

CPR-GEORGETOWN COMMISSION
ON ETHICS AND STANDARDS IN ADR

Model Rule for The Lawyer as Third-Party Neutral

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CPR Institute for Dispute Resolution
366 Madison Avenue, New York, NY 10017
(212) 949-6490 Fax: (212) 949-8859
www.cpradr.org

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CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS IN ADR

Proposed New Model Rule of Professional Conduct

Rule 4.5: The Lawyer as Third-Party Neutral¹

Reported by:

Professor Carrie Menkel-Meadow

Chair, CPR-Georgetown

Commission on Ethics and Standards in ADR

and

Elizabeth Plapinger

Staff Director, CPR-Georgetown

Commission on Ethics and Standards in ADR

PREFACE

The Commission on Ethics and Standards in ADR (sponsored by Georgetown University Law Center and CPR Institute for Dispute Resolution) has drafted this Model Rule for adoption into the Model Rules of Professional Conduct.² We offer here a framework or architecture for consideration by the appropriate bodies of the American Bar Association and any state agency or legislature charged with drafting lawyer ethics rules.

¹ The Model Rule of Professional Conduct for the Lawyer as Third-Party Neutral has been prepared by the CPR-Georgetown Commission on Ethics and Standards in ADR, sponsored by CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. The Model Rule was promulgated in draft for public comment in April 1999. This final version, being released in November 2002, represents the culmination of many years of deliberations, drafting, consultations and commentary by both members of the Commission and other interested parties.

The drafters of this Model Rule are members of the Drafting Committee of the CPR-Georgetown Commission on Ethics and Standards in ADR. The committee is part of the CPR-Georgetown's Commission's Working Group on ADR and Law Practice. The Drafting Committee includes the Honorable Jerome Simandle, the Honorable Edmund Spaeth, John Bickerman, Esq., Lawrence Fox, Esq., Duane Krohnke, Esq., Bruce Meyerson, Esq., Dean Nancy Rogers, Elizabeth Plapinger, Esq. and Professor Carrie Menkel-Meadow. Professor Geoffrey Hazard has served as a consultant and commentator for the group. Kathleen Scanlon, CPR Sr. VP and Director of Public Policy Projects, participated in the deliberations and drafting of the final version of the Model Rule.

² There have been several earlier efforts and suggestions for rules in the ADR area to be added to the Model Rules, *see, e.g.*, Judith Maute, "Public Values and Private Justice: A Case For Mediator Accountability," 4 GEO. J. LEGAL ETHICS 503 (1991). For a review of ethical issues facing mediators, *see* Robert A. Baruch-Bush, "The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications," 1 J. DISP. RESOL. 1, 3 (1994), reprinted in Dwight Golann, "Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators," ch. 14, ETHICAL DILEMMAS (Little Brown & Co. 1996).

The CPR-Georgetown effort attempts to remedy some of the inadequacies of transdisciplinary ethical code drafting, *see, e.g.*, the American Arbitration Association (AAA), the American Bar Association (ABA) and the Society of Professionals in Dispute Resolution (SPIDR), "Model Standards of Conduct for Mediators" (adopted in 1994 by the AAA, SPIDR, and the ABA Section of Dispute Resolution, but not ratified to date by the ABA Board of Governors), as well as the silences of current legal ethics formulations. For a discussion of the failure of the RESTATEMENT OF THE LAW GOVERNING LAWYERS to deal with the ethical issues raised by ADR practice, *see* Carrie Menkel-Meadow, "The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice," 10 GEO. J. LEGAL ETHICS 631 (Summer 1997); Geoffrey Hazard, Jr., "Non-Silences of Professor Hazard on 'The Silences of the Restatement': A Response to Professor Menkel-Meadow," 10 GEO. J. LEGAL ETHICS 671 (Summer 1997); RESTATEMENT OF THE LAW GOVERNING LAWYERS (2000).

The Model Rule addresses the ethical responsibilities of lawyers serving as third-party neutrals, in a variety of alternative dispute resolution (ADR) fora (*e.g.*, arbitration, mediation, early neutral evaluation). As an initial jurisdictional matter, the Model Rule does not address the ethical requirements of non-lawyers performing these duties,³ or the ethical duties of lawyers acting in ADR proceedings as representatives or advocates.⁴

³ The Model Rule is designed to be incorporated in lawyer ethics codes. The question of what other agencies may promulgate transdisciplinary rules (such as the AAA/ABA/SPIDR Model Standards of Conduct for Mediators (*supra* note 2), or state statutes governing all mediators, for example) is not addressed. The ABA Commission on Evaluation of the Model Rules of Professional Conduct (ABA Ethics 2000 Commission) recently reported on several proposed changes to the Model Rules of Professional Conduct affecting ADR. *See* Preamble, Model Rule 1.12 (Former Judge, Arbitrator or Other Third-Party Neutral) and Model Rule 2.4 (Lawyer Serving as Third-Party Neutral) (recognizing the role of the lawyer as third-party neutral, dealing with screening in law firms of mediators, arbitrators and former judges in conflicts situations involving both ADR and representational matters.) The House of Delegates of the ABA adopted in 2002 many of the proposals submitted by the ABA Ethics 2000 Commission. *See* www.abanet.org.

⁴ The Model Rule attempts to regulate solely the ethical responsibilities of lawyers serving as neutrals and does not deal with other issues such as the potentially different duties of lawyers as representatives or advocates within ADR settings. For an overview of these issues, *see* Carrie Menkel-Meadow, "Ethics in Mediation Representation," *DISPUTE RESOLUTION MAGAZINE* 3 (Winter 1997). For a summary of current efforts to address ethics issues of ADR representatives, *see infra* note 20.

Proposed New Model Rule of Professional Conduct

Rule 4.5: The Lawyer as Third-Party Neutral⁵

Preamble

As client representatives, public citizens and professionals committed to justice and fair and efficient legal processes, lawyers should help clients and others with legal matters pursue the most effective resolution of legal problems. This obligation should include pursuing methods and outcomes that cause the least harm to all parties, that resolve matters amicably where possible, and that promote harmonious relations. Modern lawyers serve these values of justice, fairness, efficiency and harmony as partisan representatives and as third-party neutrals.

This Model Rule applies to the lawyer who acts as a third-party neutral to help represented or unrepresented parties resolve disputes or arrange transactions among each other. When lawyers act in neutral, non-representative capacities, they have different duties and obligations in the areas addressed by this Rule than lawyers acting in a representative capacity. The role of the lawyer as a third-party neutral differs from the representational functions addressed by the Model Rules of Professional Conduct and judicial functions governed by the Judicial Code of Conduct.⁶

Contemporary law practice involves lawyers in a variety of new roles within the traditional boundaries of counselors, advocates and advisors in the legal system. Lawyers now commonly serve as third-party neutrals, either as facilitators to settle disputes or plan transactions, as in mediation, or as third-party decision makers, as in arbitration.⁷ Such proceedings, including mediation, arbitration and other hybrid forms of settlement or decision making, occur both as adjuncts to the litigation process (either through a court-referral or court-based program, or by agreement of the parties) and outside litigation via private agreement. These proceedings are commonly known as “ADR” processes.⁸ Some state

⁵ The Model Rule is numbered Rule 4.5 (contemplating an addition to the Model Rules section on “Transactions with Persons Other Than Clients” in simple numerical order). Ideally, the Lawyer as Third-Party Neutral would be a new Rule 4, with the other current rules simply dropping down a number. This Model Rule could be substituted for the 2002 edition of ABA Model Rule 2.4 (recognizing the lawyer as third-party neutral but not dealing specifically with many ethical issues) (www.abanet.org). Regulation of ethics issues operates at the state level and each state needs to decide whether to adopt the ABA Model Rule, the CPR-Georgetown Model Rule or another formulation. *See, e.g.*, Tenn. Rules of Professional Conduct, Rule 2.4 (approved Sept. 17, 2002) (more detailed and extensive than ABA Ethics Commission 2000 Proposed Rule 2.4) (www.tba.org). Indeed, many states bodies charged with drafting lawyer ethics rules are currently re-evaluating the rules for their jurisdictions.

Where possible, we use language, definitions, standards and formulations consistent with the current Model Rules. We also take note, where pertinent, of (i) the work of the ABA Ethics 2000 Commission, including its proposed revisions to the Model Rules of Professional Conduct and the revisions approved by the ABA House of Delegates in February 2002, *see supra* note 3, and (ii) the recently completed RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS (2000).

⁶ *See* Carrie Menkel-Meadow, “Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities,” 38 S. TEXAS L. REV. 407 (1997); *see also* Menkel-Meadow, “The Silences of the Restatement,” *supra* note 2.

⁷ For definitions of these processes, *see* Definitions, *infra*. The 2002 edition of the ABA Model Rules distinguishes for some purposes between arbitration—which is a tribunal (ABA Model Rule 1.0(m))—and mediation which is not. For implications of such a distinction, *see supra* note 20.

⁸ The term ADR is used here to connote “appropriate dispute resolution,” suggesting a choice of methods to be used to fit the particular matter. In more common parlance, ADR is used to connote “*alternative* dispute resolution” processes, where the processes are seen as alternatives to more conventional trial or litigation methods.

ethics codes, statutes or court rules now require or strongly suggest that lawyers have a duty to counsel their clients regarding ADR means.⁹

When lawyers serve as ADR neutrals they do not have partisan “clients,” as contemplated in much of the Model Rules, but rather serve all of the parties. Lawyer-neutrals do not “represent” parties, but have a duty to be fair to all participants in the process and to execute different obligations and responsibilities with respect to the parties and the process.¹⁰ Nor do the rules which apply to judges, such as the Judicial Code of Conduct, adequately deal with many issues that confront lawyer-neutrals. For example, lawyers who act as third-party neutrals in one case may serve as representational counsel in other matters and thus confront special conflicts of interest, appearance of impropriety, and confidentiality issues as they serve in the different roles of neutral and advocate.¹¹ Unlike the judge or arbitrator who remains at “arms-length” distance from the parties and who hears information usually when only both parties are present, mediators have different ethical issues to contend with because they hear private, proprietary facts and information from both sides in caucuses and *ex parte* settings.¹²

While there continues to be some controversy about whether serving as a mediator or arbitrator is the practice of law or may be covered by the ancillary practice Model Rule 5.7,¹³ it is clear that lawyers

⁹ See, e.g., Ark. Code Ann. sec. 16-7-204 (Michie 1997) (“all attorneys ... are encouraged to advise their clients about the dispute resolution process options available to them in the selection of the technique or procedure, including litigation, deemed appropriate for dealing with the client’s dispute, case or controversy.”); Colo. Rules of Professional Conduct, Rule 2.1 (1998) (“In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.”); Ga. Code of Professional Responsibility, Canon 7-5 (1996) (“A lawyer as advisor has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation.”); Haw. Rules of Professional Conduct, Rule 2.1 (1998) (“In a matter involving or expected to involve litigation, a lawyer should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.”); N.H. Rules of Prof. Conduct, Rule 1.4(b) (2002) (“A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding representation”). See generally Marshall Breger, “Should An Attorney be Required to Advise a Client on ADR Options?,” 13 GEO J. LEGAL ETHICS 427 (Spring 2000) (includes listing of relevant statutes, court rules and ethics provisions).

¹⁰ While the third-party neutral does not represent or advocate for any of the parties to an ADR proceeding, in some circumstances, the third-party neutral may provide information or advice to the parties without establishing a representational relationship. See, e.g., Fla. R. Civ. P. 10.370 (c) (2002) (“A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense....”); *infra* note 13.

¹¹ See generally *Poly Software Int’l, Inc. v. Su*, 880 F. Supp. 1487 (D. Utah, 1995).

¹² See, e.g., *Matluck v. Matluck*, 2002 Fla. App. Lexis 13443, *2-3 (Fla. Dist. Ct. App. Sept. 18, 2002); *Fields-D’Arpino v. Restaurant Assocs., Inc.*, 39 F. Supp. 2d 412, 416-17 (S.D.N.Y. 1999); *Poly Software Int’l*, 880 F. Supp. at 1494, *supra* note 11. The Judicial Code may also need revision to take account of new roles undertaken by judges in the use of ADR, such as referral to ADR processes, *ex parte* communications with parties, and service as third-party neutrals, as well as judicial roles in settlement conferences. See Carrie Menkel-Meadow, “*Ex Parte* Talks with Neutrals: ADR Hazards,” 12 ALTERNATIVES 209 (1994); Carrie Menkel-Meadow, “Judicial Referral to ADR: Issues & Problems Faced by Judges,” 7 F.J.C. DIRECTIONS 8 (1994). See also *Cho v. Superior Court*, 39 Cal. App. 4th 113, 45 Cal. Rptr. 2d 863 (Cal. Ct. App. 1995); Model Rule 4.5.2 (Confidentiality), *infra*; Model Rule 4.5.4 (Conflicts of Interest) *infra*.

¹³ In 1994, Professor Geoffrey Hazard opined that activities in ADR can be considered “ancillary” functions of the lawyer under Model Rule 5.7, making the Model Rules applicable to lawyers serving in ADR situations. See Geoffrey C. Hazard, Jr., “When ADR is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues,” 12 ALTERNATIVES 147 (1994). We believe that subsequent analysis and case law support the need for the Model Rule proposed here. See Menkel-Meadow, “Ethics in Alternative Dispute Resolution,” *supra* note 6; Menkel-Meadow, “The Silences of the Restatement,” *supra* note 2. See also *In re County of Los Angeles*, 223 F.3d 990 (9th Cir. 2000); *Fields-D’Arpino*, *supra* note 12; *Poly Software Int’l*, *supra* note 11; *Cho*, *supra* note 12.

For commentary on the debate over whether mediation constitutes the practice of law, see State Justice Institute, Guidelines for Mediation and Unauthorized Practice of Law, Report of the Office of Executive Secretary, Supreme Court of Virginia (1999); Carrie Menkel-Meadow, “To the Editors: Is Mediation the Practice of Law?” IV (5) NIDR NEWS, Nov.-Dec. 1997, Jan. 1998, at 2; Symposium, “Is Mediation the Practice of Law?,” NIDR FORUM (June 1997); Geetha Ravindra, “When Mediation Becomes the Unauthorized Practice of Law,” 15 ALTERNATIVES 94 (1997); Carrie Menkel-Meadow, “Is Mediation the Practice of Law,” 14 ALTERNATIVES 57 (1996); Bruce Meyerson, “Lawyers Who Mediate Are Not Practicing Law,” 14 ALTERNATIVES 74 (1996); “NJ Panel Finds ADR is Part of Law Practice,” 12 ALTERNATIVES 87 (1994).

serving as third-party neutrals need ethical guidance from the Model Rules with respect to their dual roles as partisan representatives and as neutrals. The Drafting Committee believes that it is especially important to develop clear ethical rules when the lawyer, commonly conceived of as a “partisan” representative, takes on the different role of “neutral” problem-solver, facilitator or decision maker.

Lawyers may be disciplined for any violation of the Model Rules or misconduct, regardless of whether they are formally found to be serving in lawyer-like roles. Accordingly, while other associations provide guidance within specific contexts,¹⁴ when lawyers serve as mediators or arbitrators their ethical duties and discipline under the Model Rules of Professional Conduct may be implicated. For these reasons, this Model Rule is submitted to provide guidance for lawyers who serve as third-party neutrals, and to advise judicial officers and state disciplinary boards who enforce lawyer ethical or disciplinary standards.¹⁵

Scope

This Model Rule is drafted to govern lawyers serving in the full variety of ADR third-party neutral roles, as arbitrators, mediators, facilitators, evaluators and in other hybrid processes. (See Definitions, *infra*). Because the Rule addresses core ethical duties that apply to virtually all neutral roles, the Drafting Committee believes that a general rule governing lawyers serving in all third-party neutral roles is appropriate. Where different neutral roles give rise to different duties and obligations, the Model Rule so provides in text or comment.¹⁶ A single rule approach is also consistent with the generally transsubstantive approach of the Model Rules. However, as the Model Rules continue to recognize increasing diversity of lawyer roles, *see, e.g.*, Model Rule 3.8 (Special Responsibilities of a Prosecutor); Model Rule 2.1 (Advisor); Model Rule 1.13 (Organization as Client), separate rules for lawyers as mediators or arbitrators may be appropriate in the future.

This Model Rule applies only to lawyers serving as third-party neutrals.¹⁷ Many other professionals now serve as arbitrators, mediators, facilitators, evaluators or ombuds, and other bodies have promulgated transdisciplinary ethical rules relating to those services.¹⁸ When a lawyer serves as a third-party neutral in a capacity governed by multiple sets of ethical standards, the lawyer must note that the Model Rules of Professional Conduct govern his/her duties as a lawyer-neutral and that discipline *as a lawyer* will be governed by the Model Rules.¹⁹ This Model Rule does not govern lawyers in their capacity as representa-

¹⁴ *See, e.g.*, Code of Ethics for Arbitrators in Commercial Disputes (American Arbitration Association (AAA)–American Bar Association (ABA), 1977). This code is currently being revised by a Task Force consisting of representatives from numerous ABA Sections - Business Law, Dispute Resolution, International Law and Practice, Litigation, Senior Lawyers Division, Torts and Insurance Practice—and representatives of other groups, including the AAA and the CPR Institute.

¹⁵ Whether third-party neutrals will be liable in malpractice or on other legal theories to parties to an ADR proceeding is a question of state law. *See, e.g., Chang's Imports, Inc. v. Srader*, 2002 U.S. Dist. LEXIS 15832 (S.D.N.Y. Aug. 20, 2002) (attorney-mediator summary judgment motion on negligence claim granted).

¹⁶ *See, e.g.*, Model Rule 4.5.4 (Conflicts of Interest – treatment of “partisan,” party-appointed arbitrators), *infra*. In facilitating dispute resolution and transaction planning in a variety of different ways, neutrals may have different obligations with respect to confidentiality (where *ex parte* or caucus sessions are used), conflicts of interests (multiple use of single neutral by one party) and other issues depending on the role intended, agreement of the parties, or the law or regulation in the relevant jurisdiction.

¹⁷ This Model Rule also governs mainly issues of individual ethical responsibility, rather than organizational duties. In the conflicts area, however, both individual and organizational responsibilities are stated in the imputation and screening rule, *see* Model Rule 4.5.4 (b), *infra*. Other rules, standards and bodies of law may regulate the organizational or associational providers of ADR services. For example, the CPR-Georgetown Commission on Ethics and Standards in ADR promulgated a set of Principles for ADR Provider Organizations (2002). *See* www.cpradr.org (Public Policy Projects). *See also* Ted Schneyer, “Law Firm Discipline,” 77 CORNELL L. REV. 1 (1991).

¹⁸ *See, e.g.*, ABA-AAA-SPIDR “Model Standards for Mediators,” *supra* note 2; Society of Professionals in Dispute Resolution, “Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution” (1986); Academy of Family Mediators, “Model Standards of Practice for Family and Divorce Mediation” (1984).

¹⁹ This Model Rule distinguishes the lawyer’s role as neutral from the lawyer who may serve as an “intermediary” under former Model Rule 2.2 and who therefore “represents” several clients in an “intermediation” of their relationship such as a partnership, joint venture, or in some cases, divorce proceedings. The 2002 edition of the ABA Model Rules of Professional Conduct calls for elimination of Model Rule 2.2.

tives or advocates within ADR proceedings. When a lawyer serves as an advocate, representative or counselor to a party in an ADR proceeding, he or she is governed by such other Model Rules as are applicable to lawyer conduct, either before tribunals (Model Rule 3.3) or in relation to all other third parties (Model Rule 4.1).²⁰

This Model Rule, where possible, uses the same language and definitions of other lawyer and judicial standards, including formulations from the Model Rules of Professional Conduct, the Judicial Code of Conduct, the Code of Ethics for Arbitrators in Commercial Disputes (AAA-ABA, 1997),²¹ and the recently completed Restatement Third of the Law Governing Lawyers (2000).²² As the Preamble and Scope to the Model Rules states, they are not to be used as liability standards for malpractice or other purposes. On the other hand, the Restatement Third of the Law Governing Lawyers recognizes that ethics rules and standards are often used for civil liability, as well as for discipline, and this Model Rule has been drafted accordingly.

Definitions

This Model Rule is intended to be applied to the duties and responsibilities of lawyers who act as third-party neutrals in the following processes:

I. Adjudicative

Arbitration — A procedure in which each party presents its position and evidence before a single neutral third-party or a panel, who is empowered to render a resolution of the matter between the parties. Arbitrators may be chosen jointly by all parties, by contractual arrangements, under court or other rules, and in some cases may be chosen specifically by each side. Arbitrators chosen separately by each party to a dispute may be considered “partisan” arbitrators or “neutral” arbitrators, depending on the rules governing the arbitration. If the parties agree in advance, or applicable law provides, the award is binding and enforceable in the same manner as any contractual obligation or under applicable statute (such as the Federal Arbitration Act or state equivalents). Agreements by the parties or applicable law may provide

²⁰ A Joint Initiative of the CPR-Georgetown Commission and the ABA Dispute Resolution Section Ethics Committee proposed amendments to the text and comments of existing Model Rules to address these issues. Among the issues addressed by the Joint Initiative was the meaning and scope of the term “tribunal” in the Model Rules. The term “tribunal” in the Model Rules had been interpreted to apply to adjudicative or trial-type hearings, thereby arguably excluding facilitative-type processes. The Joint Initiative drafters believed that the term should be clarified to include “ADR” proceedings that are not adjudicative, but held pursuant to court rules and regulations, within the courthouse or not. However, the 2002 edition of the Model Rules treats arbitration as a “tribunal,” but not mediation. See Model Rule 1.0(m). This has implications for the lawyer’s duty of candor depending upon whether the process is arbitration or mediation. Specifically, under Model Rule 3.3, a lawyer representing a client in an arbitration has a heightened duty of candor owed to the tribunal (“(a) [a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (b) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false.”), but when representing a client in a mediation would have the duty set forth in Model Rule 4.1 (“a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person”). There is no duty to disclose relevant adverse legal authority.

The Joint Initiative also considered proposals to redraft Model Rules 3.3 and 4.1 for possible increased duties of candor to tribunals, to clients and to other third parties (such as in the rectification of fraud). In addition, some of the rules which apply to the lawyer’s role as counselor (Model Rules 2.1-2.3) and general rules of lawyer-client relations (such as confidentiality, Model Rule 1.6) might also need to be supplemented or amended to take account of lawyers’ different ethical responsibilities in different kinds of settings. Some have also suggested that the duty of candor and good faith participation should perhaps be greater in some forms of ADR proceedings, see, e.g., Kimberlee Kovach, “Lawyer Ethics in Mediation: Time for a Requirement of Good Faith,” 4 DISP. RES. MAG. 9 (1997); see generally Symposium, “Focus on Ethics in Representation in Mediation,” 4 DISP. RES. MAG. (Winter 1997).

²¹ See *supra* note 14.

²² See *supra* note 2.

rules for whether the award must be in writing and what recourse the parties may have when the arbitration is not binding.

II. Evaluative

Neutral Evaluation — A procedure in which a third-party neutral provides an assessment of the positions of the parties. In a neutral evaluation process, lawyers and/or parties present summaries of the facts, evidence and legal principles applicable to their case to a single neutral or a panel of neutral evaluators who then provide(s) an assessment of the strengths, weaknesses and potential value of the case to all sides. By agreement of the parties or by applicable law, such evaluations are usually non-binding and offered to facilitate settlement. By agreement of the parties or by applicable law or practice, if the matter does not reach a settlement, the neutral evaluator may also provide other services such as case planning guidance, discovery scheduling, or other settlement assistance. By agreement of the parties or applicable law, the neutral evaluator(s) may issue fact-finding, discovery and other reports or recommendations.

Mediation — A procedure in which a third-party neutral facilitates communications and negotiations among the parties to effect resolution of the matter by agreement of the parties. Although often considered a facilitative process (*see* below) in which a third-party neutral facilitates communication and party negotiation, in some forms of mediation, the third-party neutral may engage in evaluative tasks, such as providing legal information, helping parties and their counsel assess likely outcomes and inquiring into the legal and factual strengths and weaknesses of the problems presented. By agreement of the parties or applicable law, mediators may sometimes be called on to act as evaluators or special discovery masters, or to perform other third-party neutral roles.

III. Facilitative

Mediation — A procedure in which a neutral third-party facilitates communication and negotiations among the parties to seek resolution of issues between the parties. Mediation is non-binding and does not, unless otherwise agreed to by the parties, authorize the third-party neutral to evaluate (*see* above), decide or otherwise offer a judgment on the issues between the parties. If the mediation concludes in an agreement, that agreement, if it meets otherwise applicable law concerning the enforceability of contracts and mediated settlement agreements,²³ is enforceable as a contractual agreement. Where authorized by applicable law, mediation agreements achieved during pending litigation may be entered as court judgments.

Facilitation/Consensus-Building — A process in which multiple participants or stakeholders in a legal issue, regulatory matter, transaction or dispute are brought together with a third-party neutral to mutually negotiate solutions or propose recommendations to the appropriate governing authority.²⁴

IV. Hybrid Processes

Minitrial — A procedure in which parties and their counsel present their matter, which may include evidence, legal arguments, documents and other summaries of their case, before a neutral third-party and representatives of all parties, for the purpose of defining issues, pursuing settlement negotiations or otherwise sharing information. A neutral third-party, usually at the parties' request, may issue an advisory opinion, which is non-binding, unless the parties agree otherwise.

²³ *See, e.g.*, Minn. Stat. Sec. 572.35 (2001); *Haghighi v. Russian-American Broadcasting Co.*, 577 N.W.2d 927 (Minn. 1998).

²⁴ *See* Larry Susskind, et al. (eds.), *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (Sage Publications Inc. 1999); Carrie Menkel-Meadow, "The Lawyer as Consensus Builder: Ethics for a New Practice," 70 *TENN. L. REV.* ___ (2002).

Med-Arb — A procedure in which the parties initially seek mediation of their dispute before a third-party neutral, but if they reach impasse, may convert the proceeding into an arbitration in which the third-party neutral renders an award. This process may also occur in reverse in which during a contested arbitration proceeding, the parties may agree to seek facilitation of a settlement (mediation) from the third-party neutral. In some cases, these third-party neutral functions may be divided between two separate individuals or panels of individuals.

Other — Parties by agreement, or pursuant to court rules and regulations, may create and utilize other dispute resolution processes using third-party neutral(s) in order to facilitate settlement, manage or plan discovery and other case issues, seek fact-finding or conciliation services, improve communications, simplify or settle parts of cases, arrange transactions or for other reasons. Such processes may be decisional (adjudicative) or facilitative or a hybrid of the two, and they may be binding or non-binding as party agreements or court rules or statutes provide.

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Lawyers who provide neutral services as described above in Definitions I – IV shall be subject to the duties and obligations specified below:

Rule 4.5.1: Diligence and Competence

- (a) A lawyer serving as a third-party neutral shall act diligently, efficiently and promptly, subject to the standard of care owed the parties as required by applicable law or contract.
- (b) A lawyer serving as a third-party neutral shall decline to serve in those matters in which the lawyer is not competent to serve.

COMMENT

Diligence

- [1] Like its equivalent in representational work (*see* Model Rule 1.3, discussing diligence in the lawyer-client relationship), this Model Rule requires the lawyer-neutral to act diligently, efficiently and promptly, subject to the duty of care owed the parties by applicable law or contract. Other rules or specifications of timeliness and standards of care may be specified in agreements of the parties, in rules provided by relevant organizations or by applicable case law dealing with mediator or arbitrator civil liability. The standard of care to be applied to the work of mediators and arbitrators is currently evolving in practice and case law.
- [2] The lawyer-neutral should commit the time necessary to promote prompt resolution of the dispute and should not let other matters interfere with the timely and efficient completion of the matter. If a lawyer-neutral cannot meet the parties' expectations for prompt, diligent and efficient resolution of the dispute, the lawyer-neutral should decline to serve.
- [3] While settlement or resolution is the goal of most ADR processes, the primary responsibility for the resolution of the dispute and the shaping of a settlement in mediation and evaluation rests with the parties. Accordingly, when serving in a evaluative or facilitative process (*see* Definitions II & III, *supra*), the lawyer-neutral should not coerce or improperly influence a party to make a decision or unwillingly participate in such a process.²⁵
- [4] When serving in an adjudicative or evaluative capacity (*see* Definitions I & II, *supra*), the lawyer-neutral should decide all matters justly, exercising independent judgement, without permitting outside pressure to affect the decision. The lawyer-neutral serving in adjudicative or evaluative roles should be guided by judicial standards of diligence and competence,²⁶ and other concurrent ethical standards.²⁷

Competence

- [5] A lawyer should decline appointment as a neutral when such appointment is beyond the lawyer's competence. A lawyer-neutral should serve "only in cases where the neutral has sufficient knowledge [and skill] regarding the process and subject matter to be effective."²⁸

²⁵ *See, e.g.*, Fla. R. Civ. P. 10.310 (2002); ALM Sup. Jud. Ct. Rule 1:18, Uniform Dispute Resolution Rule 9 (2002) (Massachusetts); 12 Okl. St. Chap. 37, App. A (2002) (Code of Professional Conduct for Mediators); Va. Code Ann. Sec. 8.01-576.9, 8.01-581.24 (2002).

²⁶ *See* Model Code of Judicial Conduct, Canon 3B.

²⁷ *See, e.g.*, Code of Ethics for Arbitrators in Commercial Disputes (AAA-ABA, 1977), *supra* note 14.

²⁸ "Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution," *supra* note 18.

[6] In determining whether a lawyer-neutral has the requisite knowledge and skill to serve as a neutral in a particular matter and process, relevant factors may include the following: the parties' reasonable expectations regarding the ADR process and the neutral's role; the procedural and substantive complexity of the matter and process; the lawyer-neutral's general ADR experience and training, legal experience, subject matter expertise; the preparation the lawyer-neutral is able to give to the matter; and the feasibility of employing experts or co-neutrals with required substantive or process expertise. In many instances, a lawyer-neutral may accept a neutral assignment where the requisite level of competence can be achieved by reasonable preparation.

Rule 4.5.2: Confidentiality²⁹

- (a) A lawyer serving as a third-party neutral shall maintain the confidentiality of all information acquired in the course of serving in that role, unless the third-party neutral is required or permitted by law or agreement of all the parties to disclose or use any otherwise confidential information.
- (1) A third-party neutral shall discuss confidentiality rules and requirements with the parties at the beginning of any proceeding and obtain party consent with respect to any *ex parte* communication or practice.
- (2) As between the parties, the third-party neutral shall maintain confidentiality of all information disclosed to the third-party neutral in confidence by a party, unless the party agrees or specifies otherwise.
- (3) A lawyer who has served as a third-party neutral shall not thereafter use information acquired in the ADR proceeding to the disadvantage of any party to the ADR proceeding, except when the information has become publicly known or the parties have agreed otherwise or except when necessary under (b) or to defend the neutral from a charge of misconduct.
- (b) A third-party neutral may use or disclose confidential information obtained during a proceeding when and to the extent the neutral believes necessary to prevent:
- (1) death or serious bodily injury from occurring; or
- (2) substantial financial loss from occurring in the matter at hand as the result of a crime or fraud that a party has committed or intends to commit.
- (c) Before using or disclosing information pursuant to section (b), if not otherwise required to be disclosed by law, the third-party neutral must, if feasible, make a good faith effort to persuade the party's counsel, or the party if the party is unrepresented, either not to act or to warn those who might be harmed by the party's action.

COMMENT

- [1] ADR confidentiality is distinctly different from lawyer-client confidentiality, which is nullified when adverse parties reveal information to each other or in the presence of a third-party. The extent of ADR confidentiality protections can be determined by contract, court rules, statutes or other professional norms or rules.³⁰ This Model Rule addresses the confidentiality responsibilities of the lawyer-neutral and delineates the neutral's duties to the parties, the process, and the public.
- [2] Principles of confidentiality are given effect in the laws of evidence (which govern evidentiary uses, restrictions and privileges) and in ethics rules (which establish professional ethical obligations). Privileges apply in judicial and other proceedings in which the lawyer-neutral may be called as a witness or otherwise required to produce evidence regarding an ADR process. Principles of confidentiality in professional ethics apply in situations other than those where evidence is sought from the lawyer-neutral through compulsion of law. This Model Rule is intended to provide the lawyer-neutral and parties with confidentiality protections for ADR processes for which privacy of the process and unguarded, candid communications are central to their use and effectiveness.
- [3] The traditional confidentiality protection guaranteed to clients by their representational lawyers by Model Rule 1.6 (as well as the evidentiary privilege of attorney-client) does not apply in most ADR

²⁹ This section sets forth the Model Rule's confidentiality provisions. With regard to mediation, there are numerous sources of mediation confidentiality, including private agreements, court rules and state statutes. Recently, a Uniform Mediation Act (UMA), drafted jointly by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the ABA Section of Dispute Resolution, was adopted and recommended by NCCUSL at its 2001 Annual Meeting and by the ABA House of Delegates in February 2002. For a copy of the UMA, including Reporter's Comments, see www.nccusl.org.

³⁰ See generally Symposium, "Confidentiality in Mediation," *DISPUTE RESOLUTION MAGAZINE* (Winter 1999); Symposium, "Drafting a Uniform Model Mediation Act," 13 *OHIO ST. J. ON DISP. RESOL.* 787 (1998); UMA and Reporter's Comments, *supra* note 29.

settings because (i) there is no attorney-client relationship between the parties and the lawyer-neutral, and (ii) most disclosures of information in a majority of existing ADR processes occur in the presence of the other party.

[4] Moreover, the general rule that lawyers may divulge confidences within their law firm to facilitate law practice is not applicable in ADR confidentiality, especially mediation. Because “the essence of mediation is the preservation of confidential communications, most lawyer-mediators are scrupulous not to disclose such confidential information to anyone, even attorneys in their own firm. Mediators may discuss fact patterns or mediation issues with other mediators within the firm or the community of mediators. As a matter of routine, most mediators will screen such comments to ensure that they never reveal names or confidential information.”³¹

[5] This Model Rule imposes an ethical duty of confidentiality on the lawyer-neutral to protect the ADR process and the parties. The Rule’s confidentiality standards can be altered by agreement of all parties or applicable law.

Many jurisdictions and courts provide confidentiality protections to parties and ADR neutrals as a matter of law. While some statutes are narrowly evidentiary in nature (and govern only the use of information in a court proceeding),³² other mediation confidentiality provisions include both evidentiary restrictions and broader prohibitions against disclosure.³³

[6] Since ADR confidentiality can be governed by different and sometimes conflicting sources of law and ethical duties, it is important that the parties and the neutral understand the extent and uncertainties of the ADR confidentiality protections. Accordingly, section (a)(1) requires the neutral to discuss the applicable confidentiality rules with the parties and their counsel at the beginning of the process.

Statutory or common law privileges, evidentiary codes, protective orders issued by courts under discovery or other statutes, as well as party contracts and court rules all can affect the scope of confidentiality for the parties, the third-party neutral and others outside of the particular matter. Some states, for example, require mediators to disclose certain information, like the occurrence of child abuse or domestic violence.³⁴ Additionally this Model Rule, similar to the recently completed Restatement Third of the Law Governing Lawyers (2000) (sections 66 and 67), permits disclosure of information to prevent death, serious bodily harm or substantial financial loss.³⁵ See Comment [10] below.

[7] In addition to advising the parties about the scope of confidentiality protections under law and applicable agreement, section (a)(1) also requires the neutral to discuss and obtain party consent regarding the nature of *ex parte* communications, if any, contemplated by the process. In some mediation processes, for example, parties meet separately with the mediator and share information confidential-

³¹ James E. McGuire, “Conflicts in Subsequent Representation,” *DISPUTE RESOLUTION MAGAZINE* 4 (Spring 1996).

³² See, e.g., UMA and Reporter’s Comments, *supra* note 29.

³³ See, e.g., UMA and Reporter’s Comments, *supra* note 29; Alternative Dispute Resolution Act of 1998, 28 U.S.C. 652(d) (expressly directs the courts to adopt local rules “providing for confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.”); Elizabeth Plapinger and Donna Stienstra, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (Federal Judicial Center and CPR Institute for Dispute Resolution, 1996) (federal district courts provide for confidentiality of ADR processes by local rule or court orders). Additionally, confidentiality is often provided pursuant to contractual provisions in private forums. See, e.g., Kathleen Scanlon, “Primer on Recent Developments in Mediation Confidentiality,” 6 *ALTERNATIVES*, ADR Counsel In Box section (Feb. 2001 and October 2001 Update).

³⁴ See UMA, Section 6(a)(7) and accompanying Reporter’s Comments, *supra* note 29.

³⁵ The state of permissible disclosure under the Model Rules of Professional Conduct is more complicated. The ABA Ethics 2000 Commission originally proposed essentially the same permissible disclosure rule (to prevent imminent death or bodily harm, or substantial financial loss), but the House of Delegates declined to approve some of those disclosures. See Model Rule 1.6. The new Sarbanes-Oxley Act of 2002 (corporate fraud) now may require some limited disclosures of economic harm and fraud within a corporation to its Board of Directors and others inside the entity. This raises complex questions about the confidentiality of information received during a mediation about potential corporate fraud.

ly. In arbitration processes, *ex parte* communications with partisan arbitrators may be permitted under certain rules and prohibited under others.³⁶

- [8] Given the extensive use in mediation of separate, *ex parte* meetings or caucuses with the mediator, parties and their lawyers may reveal information in caucus that is not to be disclosed to the other party without permission. Section (a)(2) establishes that the neutral shall maintain the confidentiality of all information disclosed to the neutral in confidence, unless the party agrees or specifies otherwise. In effect, all information revealed in confidence in *ex parte* sessions, or through other confidential means, is to be considered confidential, absent a specific statement or agreement by the party otherwise.
- [9] Section (a)(3) prohibits the use by the neutral of any information acquired in the ADR proceeding to the disadvantage of any party, subject to the exceptions stated in this Model Rule. This formulation tracks the current Model Rule 1.9(c)(1) for conflicts of interest for representational attorneys and former clients. Particularly in mediation or other ADR fora where *ex parte* sessions are used, the third-party neutral may hear information or settlement facts that may not be legally relevant but are highly sensitive or proprietary. Under this Model Rule, the lawyer-neutral is prohibited from using this information in subsequent neutral or representational work to the disadvantage of the former ADR party.
- [10] Similar to the recently approved Restatement Third of the Law Governing Lawyers (2000) (sections 66 and 67), this Model Rule permits disclosure by the lawyer-neutral of information (i) to prevent death or serious bodily harm to anyone on the basis of any information learned, and (ii) to prevent substantial financial loss from occurring in the manner at hand as a result of a crime or fraud that one of the parties has committed or intends to commit. Several states, notably New Jersey and Florida, require (not just permit) lawyers to reveal information to prevent death, serious bodily harm or certain criminal or fraudulent conduct.³⁷ In many jurisdictions, third-party neutrals are already under an obligation to reveal such information under separate statutes or case law.³⁸

³⁶ Compare *Delta Mine Holding Company v. AFC Coal Properties, Inc.*, 280 F.3d 815 (8th Cir. 2001) (AAA Commercial Arbitration Rules provide that, absent agreement to the contrary, party-appointed arbitrators presumed to be non-neutral; *ex parte* communications of ongoing panel deliberations not grounds for vacatur) with CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration (Rev. 2000), Rules 7.1 (“Each arbitrator shall be independent and impartial.”) and 7.4 (“No party or anyone acting on its behalf shall have any *ex parte* communications concerning any matter of substance relating to the proceeding with any arbitrator or arbitrator candidate, except that a party may advise a candidate for appointment as its party-appointed arbitrator of the general nature of the case and discuss the candidate’s qualifications . . . and a party may confer with its party-appointed arbitrator regarding the selection of the chair of the Tribunal.”).

³⁷ See, e.g., Fla. Bar. Reg. R. 4-1.6 (2002); N.J. Court Rules, RPC 1.6 (2002).

³⁸ See, e.g., UMA, Section 6(a) and accompanying Reporter’s Comments, *supra* note 29.

Rule 4.5.3: Impartiality

(a) A lawyer who serves as a third-party neutral shall be impartial with respect to the issues and the parties in the matter.

(1) A lawyer who serves as a third-party neutral shall conduct all proceedings in an impartial, unbiased and evenhanded manner, treating all parties with fairness and respect. If at any time the lawyer is unable to conduct the process in an impartial manner, the lawyer shall withdraw, unless prohibited from doing so by applicable law.

(2) A lawyer serving in a third-party neutral capacity shall not allow other matters to interfere with the lawyer's impartiality.

(3) When serving in an adjudicative capacity, the lawyer shall decide all matters fairly, with impartiality, exercising independent judgment and without any improper outside influence.

(b) A lawyer who serves as a third-party neutral shall:

(1) Disclose to the parties all circumstances, reasonably known to the lawyer, why the lawyer might not be perceived to be impartial.³⁹ These circumstances include (i) any financial or personal interest in the outcome, (ii) any existing or past financial, business, professional, family or social relationship with any of the parties, including, but not limited to any prior representation of any of the parties, their counsel and witnesses, or service as an ADR neutral for any of the parties, (iii) any other source of bias or prejudice concerning a person or institution which is likely to affect impartiality or which might reasonably create an appearance of partiality or bias, and (iv) any other disclosures required of the lawyer by law or contract;

(2) Conduct a reasonable inquiry and effort to determine if any interests or biases described in section (b)(1) exist, and maintain a continuing obligation to disclose any such interests or potential biases that may arise during the proceedings; and

(3) Decline to participate as a third-party neutral unless all parties choose to retain the neutral, following all such disclosures, unless contract or applicable law require participation. If, however, the lawyer believes that the matters disclosed would inhibit the lawyer's impartiality as a neutral, the lawyer should decline to proceed.

(c) All disclosures under (b) extend to those of the lawyer, members of his or her immediate family, his or her current employer, partners or business associates.

(d) After accepting appointment and while serving as a neutral, a lawyer shall not enter into any financial, business, professional, family or social relationship or acquire any financial or personal interest that is likely to affect impartiality or that might reasonably create the appearance of partiality or bias, without disclosure and consent of all parties.

COMMENT

Impartiality

[1] Impartiality means freedom from favoritism or bias either by word or action, and a commitment to serve the process and all parties equally. Section (a) codifies established concepts of neutrality and neutral conduct.

³⁹ See, e.g., California Judicial Council approved Ethics Standards for Arbitrators in California (Code Civ. Proc. Sect. 1281.85, added by Stats. 2001, ch. 362, sec. 4 (2002)) (calls for extensive disclosure of personal, professional and business relationships); U.S. Dist. Ct. N.J. Civil Rules, Rule 301.1(g) (Ethical Standards for Mediators (2002)). See Carrie Menkel-Meadow, "Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not," 56 U. MIAMI L.REV. ___ (2002).

Disclosure

- [2] Understanding that absolute neutrality is unobtainable even under the best of circumstances, this Model Rule establishes a broad and continuing standard of disclosure by lawyer-neutrals with the possibility of waiver by the parties. This Model Rule describes the circumstances which should be disclosed in determining whether the lawyer-neutral is without impermissible partiality and bias to serve in the particular matter. This form of disclosure is accepted practice in ADR proceedings, including both arbitration and mediation.

A lawyer, as a prospective neutral, should err on the side of disclosure because it is better that the relationship or other matter be disclosed at the outset when the parties are free to reject the prospective neutral or to accept the person with knowledge of the relationship.⁴⁰ While there is often disagreement over what may reasonably constitute a potential conflict, the growing acceptance of the principle of disclosure acts as some reassurance that potentially disadvantaged parties will be given an opportunity to object or at least investigate further.⁴¹ It also allows all parties to select a neutral after full disclosure, where the parties knowingly decide to go forward.

- [3] Where possible, best practices suggest that the disclosures should be in writing, as should any subsequent waivers or consents. While the ABA Ethics 2000 Commission revision of Model Rule 1.7 requires a written waiver of all representational conflicts,⁴² this Model Rule advises, but does not require, the preparation of written disclosures and consents.
- [4] What constitutes reasonable inquiry and effort by the lawyer-neutral to uncover interests or relationships requiring disclosure depends on the circumstances. Typically, in matters where the parties are represented, this will involve the prospective lawyer-neutral obtaining from the parties a complete identification of the parties, their representatives, insurers, lawyers, witnesses and expected attendees at the ADR process and submitting that list to the prospective neutral's conflicts system.⁴³ We note that there may be a tension under the law between the duty to disclose prior matters, clients, financial holdings and other similar information, and the confidentiality required to be maintained with respect to on-going or concluded representations and ADR proceedings.

This Model Rule defines the scope of required disclosure to include immediate family members and business partners and associates.⁴⁴ This scope follows Model Rules 1.7 (Comment 11) and 1.10. However, it does not follow Canon 3(E)(1)(d) of the Judicial Code of Conduct.

- [5] Where a lawyer-neutral volunteers to act as a neutral at the request of a court, public agency or other group for a *de minimis* period and *pro bono publico*, section (b)(2) recognizes that there may not be opportunity for full inquiry, disclosure or disqualification challenge. In such circumstances, a third-party neutral may have to proceed with the minimal inquiry and disclosure that may be reasonable under the circumstances. If the lawyer from memory recognizes an interest or relationship relevant to the case, the lawyer should identify that interest or relationship. Otherwise, the lawyer should disclose the general nature of the lawyer-neutral's practice and affiliations with law firms or other associations, or other known disqualifying circumstances.⁴⁵
- [6] In general, parties may elect to retain a lawyer as a third-party neutral after the latter's disclosure of reasons why the lawyer reasonably might be perceived not to be neutral. However, section (b)(3) imposes on the lawyer-neutral the obligation to decline to serve if the lawyer-neutral believes that the matters disclosed or other circumstances would inhibit the lawyer-neutral's impartiality or otherwise

⁴⁰ See *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 151-52, 89 S. Ct. 337 (1968) (concurring opinion).

⁴¹ See Christopher Honeyman, "Patterns of Bias in Mediation," J. OF DIS. RESOL. 141 (1985).

⁴² See Model Rule 1.7(b)(4) (www.abanet.org).

⁴³ See Annotated Model Rule 1.7, ANNOTATED MODEL RULES OF CONDUCT at 91 (4th ed.) ("The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest").

⁴⁴ The recent California Judicial Council's Ethics Standards for Arbitrators (Standard 7), *supra* note 39, requires disclosure of personal, professional and financial interests of domestic partners of arbitrators.

⁴⁵ See also Model Rule 4.5.4(b), *infra*.

impugn the integrity of the process. In such instances, the lawyer-neutral should decline to serve even if the parties consent to the lawyer's retention as a neutral.

- [7] Section (d) tracks language from the 1977 Code of Ethics for Arbitrators in Commercial Disputes (AAA-ABA)⁴⁶ and is intended to prevent partiality from developing through the acquisition of future business during the pendency of an ADR proceeding. The parties may consent to waive this provision. The consensual waiver provision may avoid difficulties for third-party neutrals engaged to mediate or arbitrate a number of disputes with the same party, either through contractual appointment pre-dispute or through multiple, simultaneous appointments or appointments during the pendency of a particular case.

⁴⁶ See *supra* note 14.

Rule 4.5.4: Conflicts of Interest

(a) Disqualification of Lawyer-Neutrals

(1) A lawyer who is serving as a third-party neutral shall not, during the course of an ADR proceeding, seek to establish any financial, business, representational, neutral or personal relationship with or acquire an interest in, any party, entity or counsel who is involved in the matter in which the lawyer is participating as a neutral, unless all parties consent after full disclosure.

(2) A lawyer who has served as a third-party neutral shall not subsequently represent any party to the ADR proceeding (in which the lawyer-neutral served as a neutral) in the same or a substantially related matter, unless all parties consent after full disclosure.

(3) A lawyer who has served as a third-party neutral shall not subsequently represent a party adverse to a former ADR party where the lawyer-neutral has acquired information protected by confidentiality under this Model Rule, without the consent of the former ADR party.

(4) Where the circumstances might reasonably create the appearance that the neutral had been influenced in the ADR process by the anticipation or expectation of a subsequent relationship or interest, a lawyer who has served as a third-party neutral shall not subsequently acquire an interest in or represent a party to the ADR proceeding in a substantially unrelated matter for a period of one year or other reasonable period of time under the circumstances, unless all parties consent after full disclosure.

(b) Imputation of Conflicts to Affiliated Lawyers and Removing Imputation

(1) If a lawyer is disqualified by section (a), no lawyer who is affiliated with that lawyer shall knowingly undertake or continue representation in any substantially related or unrelated matter unless the personally disqualified lawyer is adequately screened from any participation in the matter; is apportioned no fee from the matter; and timely and adequate notice of the screening has been provided to all affected parties and tribunals, provided that no material confidential information about any of the parties to the ADR proceeding has been communicated by the personally disqualified lawyer to the affiliated lawyer or that lawyer's firm.

(c) A lawyer selected as a partisan arbitrator of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party, nor are any affiliated lawyers.

(d) If a lawyer serves as a neutral at the request of a court, public agency or other group for a *de minimis* period and *pro bono publico*, the firm with which the lawyer is associated is not subject to imputation under section (b).

COMMENT

Conflicts

[1] ADR conflicts policy, like all conflicts regulation, has two main objectives: (i) to protect the parties from actual harm suffered by conflicts of interest, and (ii) to protect the process, the public, and the parties from the “appearance” of improper influences. In the ADR context, it is essential that conflicts rules protect against both actual harm and the appearance of self-interest.

Modern law practice is increasingly characterized by lawyer mobility, both externally where lawyers move among law firms and organizations, and internally where lawyers on a case-by-case basis move from representative to neutral roles within their law firm and through association with other private or public organizations (such as court or bar volunteer ADR programs). This Model Rule strives to

protect against both actual harm resulting from these lawyer role changes,⁴⁷ and to guard against the less tangible “appearance of impropriety” or “public” harms, which threaten the integrity of these processes, the neutrality of the lawyer-neutrals, and the parties’ and public’s confidence in these dispute resolution procedures.⁴⁸

- [2] Section (a)(1) governs conflicts that may arise during the pendency of an ADR process and is intended to be a bar against using the ADR process to obtain additional employment or other benefits. Conflicts arising under this section can be waived upon consent by all parties after full disclosure.
- [3] Section (a)(2) prohibits future representational roles by lawyer-neutrals in the same or substantially related matters, absent disclosure and consent by all parties. The recently revised Model Rule 1.12, which now includes mediators, in addition to arbitrators and former judges, allows lawyer-mediators to later represent a party “in connection with a matter in which the lawyer participated personally and substantially . . . as . . . [a] mediator” provided all parties to the proceeding give informed consent. This Model Rule also prohibits a mediator from subsequent representation “in the same manner” absent all the parties’ consent after full disclosure,⁴⁹ and further prohibits such representation in a “substantially related matter,” absent all of the parties’ consent after full disclosure. This section codifies the rule established in *Poly Software*: “Where a mediator has received confidential information in the course of a mediation, that mediator should not thereafter represent anyone in connection with the same or a substantially factually related matter unless all parties to the mediation consent after disclosure.”⁵⁰ The Drafting Committee believes that the logic behind *Poly Software’s* prohibition of future representational relationships in the same or substantially related cases also applies to adjudicative processes such as arbitration. Accordingly, under this Model Rule, a neutral arbitrator is subject to the same restrictions as a mediator, although a partisan arbitrator is excepted from these restriction by section (c).
- [4] Conflicts may exist when lawyer-neutrals, who have facilitated disputes and learned confidential and proprietary information about the disputing parties, are asked to represent a party adverse to a former ADR party. When trying to facilitate solutions, third-party neutrals may learn significant “settlement facts”—proprietary information about entities or individuals learned within the ADR setting, which although not legally relevant may affect the possibility of settlement.⁵¹ In this situation, the con-

⁴⁷ See *Matluck*, *supra* note 12 (Rule 4-1.10(b) of Florida Rules of Professional Conduct requires disqualification of a law firm of a mediator who received confidential information during same matter, despite reasonable and satisfactory efforts to screen mediator); *Fields-D’Arpino*, *supra* note 12 (court disqualified law firm from representing defendant when firm did not even attempt to implement screening procedures that would prevent attorney-mediator at firm from sharing confidential information disclosed by plaintiff during mediation, but rather sought to “exploit” what firm’s attorney-mediator learned during mediation); *McKenzie Construction v. St. Coix Storage Corp.*, 961 F. Supp. 857 (D.V.I. 1997) (court disqualified law firm notwithstanding contentions of a “cone of silence” by the firm when lawyer-mediator’s contact with other party’s agent “implicates the effectiveness of the measures allegedly adopted by her employer to avoid her involvement in the matter.”); *Poly Software Int’l*, *supra* note 11 (court disqualified a lawyer-mediator from representing a litigant in a subsequent matter related to an earlier case in which the mediator had received confidences from the parties); *Cho*, *supra* note 12 (court disqualified the law firm as counsel after the firm hired the retired judge who had previously presided over the action and had participated in settlement conferences with the parties, despite screening protections).

⁴⁸ See, e.g., *Cho*, 45 Cal. Rptr. 2d at 870, *supra* note 12 (Although the firm had established a screening process and the former judge stated that he had no recall of the settlement conferences, the court disqualified firm and stated that “[n]o amount of assurance of screening procedures, no ‘cone of silence,’ could ever convince the opposing party that the confidences would not be used to its disadvantage. When a litigant has bared its soul in a confidential settlement conference with a judicial officer, that litigant could not help but be horrified to find that the judicial officer has resigned to join the opposing law firm - which is now pressing or defending the lawsuit against that litigant. No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties’ consent.”) (footnote omitted).

⁴⁹ See also Wash. RPC 1.12 (2001) (“[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally or substantially as a judge or other adjudicative officer, arbitrator, mediator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.”); Neb. Ct. R., Code Prof. Resp. EC 5-20 (2001) (“A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. The lawyer may serve in either capacity if he or she first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he or she should not thereafter represent in the dispute any of the parties involved.”); N.Y. Code of Professional Responsibility EC 5-20 (McKinney’s 1999) (same); OH CPR Canon 5, EC 5-21 (Anderson 2001) (same); Tenn. Sup. Ct. Rule 8, EC 5-20 (2001) (same); Va. Sup. Ct. Prof. Resp. Canon EC 5-20 (2001) (same).

⁵⁰ See *Poly Software Int’l*, 880 F. Supp. at 1494, *supra* note 11.

⁵¹ See Menkel-Meadow, “The Silences of the Restatement,” *supra* note 2.

flicts issue is whether a lawyer-neutral who learned facts (*e.g.*, about financial solvency, human relations, product development, acquisitions or entity's future plans) during the ADR process would or could use those facts against the former ADR party in any subsequent representation. Section (a)(3) addresses this situation by prohibiting a lawyer-neutral from representing a party adverse to a former ADR party where the lawyer-neutral has acquired settlement facts or other information protected by this Model Rule's confidentiality provision (Rule 4.5.2), absent consent by the former ADR party.

- [5] Section (a)(4) addresses potential future representational or other relationships between the lawyer-neutral and an ADR party in unrelated cases. These relationships are often referred to by the bar as "downstream conflicts." The section is designed to protect against the appearance or the actuality that an expectation of a beneficial future relationship or interest has influenced the neutral's conduct in the preceding ADR process. The language in this section is derived from Canon I.D. of the Code of Ethics for Arbitrators in Commercial Disputes (AAA-ABA, 1977).⁵²

Imputation and Screening

- [6] For lawyer-neutrals disqualified under section (a), this Model Rule follows the recently completed Restatement Third of the Law Governing Lawyers (2000) and allows a law firm to undertake or continue representation in any "substantially related or unrelated matter," provided that the disqualified lawyer-neutral is adequately screened from any participation and the other factors set forth in (b) are satisfied.⁵³ When a lawyer-neutral is disqualified under section (a), this Model Rule does not allow for law firm representation in the "same" matter, even with screening. This Model Rule therefore differs from the recently revised 2002 ABA Model Rule 1.12, which allows a law firm to undertake or continue representation in the same matter provided the disqualified lawyer-neutral is timely screened and the other factors set forth in Model Rule 1.12(c) are satisfied. This Model Rule's formulation continues to impute disqualification to the whole firm for the same matter, which is consistent with the evolving case law trend.⁵⁴

An alternative formulation, which the Drafting Committee rejected, would apply the current non-screen, imputation formulation of Model Rule 1.10. Under such a formulation, this Model Rule would read: "Unless all affected parties consent after disclosure, in any matter where a lawyer would be disqualified under section (a), the restrictions imposed therein also restrict all other lawyers who are affiliated with that lawyer under Rule 1.10." We believe that a blanket, across the board no-screen imputation rule is contrary to the developing trend in the law to permit screening in certain circumstances and would inappropriately limit the growth of mixed neutral and representational roles for lawyers, with its attendant benefits to both the practice and the public. This Model Rule's approach is premised, in part, on the different confidentiality obligations of third-party neutrals and lawyer representatives. Unlike lawyers representing clients, lawyer-neutrals generally should not share information with other lawyers in their firm, and thus are particularly well-suited for the screening delineated in this Model Rule. *See* Comment [4] to this Model Rule 4.5.2 (Confidentiality).

⁵² *See supra* note 14. This Model Rule provides for a presumptive one-year period of disqualification, but also provides flexibility to shorten or lengthen the disqualification period as circumstances require. Although the Model Rules of Professional Conduct prefer general and not time-based rules, the Drafting Committee and consulting member Professor Geoffrey Hazard believe that a presumptive one-year safe-harbor period is preferable to a general rule of reasonableness, given the substantial need among lawyers and law firms for a clearly defined rule. Understanding that the time-based rule will not be appropriate in all circumstances, a rule of reasonableness is also included.

⁵³ *See also In re County of Los Angeles*, 323 F.3d at 997, *supra* note 13 ("We hold that the vicarious disqualification of a firm does not automatically follow the personal disqualification of a former settlement judge [who upon retirement joined the firm], where the settlement negotiations are substantially related (but not identical) to the current representation. Screening mechanisms that are both timely and effective, as the . . . firm erected here, will rebut the presumption that the former judge disclosed confidences to other members of the firm.").

⁵⁴ *See, e.g., Matluck, supra* note 12; *Fields, supra* note 12; *McKenzie Construction, supra* note 47; *Cho, supra* note 12.

- [7] Screening in the ADR context involves the same mechanisms as screening in other contexts.⁵⁵ In addition, under this Model Rule, notice of the screening must be provided to all affected parties and tribunals.
- [8] Section (c) excepts partisan, party-appointed arbitrators from the restrictions on future representational work under section (a), and from imputation and screening under section (b). We note, however, the lack of consensus regarding the role and practices of partisan arbitrators,⁵⁶ and suggest that if “partisan” arbitrators become more like neutral arbitrators, section (c) will need to be amended.
- [9] Section (d) excepts lawyer-neutrals and their affiliated lawyers from the imputation and screening rule when the lawyer-neutral volunteers his or her services at the request of a court, other public agency, or institution and serves for a *de minimis* period.

⁵⁵ See, e.g., Model Rule 1.11 (a) (1), which permits the law firm of a former government lawyer to undertake or continue representation in a matter in which the former government lawyer participated personally and substantially if the lawyer is screened from further participation in it, including receipt of fees from it. Annotated Model Rule 1.11 (a)(1) states that: “An effective screen commonly includes the following factors: (1) the disqualified lawyer does not participate in the matter, (2) the disqualified lawyer does not discuss the matter with any member of the firm, (3) the disqualified lawyer represents through sworn testimony that he or she had not imparted any confidential information to the firm, (4) the disqualified lawyer does not have access to any files or documents relating to the matter, and (5) the disqualified lawyer does not share in any of the fees from the matter.” ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 181 (4th ed.). See also RESTATEMENT OF THE LAW THIRD GOVERNING LAWYERS (2000) (secs. 123 and 124); *Kovacevic v. Fair Automotive Repair, Inc.*, 641 F. Supp. 237, 238 (N.D. Ill. 1986).

⁵⁶ See generally Thomas Stipanowich and Peter Kaskell (eds), COMMERCIAL ARBITRATION AT ITS BEST, Sec. 3.7 (ABA/CPR, 2001).

Rule 4.5.5: Fees

- (a) **Before or within a reasonable time after being retained as a third-party neutral, a lawyer shall communicate to the parties, in writing, the basis or rate and allocation of the fee for service, unless the lawyer-neutral is serving in a no-fee or *pro bono* capacity.**
- (b) **A lawyer-neutral who withdraws from a case shall return any unearned fee to the parties.**
- (c) **A lawyer-neutral who charges a fee tied to the timing or fact of settlement or other specific resolution of the matter shall explain to the parties that such an arrangement gives the neutral a direct financial interest in settlement that may conflict with the parties' possible interest in terminating the proceedings without reaching settlement. The neutral shall consider whether such a fee arrangement creates an appearance or actuality of partiality, inconsistent with the requirements of this Model Rule 4.5.3.**

COMMENT

- [1] This Model Rule requires a written communication specifying the basis, rate and allocation of fees to all parties, unless the lawyer-neutral is serving in a no-fee or *pro bono* capacity.
- [2] While controversial, contingent fee or bonus compensation schemes are sometimes used to provide incentives to participate in ADR or to reward the achievement of an effective settlement. Section (c) does not prohibit such fee arrangements (which some jurisdictions or provider organizations do) but requires the neutral to explain what the effects of such a fee arrangement may be, including conflicts of interest. This Model Rule imposes two obligations on the neutral. The lawyer-neutral is required to assess the possible conflicts attendant to use of such fee arrangements and whether the appearance or actuality of partiality prohibits its use under this Model Rule 4.5.3 (Impartiality). If use of the compensation arrangements is not prohibited under that standard, the neutral is required to disclose the possible consequences of this fee arrangement to the parties.

Rule 4.5.6: Fairness and Integrity of the Process

- (a) **The lawyer serving as third-party neutral shall make reasonable efforts to determine that the ADR proceedings utilized are explained to the parties and their counsel, and that the parties knowingly consent to the process being used and the neutral selected (unless applicable law, court rules or contract requires use of a particular process or third-party neutral).**
- (b) **The lawyer-neutral shall not engage in any process or procedure not consented to by the parties (unless required by applicable law, court rules or contract).**
- (c) **The lawyer-neutral shall use reasonable efforts to conduct the process with fairness to all parties. The lawyer-neutral shall be especially diligent that parties who are not represented have adequate opportunities to be heard and involved in any ADR proceedings.**
- (d) **The lawyer-neutral shall make reasonable efforts to prevent misconduct that would invalidate any settlement. The neutral shall also make reasonable efforts to determine that the parties have reached agreement of their own volition and knowingly consent to any settlement.**

COMMENT

- [1] While ethical rules cannot guarantee the specific procedures or fairness of a process, this Model Rule is intended to require lawyer-neutrals to be attentive to the basic values and goals informing fair dispute resolution. These values include party autonomy; party choice of process (to the extent permitted by law or contract); party choice of and consent to the choice of the third-party neutral (to the extent permitted by law or contract); and fairness of the conduct of the process itself. This Model Rule is concerned not only with specific harms to particular participating parties but also with the appearance of the integrity of the process to the public and other possible users of these processes.⁵⁷
- [2] This section requires lawyer-neutrals to make reasonable efforts to determine that the parties have reached an agreement of their own volition; one that is not coerced. While some have suggested that third-party neutrals should bear some moral accountability or legal responsibility for the agreements they help facilitate,⁵⁸ this Model Rule does not make the neutral the guarantor of a fair or just result.⁵⁹
- [3] This section of the Model Rule is designed to prevent harm not only to parties engaged in dispute resolution processes, but to the appearances presented to the general public of how legal processes are conducted. Although this section of the Model Rule may suffer from the same complaints about

⁵⁷ This Model Rule articulates a preferred rule of party choice and autonomy about the type of process (including whether mediation is facilitative or evaluative), whether caucuses are to be used or not, and the selection of the neutral. This may not be possible in situations where processes are mandated, either by contract (adhesion or freely negotiated) or by court rules and requirements. The questions implicated in the fairness and integrity of a particular ADR process are very controversial at the present time and case law is evolving. In light of these circumstances, we (or the appropriate ABA ethics body) might conclude that the questions implicated in the fairness and integrity of a particular ADR process are too “substantive” or too unsettled for ethics rule-making at this time.

Much of the recent case law has focused on the fairness and integrity of ADR processes and forums that provide arbitration pursuant to contract in the areas of consumer services, health care and employment. See, e.g., *Circuit City Stores, Inc. v. Saint Clair Adams*, 279 F.3d 889 (9th Cir. 2002) (employment-on remand from the U.S. Supreme Court (532 U.S. 105, 121 S. Ct. 1302 (2001)), the 9th Circuit voided a mandatory employment arbitration clause as unconscionable); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) (employment); *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (Cal. 2000) (employment); *Engalla v. Kaiser Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr.2d 843 (Cal. 1997) (health care); *Ting v. AT&T*, 182 F. Supp.2d 902 (N.D. Cal. 2002) (consumer). See also *Green Tree Financial Corp.-Alabama v. Randolph*, 513 U.S. 79, 121 S. Ct. 513 (2000) (Truth in Lending Act claim); Carrie Menkel-Meadow, “Do The Haves Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR,” 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

⁵⁸ See Lawrence Susskind, “Environmental Mediation and the Accountability Problem,” 9 VT. L. REV. 1 (Spring 1981).

⁵⁹ The Kutak Commission rejected an earlier effort to prevent lawyers from facilitating negotiated agreements which would be held unconscionable as a matter of law, see Proposed Rule 4.3, Draft Model Rules, 1980. See Carrie Menkel-Meadow, “Ethics, Morality and Professional Responsibility in Negotiation,” ETHICS IN DISPUTE RESOLUTION: A COMPREHENSIVE GUIDE (P. Bernard and B. Garth, eds.) (ABA Press, 2002).

vagueness as the former Canon 9 “appearance of impropriety” did under the old structure of the Code of Professional Conduct, the drafters believe that where lawyers “switch” sides and roles, from partisan to neutral, it is important to provide for basic criteria of fairness to be monitored in the process for the acceptability and legitimacy of the process and the lawyers within it.

CPR-Georgetown Commission on Ethics and Standards in ADR*

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Washington, DC

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Bickerman Dispute
Resolution Group
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Skadden, Arps, Slate,
Meagher & Flom
New York, NY

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U.S. District Court
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Fordham University School of Law
New York, NY

Lawrence J. Fox

Drinker, Biddle & Reath
Philadelphia, PA

Howard Gadlin

National Institute of Health
Bethesda, MD

Bryant Garth

American Bar Foundation
Chicago, IL

Shelby R. Grubbs

Miller & Martin
Chattanooga, TN

Prof. Geoffrey C. Hazard, Jr.

University of Pennsylvania
Law School
Philadelphia, PA

H. Roderic Heard

Wildman, Harrold
Chicago, IL

James F. Henry

CPR Institute for
Dispute Resolution
New York, NY

Christopher Honeyman

Madison, WI

J. Michael Keating, Jr.

Chris Little & Associates
Providence, RI

Judith Korchin

Holland & Knight
Miami, FL

Duane W. Krohnke

Faegre & Benson
Minneapolis, MN

Hon. Frederick B. Lacey

LeBoeuf, Lamb, Greene & MacRae
Newark, NJ

Prof. Homer LaRue

Howard University
School of Law
Washington, DC

Michael K. Lewis

ADR Associates, L.L.C.
Washington, DC

Deborah Masucci

JAMS
New York, NY

Prof. Harry N. Mazadoorian

Quinnipiac Law School
Hamden, CT

Prof. Barbara McAdoo

Visiting Scholar
Hamline University School of Law
Dispute Resolution Institute
St. Paul, MN

Bruce Meyerson

Miller LaSota & Peters, PLC
Phoenix, AZ

Hon. Milton Mollen

Graubard Mollen Horowitz
Pomeranz & Shapiro
New York, NY

Jean S. Moore

Hogan & Hartson
Washington, DC

Robert C. Mussehl

Mussehl & Rosenberg
Seattle, WA

John E. Nolan, Jr.

Steptoe & Johnson
Washington, DC

Melinda Ostermeyer

Washington, DC

Wayne N. Outten

Lankenau Kovner & Kurtz
New York, NY

Charles Pou

Mediation Consortium
Washington, DC

Sharon Press

Supreme Court of Florida
Tallahassee, FL

Charles B. Renfrew

Law Offices of Charles B. Renfrew
San Francisco, CA

*Affiliations and titles as of November 2002

Dean Nancy Rogers

Ohio State University
College of Law
Columbus, OH

Prof. Frank E. A. Sander

Harvard Law School
Cambridge, MA

Robert N. Saylor

Covington & Burling
Washington, DC

Hon. William W. Schwarzer

U.S. District Court
San Francisco, CA

Kathleen Severens

U.S. Department of Justice
Washington, DC

Margaret L. Shaw

Co-Chair, Committee on ADR
Provider Organizations
ADR Associates, L.L.C.
New York, NY

Hon. Jerome B. Simandle

U.S. District Court
Camden, NJ

William K. Slate

American Arbitration Association
New York, NY

Stephanie Smith

Hewlett Foundation
Menlo Park, CA

Hon. Edmund B. Spaeth, Jr.

Philadelphia, PA

Larry S. Stewart

Stewart Tilghman Fox & Bianchi
Miami, FL

Thomas J. Stipanowich

CPR Institute for
Dispute Resolution
New York, NY

Harry P. Trueheart III

Nixon, Hargrave, Devans & Doyle
Rochester, NY

Hon. John J. Upchurch

CCB Mediation, Inc.
Daytona Beach, FL

Alvora Varin-Hommen

U.S. Arb. & Mediation Service
Bensalem, PA

Hon. John L. Wagner

Irell & Manella
Newport Beach, CA

Hon. William H. Webster

Milbank, Tweed, Hadley & McCloy
Washington, DC

John W. Weiser

XL Capital Ltd.
Kentfield, CA

Michael D. Young

JAMS
New York, NY

CPR Staff**Elizabeth Plapinger**

Former Vice President and
Director of Public Policy Projects
CPR Institute for
Dispute Resolution
New York, NY

Kathleen Scanlon

Senior Vice President and
Director of Public Policy Projects
CPR Institute for
Dispute Resolution
New York, NY