same extent as had the paying party, and appeared unconcerned by the possibility of mediator bias in favor of the paying party. Trust then, rather than payment, would appear to be the critical issue.

Stephen B. Goldberg, *Meditations of a Mediator*, 2 NEGOT. J. 345, 346 (1986). But see Kimberlee K. Kovach, *Costs of Mediation: Whose Responsibility?*, 15 MEDIATION Q. 13, 19 (1997) (noting that "[a]lthough this [practice] should not have any effect on neutrality, the practice itself may give rise to the nonpaying party's concerns"). I do worry about the potential for partiality when such fees are paid under institutional arrangements for long-term provision of ADR services.

settlement rates—perhaps to avoid damage to its reputation, litigation expenses, or the weakened employee morale that might result from the disclosures that sometimes accompany employment litigation. Thus, in this instance, the settlement bias created by the success fee primarily accrues—or appears to accrue—to the benefit of one party: the employer.

This example highlights the need for a tailored approach to CFM. A mediator should consider whether a CFM arrangement creates a biasing interest that might undermine the mediator's three core functions. If there is such an interest—or the appearance of such an interest—the mediator should avoid the contingent fee. As indicated above, this clearly rules out percentage-of-settlement fees.<sup>182</sup> It does leave some room for success fees. It also leaves some room for fees that are contingent on either a percentage of transaction cost savings or the amount of value created.

Percentage-of-cost-savings fees create similar biases to success fees. Such a fee creates a settlement bias because the mediator can only be said to have saved costs if the parties actually settle their dispute rather than litigate.<sup>183</sup> Such a fee also creates a process bias because the mediator will have an obvious incentive to reach resolution quickly. A percentage-of-cost-savings fee does not, however, create an outcome bias. The mediator remains indifferent as between the possible agreements.<sup>184</sup>

A percentage-of-cost-savings fee, like a success fee, will not necessarily undermine the mediator's role. Even as she strives to work quickly, a mediator will still have reason to try to facilitate settlement, optimize settlement, and deal with barriers to settlement. Of these three functions, it is the second, optimization, that is most at risk under a percentage-of-cost-savings fee for the simple reason that a mediator may be less concerned with optimizing the parties' agreement if such optimization takes time (and therefore might decrease her percentage-of-cost-savings fee). Lack of optimization will not necessarily be the case because the mediator may need to optimize to be able to get the parties to reach agreement. But it could be the case because the percentage-of-cost-savings fee creates a process bias.

This risk is one that reasonable parties might wish to bear. Some contexts do not afford great value-creating opportunities.<sup>185</sup> Personal injury

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182. See *supra* note 140 and accompanying text.

183. One could theoretically save costs as compared to unassisted negotiation. The mediator could argue that the parties would have bargained for longer and still failed to reach agreement had they not used a mediator. Most likely, however, such fees would only be earned when the mediation had, in fact, produced agreement.

184. If one could show that certain agreements were strongly linked to cost savings—in other words, that certain agreements could be arrived at quickly, whereas others would take more time—then one might say that a mediator using such a fee had an indirect outcome bias. She would be partial to those agreements that could be reached quickly.

185. See, e.g., MNOOKIN ET AL., *BEYOND WINNING*, *supra* note 143, at 42–43 (discussing a spectrum of negotiation contexts, some with value-creating opportunities, some without).



litigation, for example, presents a largely distributive bargaining problem; there are few ways to create value in such a single-issue, one-shot negotiation. Mediating parties in this context might be more concerned about saving costs than about finding a Pareto-efficient agreement. On the other hand, the class action example raised in subpart I(A) may afford opportunities for value-creating trades. In that context, there is greater risk that a percentage-of-cost-savings fee could so bias the mediation process that the parties would rush to a given settlement without sufficient consideration of its merits. In addition, the quality of client consent to settlement, or fee, terms in the class action context is notoriously questionable. One might fear collusion between the mediator and class counsel. Class counsel could offer the mediator a percentage-of-cost-savings fee in return for a quick, unquestioned, but ill-considered settlement of the class litigation.

The point, again, is that CFM arrangements must be considered on a case-by-case basis. Although the class action example from subpart I(A) might seem inappropriate on its face, not all percentage-of-cost-savings fees will be suspect. In some settings, informed parties could quite reasonably decide that such a fee was in their joint interest. Particularly if structured as a voluntary post-mediation bonus, as in the example in subpart I(A), informed parties could see such a fee as an antidote to delay. The divorcing couple discussed above, for example, might be willing to make the mediator's fee contingent on the savings they expect by forgoing litigation—savings quite easy to quantify. They might realize that a mediator could help them overcome personality or emotional issues that stand in the way of settlement and might be willing to give a portion of their saved transaction costs to a third party to help them in this way.<sup>186</sup>

Finally, consider a fee based on the percentage of value created by a mediator. Once again, such a fee does not inherently create a biasing interest. There is no reason why one party or another would be disproportionately benefited by a more Pareto-efficient resolution of the dispute. Instead, both parties should benefit if they can arrive at a more optimal settlement.<sup>187</sup> It is true that a given solution might be more benefi-

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186. The economics of bargaining suggests that litigating parties should almost always settle because, by doing so, they can capture—and split—for themselves the transaction costs they would otherwise spend on going to court. See, e.g., Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. LEGAL STUD. 29 (1995) (noting that, since settling saves litigation costs, parties can divide and keep the surplus created by not litigating); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 11 (1995) (arguing that, unless the difference between the plaintiff's and defendant's expected judgments exceeds the sum of their trial costs, the parties will settle to save such costs). If one accepts that bargaining failures will sometimes occur because of information asymmetries, psychological biases, or emotional or relationship barriers, then one can imagine that parties could rationally hire a mediator to help them settle under an arrangement whereby the mediator captured a portion of the transaction cost surplus and the parties retained the rest.

187. This is necessarily true if a mediator helps the parties reach a strongly efficient solution—better for both than some baseline outcome. It is also true, however, even if the mediator only helps

cial to one party, but this imbalance is both unknowable in advance and of no consequence—the same could be said of any negotiated outcome, regardless of whether it is Pareto-efficient.

Given that such a fee should have no impact on impartiality, it should not undermine the mediator's three core functions. Indeed, as with some of these other fees' structures, a percentage-of-value-created fee underscores an aspect of the mediator's role—finding value-creating settlements—and encourages the mediator to play that role fully.

Even if unobjectionable, it is worth noting that such percentage-of-value-created fees may be difficult to implement. It may be hard to determine how much value the mediation created because there may be no clear baseline against which to compare. In the scenario discussed in subpart I(A), for example, two corporate parties ultimately agreed to undertake a joint venture together that they had not previously contemplated. This aspect of their negotiated agreement clearly differs from what they would have received from the litigation process, and, in that sense, the parties did better than they could have otherwise. But the parties might have been able to find this joint venture without the assistance of a mediator. They might have simply settled their underlying contract litigation and then, months or years later, have discovered the joint venture possibility. Can one thus attribute the earnings from that joint venture to the mediator's efforts? How should the parties distinguish the mediator's contribution from the work of the management consultants, investment bankers, and lawyers that inevitably would be involved? To make a percentage-of-value-created fee work, the parties and the mediator would either have to establish *ex ante* what comparisons would be used *ex post* to determine value creation, or they would have to make the fee a voluntary bonus.

The point is, however, simple. CFM does not inherently create a biasing interest on the mediator's part. Instead, it can be used to align the mediator's interests with those of the parties. Contingent fees can support, rather than undermine, the mediator's core functions.

### C. *CFM Promotes Party Autonomy*

As illustrated above, the classical conception of neutrality was closely tied to respect for party autonomy.<sup>188</sup> The classical conception assumed that respect for party autonomy required strict neutrality, defined as both impartiality and self-disinterest. I think this assumption has it backwards. Respect for party autonomy requires allowing parties to have a say in what sort of

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the parties reach a weakly efficient solution—better for one than the baseline, but only as good as the baseline for the other. Assuming the possibility of side payments, both parties should prefer a more efficient solution to a baseline-dominated solution.

188. See *supra* note 148 and accompanying text.

neutrality they want. A contractarian approach recognizes that parties may wish to shape neutrality to their own needs. Thus, although it is important for mediators to maintain sufficient impartiality to be able to fulfill their basic functions as mediators, certain aspects of neutrality can be varied to meet the parties' interests in the dispute resolution process.

If parties are focused on reaching settlement, they may want a mediator with incentives to settle. A success fee may be appropriate in such circumstances. Similarly, if parties prioritize optimizing their settlement—finding available value-creating trades—they may want to tie the mediator's compensation to a percentage of value created.

It is important to note that this approach does not presuppose what mediation style or approach the mediator will take. Some have argued, for example, for a transformative approach to mediation in which the mediator attempts to help the parties transform their relationship through personal empowerment and recognition.<sup>189</sup> This vision of mediation is consistent with my own. I argue simply that a mediator should be accountable for doing what she is hired to do. Thus, if two parties wanted to make the mediator's fee contingent on successfully transforming the relationship, so be it. So long as, per subpart III(A) above, a mediator's core functions are not sacrificed, the parties should be able to tie their mediator's compensation to whatever variable they choose.

## V. Contractarian Economics and the Regulation Of Mediation

We have now come to the final stage of my argument. Currently the mediation profession regulates CFM using an immutable, untailored rule: when regulated, CFM is prohibited.<sup>190</sup> Good reasons exist for CFM, however, in some circumstances. In particular, allowing parties to use CFM—and to tailor the sort of neutrality they desire from their mediator—gives parties more control over the mediation process and its outcomes. The remaining question, therefore, is how best to regulate CFM. Assuming CFM should be permitted in some circumstances, what sort of rule structure makes most sense?

### A. *A Tailored CFM Default Rule*

In the lawyer-client context, immutable rules about contingency fees have given way to default rules over time. Whereas the common law traditionally prohibited contingency fees entirely,<sup>191</sup> the Model Rules of

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189. See BUSH & FOLGER, *supra* note 162, at 84–85.

190. See *supra* Part II.

191. Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 639–40 (1995) (discussing how the common law prohibition on contingency fees came from the doctrine of champerty).

Professional Conduct permit contingency fees so long as the attorney-client contract is in writing and clearly states how the fee will be determined.<sup>192</sup> Although attorneys are still subject to an immutable requirement that such fees be reasonable,<sup>193</sup> the Model Rules allow attorneys and clients to opt-in to a contingency arrangement provided they meet certain requirements.<sup>194</sup>

Part III suggests that a similar evolution should occur in mediation ethics regarding CFM. I propose the following rule as a guide for future mediation ethics codes:

*A mediator shall not take a fee contingent on any aspect of a mediation unless*

*(a) the mediator discloses, in writing, the fee arrangement and its potential consequences, the mediator recommends that the parties consult with counsel about the fee arrangement, and, prior to the mediation, all parties provide informed consent in writing and after an opportunity to consult with counsel;*

*(b) in court-ordered mediation, the fee arrangement is disclosed to and approved by the court prior to the mediation; and*

*(c) the fee arrangement does not create an appearance or actuality of partiality toward one party.*

This is a tailored default rule—sections (a) and (b)—coupled with an immutable standard—section (c). It assumes that CFM is prohibited but allows for parties to contract around that prohibition in certain circumstances. First, the contingent fee must not create partiality towards one party. This immutable requirement is set in section (c) by a general standard. This standard is similar to the current neutrality requirements in the Model Standards and in the Georgetown-CPR proposal.<sup>195</sup> Second, the mediator must disclose the fee to the parties in writing and provide the parties with sufficient information to be able to give informed consent to the fee. Parties must provide their consent in writing and after an opportunity to consult with counsel. These formal requirements serve to establish a record of the disclosures made, to channel the behavior of mediators and parties, and to signal the importance of the CFM issue.<sup>196</sup> Finally, in court-connected mediation, a mediator must have the fee arrangement approved by the presiding judge prior to beginning the mediation.<sup>197</sup>

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192. MODEL RULES OF PROF'L CONDUCT R. 1.5(c); see also Painter, *Rules Lawyers Play By*, *supra* note 14, at 694 n.157 (discussing the repeal of the prohibition on contingency fees).

193. MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2002).

194. *Id.*

195. See *supra* notes 65–69, 87 and accompanying text.

196. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–01 (1941) (discussing the functions of formality).

197. Such approval seems important to alleviate concerns that parties using a court-appointed mediator, who could be considered a state actor, might require greater protections against abuse before making use of CFM. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation*:

Is this rule better than the status quo immutable prohibition on CFM? As noted, an immutable ban on CFM would be justified if it were necessary either to protect some valuable social interest or to protect vulnerable parties from abuse at the hands of mediators.<sup>198</sup> Neither concern seems to justify the existing prohibition on CFM. First, the dominant social interest in question is our desire to protect the mediation process from distortion and keep mediation as a viable and fair alternative to adjudication. If CFM inevitably undermines the mediation process, an immutable rule makes sense. As already illustrated, however, CFM does not necessarily subvert the mediator's ability to assist parties in resolving their disputes. Only certain types of CFM—in particular, percentage-of-settlement fees—necessarily create biasing interests that may make a mediator ineffective. Thus, a broad immutable ban on CFM seems overinclusive.

What about the need to protect parties from unscrupulous mediators? This concern is certainly valid. As noted above, institutional oversight of mediation is limited, and mediators are rarely disciplined or held accountable through malpractice actions.<sup>199</sup> An immutable ban on CFM might thus be called for if we expected that mediators would have the upper hand in negotiations with parties concerning the decision to use CFM. Is this likely?

This is an empirical question, and one that I cannot answer definitively. But I think it is rather unlikely for several reasons. First, private mediation is a referral-driven business. A mediator depends on referrals to find future work. Reputational markets thus put some constraints on mediator behavior. Furthermore, CFM is inherently sensitive; a mediator considering its use will know that her actions will be scrutinized by colleagues, judges, and clients that might refer her future work. Assuming that a mediator cares about such referrals, she is unlikely to construct skewed fee arrangements that could be called into question.

Second, attorneys are involved in many private mediations. Divorcing parties and civil litigants generally have lawyers as well as mediators.<sup>200</sup>

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*What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 833 (2001) ("Particularly in court-connected mediation, this third party is likely to be perceived as a representative of the courts and as an authority figure."). In depth discussion of this potential problem is beyond the scope of this Article. For a discussion of the state actor problem, see generally Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000) and Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997). But see Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 188 (2002) (arguing that consensual mediation is not state action).

198. See *supra* notes 38–41 and accompanying text.

199. See *supra* notes 6–7 and accompanying text.

200. Diane Fornari, *Expanding Horizons for Domestic Litigation in West Virginia – Divorce Mediation*, 10 W. VA. LAWYER, Mar. 1997, at 12, 12.

Only in low-stakes litigation are attorneys regularly not involved.<sup>201</sup> But in such low-stakes cases, a mediator is unlikely to want a contingent fee or to spend the time to explain contingent fees and contract around the default rule. In higher stakes disputes, the likely presence of counsel will make it unlikely that a mediator will be able to propose or enforce a manipulative or one-sided fee arrangement. Again, parties are likely to be inherently wary of CFM and their attorneys even more so. For a mediator to persuade parties to contract around my proposed default rule will require that the mediator disclose her understanding of her fee arrangement, its consequences, and its likely benefits. Assuming the assistance of counsel, I doubt that parties will unwittingly enter into one-sided CFM arrangements.

Third, my proposed rule contains a tailored provision related to court-connected mediation. I require that parties inform the presiding judge of their decision to use CFM. This requirement will serve several purposes. First, a judge could obviously intervene in the mediation process if the judge is concerned about the improper use of CFM. Second, and more importantly, this requirement will likely deter mediators from overreaching contingent-fee arrangements.

In general, my proposed default rule on CFM will promote efficiency by allowing parties to tailor a mediator's incentive structure to best align with their joint interests. This tailored arrangement should reduce agency costs and allow parties to obtain more value out of their mediator. In addition, it should promote differentiation within the market for mediators. It will allow mediators to signal their approach to mediation by using certain types of contingent fees. It will also allow parties to hold mediators somewhat accountable for their actions and help potential parties to distinguish confident (and high quality) mediators from those less interested in accountability.<sup>202</sup>

My proposed rule has obvious information-forcing or penalty qualities. It requires negotiation between parties and their potential mediator prior to the mediation, and it requires that mediators disclose sufficient information to parties to allow them to make an informed choice about the use of CFM. This disclosure not only serves to ensure that CFM is used wisely but should also assist parties as they attempt to distinguish mediators in the marketplace. In particular, it may provide a vehicle for conversations about a given mediator's style and approach—conversations that I believe should be much more common.

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201. See, e.g., John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 816 n.14 (1999) (stating that parties to small claims are not often represented by lawyers).

202. See Maute, *Public Values and Private Justice*, *supra* note 124, at 521–35 (discussing mediator accountability).

My proposed rule would have various implications for current mediation practice. If we return to the four examples with which we began—all of which were barred by current prohibitions on CFM—we can see that this tailored rule would permit contingent fee mediation in some, but not all, conceivable mediation situations.

For example, my rule would categorically deny the possibility of percentage-of-settlement fees. As discussed above, such fees violate the rule's requirement that no fee arrangement shall create an appearance or actuality of partiality toward one party.<sup>203</sup> But the rule would permit some success fees contingent on the occurrence of settlement, as well as fees based on cost savings or value created. As indicated in Part III, although such fees may eliminate a mediator's claim to absolute self-disinterest, they do not necessarily bias the mediator towards one party (and would therefore not run afoul of the rule's section (c)). Subject to its various constraints, the rule would also permit voluntary bonuses given after a mediation's conclusion.

Would the adoption of this rule change the incidence of CFM and make contingent fees commonplace in mediation? Again, this is an empirical question that I cannot answer. My suspicion is that such a rule would have *some* impact on the incidence of CFM. In particular, I think it likely that some demand exists among disputants for mediation based on success fees. Were a mediator to offer success-fee-based services, I expect that that mediator would have some competitive advantage in the market for mediation. Although many parties would undoubtedly shy away from success fees because of their potential effect on a mediator's behavior, others would welcome the increased accountability that such fees would bring.

Other types of contingent fees, particularly percentage-of-cost-savings and percentage-of-value-created fees, are less likely to become wildly popular. I expect, however, that there is some mediator demand for such fees. Particularly in large, complex disputes with high stakes, it would be reasonable for a mediator to feel undercompensated currently, even when charging a high daily or hourly rate. In the "percentage-of-value-created" scenario described in Part I,<sup>204</sup> for example, the parties realized approximately \$500 million in additional gains as a result of the mediator's efforts. Although this may be rare, it is possible. A savvy mediator can help parties turn a dispute into a business opportunity. Such a mediator may serve as a dispute resolver, deal broker, and management consultant. If the mediator can help the parties find value and can reach satisfactory agreement with those parties about how that value should be measured, it is not unreasonable for the mediator to seek a percentage of the value created.

A final and slightly difficult question is raised: are mediators likely to want to use CFM? The advantages are clear. In some cases, a mediator

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203. See *supra* note 140 and accompanying text.

204. See *supra* section II(B)(4).

might be compensated more fairly under a CFM arrangement than under an hourly or daily fee agreement. In addition, a mediator might value the increased accountability that accompanies CFM. She might be willing, even eager, to absorb the risk of a success fee, for example, in return for the right to increased compensation if her skills led to a successful resolution of the parties' dispute.

But mediators face a particular disadvantage that I have not yet mentioned. That is the risk of exploitation by parties who try to use CFM to avoid compensating a mediator entirely. The danger is obvious. If a mediator is to be compensated only if the case settles, the parties could use the mediator's services and then stop short of settling. They might then continue to negotiate after the mediation ends, settle on their own without the mediator, and reap the benefit of the mediation without incurring its cost.<sup>205</sup>

Does this pragmatic problem completely spoil CFM for mediators? I do not think it does. Mediators might combat exploitation in several ways. First, a CFM fee agreement will undoubtedly need to include a good faith provision binding parties not to engage in this sort of behavior. Such a provision would be somewhat similar to a clause in a real estate agency contract that obligates a seller to pay their agent rather than sell their home independently. But it may not be quite as easy to enforce as such a real estate clause. In real estate, agents can monitor the sale of a home. If a homeowner tries to shirk her contractual obligations, the real estate agent is likely to discover that behavior. It may be more difficult—although not impossible—for a mediator to track the eventual disposition of disputes that fail to settle during mediation. Nevertheless, such clauses would undoubtedly have some impact on party behavior.

Second, this fear of exploitation may make mediators think twice about using CFM with unknown parties. Instead, a mediator may employ CFM only when reputational information suffices to reassure the mediator that exploitation is unlikely. If the mediator knows one or both parties or has worked with their attorneys before, the mediator may feel comfortable with CFM.

Finally, mediators may be more likely to try CFM in mediations that occur "on the eve of trial" when there may be little chance left for post-mediation bargaining. In such instances, the exploitation risk may be fairly low.

In all events, these possible problems should not prohibit mediators and parties from trying CFM in some instances. Mediators are well-positioned to assess the risks of such fee structures. With a well-tailored default rule, they

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205. I thank Michael Moffitt and Kimberly Kovach for highlighting the need to discuss this problem.



will explore alternative fee structures to the extent that the benefits outweigh those risks.

*B. Broader Implications of a Contractarian Approach to Mediation Ethics*

Although I have focused throughout this Article on neutrality and contingent fee mediation, my approach to these issues has broader implications for the field of mediation ethics. As it has in the world of legal ethics, contractarian thinking could greatly influence the regulation of mediation. Here I explore two potential influences.

*1. Other Rules Ripe for Revision.*—Even if one is not interested in the CFM debate, the discussion to this point has shown the potential power of a contractarian approach to mediation ethics. The contractarian taxonomy of rule types opens up a range of regulatory choices that are often overlooked in current ethics codes. In addition to the prohibition on CFM, other mediation ethics rules are ripe for revision or re-analysis in light of this contractarian approach. Here I consider just two.<sup>206</sup>

*a. Control Over Terminating (or Not Terminating) a Mediation.*—Consider, for example, the immutable rule in the Model Standards stating that “[t]he parties decide when and under what conditions they will reach an agreement or terminate a mediation.”<sup>207</sup> The mediation community has long assumed that parties must be free to walk away from a mediation and that this freedom is a fundamental part of the self-determination that mediation offers.<sup>208</sup> But is an immutable rule justified in this instance? I think this is open to question for at least two reasons.

First, one can imagine various scenarios in which, like Ulysses tying himself to the mast to avoid the sirens’ song, parties might want to cede control over the termination of their mediation to their mediator. This presents a classic precommitment problem. At the start of a mediation—Time 0—the parties might know that later they could be subject to needs and interests that at Time 0 they found unsavory. They might fear that public opinion or the pull of constituents would overwhelm their better judgment and force them to terminate the mediation unwisely. At Time 0, they might therefore wish to cede that control to the mediator to keep their future selves from making a choice that their present selves disfavored. This situation is akin to a smoker’s decision to destroy her cigarettes so as not to give in to a

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206. Others include the following: the conflict of interest rules for mediators, which perhaps should vary by context; various rules that could be tailored to address mediation by large, institutional ADR service providers; and mediator accountability rules that could be revised to allow parties and mediators to opt-in to more stringent accountability for the mediator.

207. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 5, § VI.

208. See, e.g., KOROBKIN, *supra* note 153, at 344.

future impulse or to the choice to place one's alarm clock far from one's bed so as to precommit oneself to get up at a certain time, knowing one's propensity to hit the snooze button.<sup>209</sup> Instead of an immutable requirement that parties have control over the termination decision, one might imagine a default rule vesting such power in parties but allowing them to contract with a mediator for penalties (payable to the other party) in the event of termination before an agreed-upon time.

Parties might have a second—and in some ways opposite—reason for desiring a default rule regarding termination. Jennifer Brown and Ian Ayres have shown that, in some circumstances, a mediator's ability to help parties is undermined by the ability of the parties to continue to bargain even if they walk away from the mediation.<sup>210</sup> Consider a simple mediation in which the mediator privately solicits an offer from the defendant and a demand from the plaintiff. If the defendant offers more than the plaintiff demands, the case is settled. If not, the mediation is over, and the parties must go to court.

In this mediation, the parties have an incentive to be reasonable. If they state their offers and demands accurately, without inflating them to try to "get a better deal," they have a greater chance of settling the case and saving the transaction costs of litigating.<sup>211</sup> And, if the mediator can actually bind them to a promise not to keep bargaining after the mediation, then this chance is their last one at settlement. If, on the other hand, the parties can continue to negotiate even after a failed mediation, the situation changes. The game theoretic problem is simple: if the parties are free to continue bargaining after the "mediation game" is over, the parties have less incentive to dampen strategic posturing during the mediation game.<sup>212</sup> Instead, they can engage in brinkmanship, hope to get an advantageous deal, and continue bargaining if no deal emerges.

Brown and Ayres argue that "[t]he mediator's ability to prohibit further negotiation . . . plays a crucial role" in dampening strategic behavior during mediation.<sup>213</sup> They demonstrate that "[t]he expected gains from trade can at times be increased . . . if the parties commit not to trade when their private reports of value to the mediator are not overlapping."<sup>214</sup>

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209. For an introduction to precommitment problems generally, see JON ELSTER, *ULYSSES UNBOUND* (2000) and JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979).

210. Brown & Ayres, *Economic Rationales*, *supra* note 154, at 354.

211. See generally MNOOKIN ET AL., *BEYOND WINNING*, *supra* note 143, at 101–07.

212. Brown & Ayres, *Economic Rationales*, *supra* note 154, at 342.

213. *Id.*

214. *Id.* at 335. I am assuming this assertion to be true without going into the economic analysis that underlies it. (I heartily recommend the Brown & Ayres essay.)

This point suggests that, in some instances, a mediator needs both the power to terminate the mediation and the power to prevent the parties from negotiating further after a mediation ends. This is completely at odds, however, with the immutable rule on termination in the Model Standards. This variance suggests that, in some instances, disputing parties might want to be able to contract with their mediator for a quite different regime on the termination of their mediation session.

*b. The Facilitative or Evaluative Debate.*—Another debate in the mediation ethics community would benefit from contractarian analysis. That is the dispute over whether mediators should be permitted to engage in “evaluation” of a dispute. Typically, mediators are barred from giving parties an estimate of the settlement value of their litigation if the litigation were to go to court.<sup>215</sup>

This debate has raged long and hard, and I see no reason to rehash it here. I will instead make only one tentative suggestion. Perhaps the debate could be put to rest by altering the assumption that mediation should or should not be evaluative or that parties do or do not want facilitation or evaluation. Instead, a contractarian approach to mediation ethics would suggest that mediation ethics codes should provide a menu of options for mediators and parties. One might, for example, have a penalty default rule that provided that mediators should not provide evaluation absent written and informed consent by both parties. Such a rule would require that a mediator disclose information to the parties about the costs and benefits of evaluation, which might appease some critics of evaluation who worry that it is foisted upon unsuspecting parties. But a default rule would also allow parties to choose the type of mediation style they preferred, rather than imposing a uniform style on all mediations. (One could also tailor such a rule. Perhaps some contexts are more appropriate for evaluation, and thus mediation ethics codes could specify different constraints on evaluation in those contexts.)

*2. The Evolution of Mediation Ethics.*—As a more general matter, I believe that a contractarian approach to mediation ethics could greatly assist in the ongoing evolution of the regulation of alternative dispute resolution. Part I illustrated that mediation ethics codes and regulations are in some ways confused and disparate. A given mediator or mediation is often subject to many overlapping codes and obligations. Little or no systematic enforcement of these codes exists. In short, the mediation profession has failed to develop self-regulatory mechanisms on par with those of other professions.

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215. Cf. Riskin, *Understanding Mediators' Orientations*, *supra* note 142, at 44 (discussing the benefits and detriments of having a mediator evaluate the value of a case should it go to court).

Moving beyond the status quo in mediation ethics will not be easy because of the dilemma identified in the Introduction. On the one hand, mediators need clear ethical rules to guide their behavior. On the other hand, the mediation profession is radically heterogeneous. The types of mediations, dispute contexts in which mediation is used, and styles of mediation are many. Simple ethical rules will often not apply comfortably across such contexts. If the rules are strict enough to enforce, they will be too strict to work.

This dilemma has bogged down the evolution of mediation ethics. I believe, however, that a contractarian approach offers a way out. The key is to change a critical assumption that has guided the promulgation of mediation ethics codes to date: that ethical duties should be cast as categorical immutable duties designed to apply to all mediations regardless of context. Mediation codes have succumbed to this tendency to their detriment.<sup>216</sup>

The assumption that ethical obligations must be immutable has led to a predictable end of unhelpful, fuzzy standards. As Richard Painter has explained in the context of legal ethics rules, rulemaking bodies often turn to standards instead of rules when they agree upon a given principle or social interest but disagree on the specifics of how best to protect it.<sup>217</sup> In the face of such disagreement, an immutable rule seems too harsh. Such bodies therefore may turn to immutable standards as a sort of compromise. The choice of a standard over a rule softens the impact of their decisionmaking without taking the teeth out of their ethical guidelines.

A contractarian approach to mediation ethics advocates for a different resolution to this dilemma. It accommodates heterogeneity in the mediation field by permitting parties and mediators to opt-in to certain obligations and opt-out of others, depending on the parties' needs. This choice advocates the use of default rules rather than immutable rules. At the same time, it accommodates the need to provide guidance to the mediation profession by setting clear and tailored rules instead of fuzzy, untailored standards. Such tailored rules should be palatable to rulemakers because they are merely defaults. Parties can shape them to suit their needs.

In some ways, this is the approach taken by Hawaii in its recent revision to its CFM rules. As discussed above, the Hawaii judiciary has promulgated three inconsistent possibilities with regard to CFM and permits parties to choose between them.<sup>218</sup> The Hawaii approach, however, seems too lax.

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216. See Jamie Henikoff & Michael Moffit, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 95–96 (1997) (criticizing the existing mediation standards for setting out “inflexible rules that all attorneys ‘shall’ or ‘must’ observe, regardless of circumstance”).

217. See Painter, *Rules Lawyers Play By*, *supra* note 14, at 688–90 (discussing how, in the context of lawyer's fees and sexual relations between a lawyer and client, states have preferred standards to rules).

218. See *supra* notes 96–104 and accompanying text.

The rules have little detail, and they ultimately provide little real guidance. But they do suggest the right direction for mediation ethics generally. If we wish to accommodate the diverse needs of the mediation profession, we must revise our assumptions about how best to formulate the profession's ethical codes. Contractarian analysis offers much insight into that task.

## VI. Conclusion

This Article has argued for three interrelated points. First, contingent fee mediation may be appropriate in some circumstances. Second, although the use of CFM has implications for our traditional understanding of mediator neutrality, that understanding is ripe for revision. Not only is the classical conception of mediator neutrality flawed, but the critique of it has been misguided as well. Finally, both of these issues—CFM and what neutrality requires—can benefit from returning to the notion of mediation as a creature of contract. A contractarian approach to mediation ethics would guide parties through tailored default rules that permitted parties and mediators to shape their mediation to best meet the parties' needs. This approach has much to offer to the regulation of mediation ethics generally.

