McGeorge Law Review

Volume 44 | Issue 4 Article 5

1-1-2013

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TABLE OF CONTENTS

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I. INTRODUCTION

People come to mediation in order to solve differences in a consensual way. They want to make their own decisions; otherwise they would go to court or to arbitration and seek an expert decision. But mediators have a role to play. They must make decisions in order to fulfill their role and conduct the mediation. How should mediation parties and mediators share decision-making in mediation? To what extent should mediation parties control decision-making? What kind of decisions may mediators make alone? What kind of decisions may mediators make against the wishes of the parties?

A review of the major codes of conduct for mediators and mediation literature on decision-making reveals several approaches to the allocation of decision-making authority in mediation. According to one approach, the parties are responsible to and have control over the content and outcome of mediation, while mediators are responsible to and have control over the process.[1] Another approach distinguishes between substantive decisions that should be made by mediation parties and other non-substantive decisions that should be made by mediators.[2] A third approach simply ignores the tension between the parties' right to make decisions and the mediator's duty to make decisions.[3] These approaches cannot guide mediators in making decisions during mediation and cannot inform mediation parties of what constitutes legitimate behavior of mediators with respect to decision-making; yet, these are precisely some of the goals of mediators' codes of conduct.[4] The reason for that failure is that it is impossible to draw a clear line between process and content and between substantive and non-substantive decisions. Decisions on process are bound to affect content and outcome and should be considered, at least sometimes, as substantive. Ignoring the issue altogether, without supplying guidance on how decision-making is to be shared, simply leaves mediators and parties in a state of confusion. Thus, an effort is made in this Article to look for another basis for allocating decision-making authority in mediation.

1. *See infra* Part II.A & Part III.

2. *See infra* Part II.B & Part III.

3. *See infra* Part II.C.

4. *See, e.g.,* MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmbl. (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (on file with the *McGeorge Law Review*) [hereinafter Model Standards]. *See also* Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, CAL. RULES OF COURT, R. 3.850(a) (2010), *available at* http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_3.pdf (on file with the *McGeorge Law Review*) [hereinafter California Rules of Conduct]; FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS R. 10.200 (2010), *available at* http://www.flcourts.org/gen_public/adr/bin/RulesForMediators.pdf (on file with the *McGeorge Law Review*) [Florida Rules for Mediators]; Oregon Mediation Association Core Standards of Mediation Practice, pmbl. (Revised Apr. 23, 2005), *available at* http://www.omediate.org/docs/2005Core StandardsFinalP.pdf (on file with the *McGeorge Law Review*) [OMA Standards of Practice].

This Article suggests a theory for decision-making in mediation, which is based on a general right of parties to make all decisions in mediation, and a general duty of mediators to conduct mediation in accordance with the rules of conduct that apply to them.[5] The Article argues that the parties' right is limited in two senses. Firstly, their right does not extend to decisions that they practically or ethically cannot make.[6] Secondly, the right of the parties is perceived as a relative right, which might be restricted by mediators for justified reasons.[7] In order to justify an intervention with parties' right to make decisions, mediators must be able to show that the intervention is minimal and necessary in order to conduct the mediation according to the applicable rules of conduct.[8] Thus, the theory seeks both to delineate the decision-making powers of mediators and parties, and to offer a rationale for the legitimate restrictions mediators may impose on mediation parties' right to make decisions. The theory is not restricted to a specific mediation style[9] and assumes that mediators of all styles must respect party self-determination, must make decisions themselves, and need guidelines on appropriate interventions in party decision-making.[10]

This Article differs from current literature on decision-making in mediation in that previous scholarship[11] has focused on decision-making by mediators[12] or

5. *See infra* Part IV.

6. *See infra* Part IV.B.1.

7. *See infra* Part IV.B.

8. *See infra* Part IV.B.2.

9. *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed,* 1 HARV. NEGOT. L. REV. 7 (1996); LAURENCE BOULLE & MIRYANA NESIC, MEDIATION: PRINCIPLES PROCESS PRACTICE 27–29 (2001); Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHIO ST. J. ON DISP. RESOL. 321, 328–42 (2007).

10. For a similar argument concerning the implications of a theory of informed consent on the practice of mediators, *see* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking,* 74 NOTRE DAME L. REV. 775, 814 (1999) ("The principle of informed consent does not depend for its vitality on any particular practice model but must be operationalized in all decisionmaking models").

11. For a discussion of decision-making in mediation, *see infra* Part III. Decision-making in a professional setting has been subject to academic investigation. For writing on decision-making in lawyer-client relationships *see, e.g.,* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession,* 128 U. PA. L. REV. 41 (1979); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy,* 65 N.C. L. REV. 315 (1987); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement,* 32 ARIZ. L. REV. 501 (1990); Robert F. Cochran, *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation,* 47 WASH. & LEE L. REV. 819 (1990); DANIEL MARKOVITS, A MODERN LEGAL ETHICS 28-31(2008). For writing on decision-making in doctor-patient relationship *see e.g.,* Linda L. Emanuel & Ezekiel J. Emanuel, *Four Models of the Physician-Patient Relationship,* 267 JAMA 2221 (1992); Roger B. Dworkin, *Getting What We Should from Doctors: Rethinking Patient Autonomy and the Doctor-Patient Relationship,* 13 HEALTH MATRIX 235 (2003); Marjorie Maguire Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219 (1985).

12. A prominent example is Riskin, *supra* note 9. *See also* Nolan-Haley, *supra* note 10, at n. 188 (referring to literature on mediation models and styles which focus on mediators' behavior).

by the parties[13] while this Article combines both and focuses on the intersection between the exercise of decision-making powers by mediators and parties and on the resulting tension of that meeting,[14] The Article does not discuss the definitional elements of party self-determination (i.e., that decisions must be voluntary, un-coerced, free, and informed).[15]

Parts II and III of the Article describe the current approaches to allocation of decision-making powers in mediation, as reflected in leading codes of conduct for mediators and in mediation literature. Part IV suggests a new basis for sharing decision-making authority in mediation that avoids the shortcomings of the current approaches. Part V illustrates how the theory applies to all the decisions that are made in mediation. Part VI summarizes the insights of the Article.

II. THE VAGUENESS OF CODES OF CONDUCT ON DECISION-MAKING IN MEDIATION

There are numerous codes of conduct for mediators and it is impossible to review them all.[16] Thus, the Article selects and focuses on three major codes of conduct for mediators: the Model Standards of Conduct for Mediators (Model Standards),[17] California Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases (California Rules of Conduct),[18] and Florida Rules for Certified and Court-Appointed Mediators (Florida Rules for Mediators).[19] These leading codes of conduct are highly regarded and provide important guidance for ethical conduct in mediation.[20]

13. *See e.g.,* Nolan-Haley*, supra* note 10, at n. 188 ("I focus on the parties to the dispute and on their exercise of autonomy in decisionmaking rather than on activity by the mediator"); *id.* at 814.

14. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System,* 79 NOTRE DAME L. REV. 1, 21–28 (2003).

15. *See* Model Standards, *supra* note 4, at Standard I.A. For writing focusing on the meaning of party self-determination *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 (2001).

16. *See Policy & Standards,* ABA (last visited May 12, 2013), http://www.americanbar.org/groups/dispute_resolution/policy_standards.html (on file with the *McGeorge Law Review*) (listing various mediation codes of conduct).

17. Model Standards, *supra* note .

18. California Rules of Conduct, *supra* note 4.

19. Florida Rules for Mediators, *supra* note 4.

20. The Model Standards represent a joint and continued effort of many years by several leading organizations of developing guidelines for mediators' conduct. *See* Model Standards Reporter's Notes, 1–6 (Jan. 17, 2005), *available at* http://moritzlaw.osu.edu/programs/adr/msoc/pdf/reportersnotes-jan17final.pdf (on file with the *McGeorge Law Review*); Julie Macfarlane, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, 40 OSGOODE HALL L.J. 49, 53 (2002) (describing the Model Standards as a prominent example of codes of conduct for mediators); Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators,* 5 APPAL. J. L. 195, 197–00 (2006); Laura E. Weidner, *Model Standards of Conduct for Mediators,* 21 OHIO ST. J. ON DISP. RESOL. 539, 549–53 (2006). In addition, the Model Standards have inspired other codes of conduct and influenced their content. *See, e.g.,* MEDIATORS REVISED CODE OF PROFESSIONAL CONDUCT OF

A. The Model Standards of Conduct for Mediators: Adopting a Process/Content Approach to Decision-Making?

The Model Standards anchor the authority of mediation parties to make decisions in a Self-Determination Standard; that authority is drafted widely and applies to decisions on "process and outcome" "at any stage of a mediation," "including mediator selection, process design, participation in or withdrawal from the process, and outcomes."[21] However, the Standards remain vague on the allocation of decision-making authority between the mediator and the parties. This is because alongside the Self-Determination Standard, which states that the parties have authority to make decisions in mediation,[22] stands a Quality of the Process Standard, which authorizes the mediator to make decisions necessary in order to "conduct a mediation in accordance with [the] Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants."[23]

The possible conflict between the Self-Determination Standard and the Quality of the Process Standard is not dealt with adequately in the Standards and several issues remain unresolved. For example, the Self-Determination Standard recognizes that there may be circumstances in which the mediator would be authorized to balance party self-determination with his "duty to conduct a quality

THE COLORADO COUNCIL OF MEDIATORS AND MEDIATION ORGANIZATIONS Introductory Note (last visited May 12, 2013), *available at* http://www.dola.state.co.us/osg/docs/adrmediatorscode.pdf [hereinafter Colorado Code of Conduct] (on file with the *McGeorge Law Review*); LAW COUNCIL OF AUSTRALIA, ETHICAL GUIDELINES FOR MEDIATORS (2006), *available at* http://www.nswbar.asn.au/docs/professional/ adr/documents/ LawCouncilEthicalGuidelinesforMediators.pdf (on file with the *McGeorge Law Review*); A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS, *available at* http://www.justice.gov/adr/pdf/final_manual.pdf, Forward, The Nebraska Standards of Practice and Ethics for Family Mediators, *available at* http://www.supremecourt.ne.gov/mediation/pdf/Standards_and_Ethics_Revised_10-31-08.pdf. *See also* Young, *id.* at 197 (stating that "Virginia has a Standards of Ethics that its drafters modeled on the 1994 Model Standards"); Weidner, *id.* at 551 (noting that "The Model Standards (1994), as a whole, met great success. Many states adopted it in whole or at least used the 1994 version as a template to form their own ethical codes for mediators"). *See also* Susan Nauss Exon, *How can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators,* 2006 J. DISP. RESOL. 387, 408 (2006) (noting the importance of the California and Florida codes).

21. Model Standards, *supra* note 4, Standard I.A.

22. Alongside the general authority to make decisions contained in the Self-Determination Standard, other standards refer to circumstances in which parties have an authority to make *specific* decisions. For example, the decision whether a mediator who has disclosed a conflict of interests may continue to mediate the dispute or the decision to select any mediator whose competency and qualifications satisfy the parties' expectations. *Id.* Standard III.C, D, Standard IV.A.1.

23. *Id.* Standard VI.A. The Quality of Process standard goes on to determine mediators' authority to make *specific* decisions in several areas. Mediators may decide, together with the parties, on the presence or absence of persons at the mediation, and recommend other dispute resolution processes. *Id.* at Standard VI.A.3, 7. Other standards refer to additional cases of mediator decision-making. Mediators have authority to make decisions to assist the parties to exercise self-determination, such as decisions to refer parties to consult other professionals. *Id.* at Standard I.A. "Mediators may accept . . . de minimis gifts" in certain circumstances." *Id.* Standard II.B.3.

process," but this is limited by the words of the standard to decisions on *process design*.[24] It seems therefore that according to the Standards mediators cannot balance parties' decisions that are *not* on process design, such as decisions on mediator selection, participation in or withdrawal from the process, and outcomes. But other standards of the Model Standards expressly impose limitations on party self-determination of issues other than process design, such as the power of parties to select a mediator![25] Moreover, at least one code of conduct for mediators clearly rejects the distinction between process design and other decisions and attaches the balancing authority to all types of decisions.[26] So it seems that the Standards adopt, de-facto, a *process/content* distinction according to which process design is treated as a matter of procedure in which the mediator is entitled to intervene; while other decisions are treated as relating to content and are thus made subject to the parties' decision making. But what are decisions on process design? Do they not affect content?[27]

In addition to express limitations that the Model Standards impose on the parties' right to make decisions on process design and on mediator selection, the Standards limit the parties' freedom of choice on other issues without expressly stating so.[28] The mediator's authority to make decisions is also subject to numerous restrictions.[29] These observations demonstrate the confusing message sent by the Standards with regard to decision-making in mediation and point to the need for identifying a clear rationale for the allocation of decision-making authority between mediators and parties and clear guidelines for legitimate mediator interventions in party decision-making.

24. *Id.* Standard I.A.1.

25. *See e.g.,* Model Standards, *supra* note 4, Standard III.E. The conflicts of interest standard provides that parties cannot select a mediator "if a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation", thus imposing a limitation on mediator selection. *Id. ; see also infra* Part V.B.

26. *See* STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS Standard I, cmt. 2 *(*revised October 16, 2009), *available at* http://www.courts.state.ny.us/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct.pdf [hereinafter NY-CDRC Standards of Conduct] (on file with the *McGeorge Law Review*).

27. *See infra* notes 65–66 and accompanying text; *infra* Part V.A.

28. For example, a mediator may be required by law to disclose mediation information even where the parties object to such disclosure. Model Standards, *supra* note 4, Standard V.A. Mediators must not establish a relationship with one of the parties subsequent to the mediation in a "matter that would raise questions about the integrity of the mediation" even where the parties agree to such relationship. *Id.* Standard III.F.S.

29. Mediators must *decline* a mediation in certain circumstances for reasons of impartiality, *id.* at Standard II.A, or conflict of interests, *id.* at Standard III.A,E; mediators must *discontinue* mediation where their conduct jeopardizes conducting the mediation consistent with the Standards, *id.* at Standard VI.C ; mediators are not allowed to accept gifts and favors which raise a question of impartiality. *Id.* at Standard II.B.2, 3.

B. Florida Rules for Certified and Court-Appointed Mediators: Adopting a Substantive/Non-Substantive Approach to Decision-Making

The Florida Rules for Mediators do not use the process/content distinction and instead replace it with a substantive/non-substantive terminology, stating that a "mediator shall not make substantive decisions for any party."[30] The Rule's language regarding the parties' right to make decisions is not free of doubt. On the one hand, the self-determination rule,[31] along with other rules, grant mediation parties a right of self-determination that could be construed as relating to *all* mediation decisions[32] in all stages of the process.[33] On the other hand, the self-determination rule provides that mediators shall not make substantive decisions for the parties,[34] which may be construed as allowing the mediator to make non-substantive decisions. The difficulty is that the Rules do not define what substantive decisions are, thus leaving unanswered the question: what are non-substantive decisions that mediators may make for the parties? Defining procedural decisions as non-substantive[35] would allow mediators to make decisions on procedural matters as opposed to substantive matters. But the terms "substantive decisions" and "non-substantive decisions" do not clarify the allocation of decision-making authority between mediators and mediation parties more than the process/content distinction. For example, is setting the mediation agenda procedural or substantive? In my opinion, it is a substantive decision that should be made by mediation parties,[36] but others might consider it a process decision.

The Florida Rules for Mediators do not clearly define mediators' authority to make decisions. This authority is implied from a number of rules which make it possible for mediators to carry out their duties, such as the rule stating the role of

30. Florida Rules for Mediators, *supra* note 4, R. 10.310(a)*; see also* ALABAMA CODE OF ETHICS FOR MEDIATORS Standard 4(a) (1997), *available at* http://www.alabamaadr.org /index.php?option=com_content &task=view&id=24&Itemid=6 (on file with the *McGeorge Law Review*).

31. Florida Rules for Mediators, *supra* note 4, R. 10.310(a).

32. *See, e.g., id.* ("Decisions made during a mediation are to be made by the parties"); *id.* R. 10.310(b) ("A mediator shall not coerce or improperly influence any party to make *a decision* . . . .") (emphasis added); *id.* R. 10.220 ("The ultimate decision-making authority, however, rests solely with the parties."); *id.* R. 10.420(a)(2) ("The mediator is an impartial facilitator without authority to impose a resolution or adjudicate *any aspect* of the dispute . . . .") (emphasis added); *id.* R. 10.310, Committee Notes to Florida Rules for Mediators, ("A mediator must not substitute the judgment of the mediator for the judgment of the parties, coerce or compel a party to make *a decision* . . . .") (emphasis added).

33. *See id.* R. 10.310, Committee Notes to Florida Rules for Mediators ("It is critical that the parties' right to self-determination (a free and informed choice to agree or not to agree) is preserved during all phases of mediation.").

34. *Id.* R. 10.310(a).

35. *See, e.g., Substantive Definition,* DICTIONARY.COM, http://dictionary.reference.com/browse/Substantively (on file with the *McGeorge Law Review*) ("[E]ssential legal principles administered by the courts, as opposed to practice and procedure.").

36. *See* Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics,* 8 PEPPERDINE DISP. RESOL. J. 243, 256–58 (2008).

the mediator,[37] the rule determining mediators' responsibility to mediation parties,[38] and the rule instructing mediators to conduct a balanced process,[39] Despite the fact that the Rules recognize limitations on mediation parties' right of self-determination[40] and on the freedom of mediators to make decisions in specific circumstances,[41] the Rules lack a general statement guiding mediators actions in the event of a clash between the wishes of mediation parties and the duty of mediators to conduct the mediation ethically according to the Rules.

C. California Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases: Ignoring the Problem of Decision-Making Allocation

The California Rules of Conduct do not use either the process/content or the substantive/non-substantive distinction to describe decision-making in mediation.[42] The Rules include a "voluntary participation and self-determination" standard[43] and make clear that mediation parties have the authority to make decisions on the outcome of mediation,[44] on whether to continue to participate in the mediation,[45] on the extent of their participation in the process, and on withdrawal.[46]

37. Florida Rules for Mediators, *supra* note 4, R. 10.220.

38. *Id.* R. 10.300.

39. *Id.* R. 10.410.

40. *See, e.g., id.* at R. 10.340(c) (withdrawal due to a conflict of interest that clearly impairs a mediator's impartiality); *id.* R. 10.420(b) (listing circumstances in which the mediator must adjourn or terminate the mediation).

41. Mediators' authority to make decisions is restricted by provisions that assign decision-making authority to the parties. *See supra* note 32. In some circumstances the authority of mediators to decide on the continuation of the mediation is restricted and they have to withdraw from or terminate the mediation, for example, where "a party is unable to freely exercise self-determination," *id.* at R. 10.310(d), or where a mediator is no longer impartial, *id.* at R. 10.330(b).

42. For other codes which do not employ the process/content/substantive terminology in defining the principle of party self-determination *see, e.g.,* THE MEDIATION COUNCIL OF ILLINOIS PROFESSIONAL STANDARDS OF PRACTICE FOR MEDIATORS (2009), *available at* http://www.mediationcouncilofillinois.org/MCI%20Professional%20 Standards%20of%20Practice%20Revised%202.4.10.pdf (on file with the *McGeorge Law Review*) [hereinafter MCI Standard of Practice] ("The mediation process relies upon the ability of participants to make their own voluntary and informed decisions"); STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS ADOPTED BY THE SUPREME COURT OF NORTH CAROLINA Standard V.A. (2010), *available at* http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/Standards_030110.pdf [hereinafter NC Standards of Conduct] (on file with the *McGeorge Law Review*) ("A mediator … shall not impose his/her judgment or opinions for those of the parties concerning *any aspect of the mediation*.") (emphasis added); OMA Standards of Practice, *supra* note 4, at Standard I, cmt. 1 ("Participants should be free to choose their own dispute resolution process, and mediators should encourage them to make their own decisions on all issues.").

43. California Rules of Conduct, *supra* note 4, R. 3.853.

44. *Id.* R. 3.853(1).

45. *Id.* R. 3.853(3).

46. *Id.* R. 3.853(2).

The Rules are unclear whether parties' decision-making authority extends to *all* mediation decisions, but arguably this is the result of two of the Rules: one instructs mediators to "refrain from coercing any party to make a *decision*"[47] (i.e., the rule does not specify certain types of decisions and therefore refers to all decisions). The other instructs mediators to "conduct the mediation proceedings in a procedurally fair manner" while defining "procedural fairness" as "a balanced process in which each party is given an opportunity to participate and make un-coerced *decisions*"[48] (i.e., again, the rule refers to decisions of any type which may not be coerced).

The California Rules of Conduct neither include a specific rule stating that mediators have a *general* authority to make decisions, nor a rule discussing generally the potential conflict between mediation parties' wishes and mediators' duty to make decisions which might be inconsistent with the parties' desires. Instead, one finds rules imposing duties on mediators and authorizing them thereby to make decisions and take actions necessary to fulfill those duties.[49] In addition, the Rules supply many illustrations of limitations on mediation parties' right of self-determination[50] and on the authority of mediators to make decisions.[51] As in the case of the Model Standards and the Florida Rules for Mediators, a clear statement on the allocation of decision-making authority between parties and mediators and an explicit rationale for it are missing; as a result, the guidance of the Rules is undermined.

III. NO ANSWER IN MEDIATION LITERATURE: THE UNSATISFACTORY STATE OF CURRENT LITERATURE ON DECISION-MAKING IN MEDIATION

If codes of conduct for mediators fail to adequately address the issue of decision-making in mediation, can answers be found in mediation literature? Writers have recognized the process/content approach and distinguished between procedural decisions and decisions on content or outcome; these authors assign mediators with responsibility for making procedural decisions and parties with responsibility for making decisions on the content of mediation and its outcome.[52]

47. *Id.* R. 3.853(3) (emphasis added).

48. *Id.* R. 3.857(b) (emphasis added).

49. For example, R. 3.853 instructs the mediator to "conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties". *Id.* R. 3.853. R. 3.857(b) requires that mediators "conduct the mediation proceedings in a procedurally fair manner . . . [where] each party is given an opportunity to participate and make uncoerced decisions." *Id.* R. 3.857(b).

50. Parties cannot excuse mediator impartiality or incompetence and mediators must decline a mediation or withdraw from mediation notwithstanding the parties' wishes to the contrary "where the mediator cannot maintain impartiality toward all the participants." *Id.* R. 3.855(f)(1).

51. Mediators are not allowed to coerce "any party to make a decision or to continue to participate in the mediation," *id.* R. at 3.853(3), and must provide the parties with information on various matters such as the voluntary nature of the agreement. *Id.* at R. 3.853(1).

52. *See, e.g.,* Riskin, *supra* note 9, at 43 n. 145; Boulle & Nesic, *supra* note 9, at 19.

Other writers have preferred the substantive/non-substantive terminology, and distinguished between substantive decisions and making non-substantive decisions.[53] According to this distinction, mediation parties are presumed to be in charge of making substantive decisions and mediators are presumed to be in charge of making non-substantive decisions.[54] The substantive/non-substantive distinction is linked to the process/content distinction if substantive decisions are viewed as decisions on content and outcome, and non-substantive decisions as decisions on procedure. A third distinction that has been made in mediation literature, which is also linked to the process/content approach, distinguishes between an interventionist or directive mediator style, which allows for an extensive decision-making capacity for the mediator, and a non-interventionist or non-directive style, which assigns the mediator a more modest decision-making role.[55]

Writers seem to accept these distinctions and rely upon them.[56] Kovach, for example, has accepted the process/content distinction and argued that mediators control and have responsibility for the process while mediation parties control and have responsibility for the content of mediation.[57] Other writers have suggested that mediation parties are entitled to control both process and outcome.[58] Some writers discuss decision making in mediation in ways that illustrate the shortcomings of such generalizations and show, for example, the limitations of the process/content distinction as a guide for decision-making.[59] However, no writer has yet offered a different concept of decision-making in mediation, which can provide clear and detailed guidelines to mediators on how decision-making in mediation is to be shared. Take Riskin for example, who described in a well-known article different mediator styles involving various degrees of intervention, but did not take a stand on the appropriate practice that

53. *See e.g.,* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 282 (2004); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. OF WOMEN & L. 145, 173–74 (2003).

54. *Id.*

55. *See e.g.,* Boulle & Nesic, *supra* note 9, at 21; CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 55 (3rd ed., 2003).

56. *Infra* notes 57–63 and accompanying text.

57. *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 46 (3d ed., 2004).

58. *See* CARRIE MENKEL-MEADOW, ET AL., MEDIATION: PRACTICE, POLICY, AND ETHICS 94 (2006).

59. *See, e.g.* Boulle & Nesic, *supra* note 9, at 14, 19–21 (considering the description of mediators as having control over the process and refraining from interfering with the content of the dispute as an unresolved issue); *id.* at 20 (describing situations in which mediators and parties share control of the process and arguing that "[m]ediators do not, in all respects, control the process alone"); *see also* Moore, *supra* note 55, at 217 ("The mediator should clearly explain the stages of the problem solving process and should take care not to present herself as an authority figure. It is the disputants' process, not the mediator's. The process description is a procedural suggestion, not an order."); *id.* at 226 ("The choice [of opening] to focus on substance, process, or the psychological conditions of the disputants depends on: . . . The degree of authority the disputants have given to the mediator to design and regulate the process of the meeting and opening procedures or statements.").

mediators should adopt.[60] In a later article, Riskin distinguished between substantive, procedural, and meta-procedural decisions made in mediation,[61] but again refrained from opining on the appropriate allocation of decision-making authority between the mediator and the parties.[62] Another writer focused on decision-making in mediation is Nolan-Haley, who described four models of mediator-parties relationships or mediation autonomy.[63] However, these models do not reveal a clear allocation of decision-making authority between mediators and mediation parties, and the author refrains from evaluating the models or choosing between them.[64]

This short review of the literature suggests that mediation literature, like mediators' codes of conduct, is unable, at its current state, to supply adequate guidance to mediators and to parties on their decision-making rights. The use of process/content and substantive/non-substantive terminology is vague and unhelpful because it is difficult to distinguish between decisions on process or procedure and decisions on content or substance. There is extensive literature arguing that decisions that are often classified as procedural can potentially influence the content and outcome of mediation and the ability of the parties to exercise self-determination in relation to substantive issues in mediation, including the mediated agreement.[65] As a result, an attempt to assign decision-making authority along the lines of process/content or substantive/non-substantive decisions is bound to fail.[66]

Moreover, the discussion in the literature of an interventionist-directive style and a non-interventionist-non-directive style does not inform us on the allocation of decision-making authority in mediation, but rather *assumes* and *presupposes* such allocation. The degree of mediators' directiveness is worth considering both

60. *See* Riskin, *supra* note 9, at 12–13.

61. *See* Riskin, *supra* note 9, at 34–37.

62. *See id* at 49 ("In this Article, I do not mean to promote a particular approach to decisionmaking in general or in a given mediation.").

63. *See* Nolan-Haley, *supra* note 1, at 815–16 (describing paternalistic, instrumentalist, informative, and deliberative models of mediator-party relationships).

64. *Id.* at 814. "My purpose [with the exception of Part V of Nolan-Haley's article where she "suggest[s] using an informative decisionmaking model for unrepresented parties in mandatory court mediation,". . . is neither to evaluate nor to recommend, but to explain how parties exercise autonomy and self-determination in mediation in order to elaborate a theory of informed consent that accommodates the realities of practice." Id. at n. 91.

65. *See* Riskin, *supra* note 9, at 28; Boulle & Nesic, *supra* note 9, at 20, 26; Macfarlane, *supra* note 20, at 59; Forrest S. Mosten *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163, n. 4 (2008).

66. *See infra* Part V.A. In legal ethics the distinction between ends (controlled by the client) and means (controlled by the lawyer) has been subject to similar criticism. *See, e.g,* Strauss, *supra* note 11, at 324–25; David Luban, *Paternalism and the Legal Profession,* 1981 WIS. L. REV. 454, n. 9 (1981); Rodney J. Uphoff, *Who Should Control The Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices,* 68 U. CIN. L. REV. 763, 775–78 (2000).

in relation to procedural matters and substantive matters.[67] However, one cannot deduce from a mediator's style whether and in what circumstances decision-making authority rests with the parties, or rather, with the mediator—unless the supposition is that a high degree of directiveness should be limited to some types of decisions, for example to decisions on process. Yet, this brings back the unresolved problem of the need to distinguish between process and content. Thus, the distinction between degrees of intervention and directiveness has importance not as a means for identifying the allocation of decision-making authority between the mediator and the parties, but for assessing the legitimacy of mediator actions (i.e., for considering whether the degree of intervention or direction has been so high as to undermine the parties' right to make a decision). Such discussion, in order to be meaningful, must rest on a prior understanding of the extent of mediation parties' and mediators' authority to make decisions.

The argued conclusion is that an attempt to differentiate between process and content for the purpose of assigning decision-making authority is futile. Similarly, there is no point in searching for a dividing line between substantive and non-substantive decisions. A new workable approach is needed; an approach that clearly delineates the decision-making authority of mediators and parties, and which offers a rationale for the legitimate restrictions mediators may impose on mediation parties' right to make decisions.

IV. A NEW APPROACH TO SHARING DECISION-MAKING IN MEDIATION AND ITS DEFENSE

A. Arguments in Favor of the New Approach

A workable concept of decision-making allocation in mediation must start with an extensive right of self-determination for the parties, which has *general application* to *all* mediation decisions. Taking this approach avoids the traps of the process/content and substantive/non-substantive distinctions and is consistent with mediation philosophy and ideology, which seek to place the parties at the heart of the process and make them the owners of it.

The Model Standards reflect this approach to a certain degree. The standard of self-determination refers to all the stages of mediation—both to process and outcome—and therefore can be understood as applying to *all* mediation decisions.[68] However, the Standards depart from this approach when they impose on the mediator a duty to balance self-determination when making decisions on

67. *See e.g.,* Riskin, *supra* note 1, at 30 (". . . almost any conduct by the mediator directs the mediation process, or the participants, toward a particular procedure or perspective or outcome").

68. *See supra* note 21 and accompanying text. The standard's wording, which refers to different types of decisions other than the decision on outcome, is not incidental and was intended to extend the scope of self-determination. *See* Model Standards Reporter's notes, *supra* note 20, at 9.

process design, thus bringing back the process/content distinction through the back door. As noted above, the Florida Rules for Mediators and the California Rules of Conduct also support an extensive self-determination right to mediation parties, but the California Rules of Conduct use the substantive/non-substantive distinction and the California Rules of Conduct do not address the possible clash between mediators' and parties' decision-making.[69]

Self-determination is a right in the sense that it enables a party to make decisions, insist on his choices, and oppose the will of others.[70] The right of self-determination belongs to each party *separately*; thus, the right may be exercised with respect to all decisions, not only against mediators, but also against other mediation parties. For example, neither the mediator, nor any party, may deny a party's right to decide who shall be the mediator in his case, whether to participate in mediation or to withdraw from it, whether to accept or reject a particular resolution, or whether to agree to disclosure of information obtained in private session. Decisions of all types should not be coerced and must be made with each party's consent.

While it is true that mediation parties have a right to make decisions throughout the mediation process, a realistic view of mediation must recognize a place for mediator decision-making in order for the process to achieve its goals and promises. No one can seriously envision a mediation in which the parties make all decisions and the mediator makes none. Mediators must make decisions because they have a role to fulfill. Their role is to assist the parties in communicating effectively, to negotiate constructively, and to reach an agreement if one is desired. They have responsibilities to the parties and to the process; with these responsibilities come duties to act. The questions are therefore what are the decisions that mediators are allowed to make? What are the sources of mediators' decision-making authority? And what are the limits on that authority in view of the parties' extensive right of self-determination?

Let us consider the issue of the source of authority first. The Model Standards locate, as we have seen, the major source of mediator decision-making authority in the Quality of the Process Standard, but in fact other standards also authorize the mediator to make those decisions that are required in order to comply with the Standards.[71] Furthermore, the Self-Determination Standard is a

69. *See supra* Part II.A, B.

70. It is a right *stricto sensu* in that it imposes a duty on the mediator to conduct the mediation on the basis of the principle of party self-determination, *see* Model Standards, *supra* note 4, at Standard I.A., in a manner that supports party self-determination, *see* California Rules of Conduct, *supra* note 4, R. 3.853, and to assist the parties in making decisions and protect their right to self-determination, *see* Florida Rules for Mediators, *supra* note 4, R. 10.310(a)). It is a privilege or a liberty in the sense that the parties are free to make decisions or refrain from making them at any stage of mediation, *id*, without coercion. Florida Rules for Mediators, *id.* R. 10.310(b); California Rules of Conduct, *supra* note 4, R. 3.853(3). On the meaning of rights *see* WESLEY N. HOHFELD FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1919); M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 396–97 (8th ed., 2008).

71. *See supra* Part II.A. Of course, the primary source for mediators' decision-making authority is the

source of authority not only for the parties, but also for mediators. It authorizes mediators to make decisions that are necessary in order to "conduct a mediation based on the principle of party self-determination."[72] The Florida Rules for Mediators and the California Rules of Conduct do not include a specific rule that establishes a general source of authority for mediators to make decisions, but instead contain many other rules that impose duties on mediators, authorizing them to make decisions and take actions necessary to fulfill those duties.[73] Whether or not codes supply a formal basis of authority for mediators to make decisions, such authority must exist in order for them to fulfill their role. Thus, notwithstanding the absence of a standard entitled "Mediator Decision-Making Authority" or language of similar meaning, it should be recognized that the authority of mediators to make decisions has an independent status, just like the parties' decision-making authority that is reflected in their right of self-determination. Thus, both mediators and parties have decision-making power. The question is how can the mediator's duty to make decisions and the parties' right to make decisions be reconciled?

The answer lies in the relativity of mediation values. No standard or rule has in-advance priority over all other standards or rules. For example, it cannot be maintained that party self-determination is more important than mediator impartiality, or that mediator impartiality is more important than confidentiality and so forth.[74] The weight of each norm must be ascertained in context, and no norm always trumps the others. It follows that mediators are under a duty to adhere to *all* standards or rules, and in the absence of an overriding formal provision in a code or other appropriate justification, mediators are under a duty to honor the parties' right to self-determination when conducting the mediation. Similarly, mediators must comply with their other obligations, such as acting impartially and keeping confidences. This means, first, that as a general rule, decisions throughout the mediation should be made by the parties; second, that mediators, irrespective of the process/content or substantive/non-substantive distinctions, should refrain from making decisions alone unless a special reason justifies their intervention; and third, that when decisions are made by mediators, parties should be able to participate in the decision-making (i.e., mediators should discuss the issue to be decided with the parties and ascertain their position) unless there is a compelling reason that justifies making the decision without the parties.[75]

parties' decision to select them as mediators in their case.

72. Model Standards, *supra* note 4, Standard I.A.

73. *See supra* Part II.B & C.

74. *See* Model Standards, *supra* note 4, Note on Construction ("These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear."); Model Standards Reporter's notes, *supra* note 20, at 7.

75. For provisions drafted in a manner that connotes a collaborative approach to decision-making *see, e.g.*, CALIFORNIA DISPUTE RESOLUTION COUNCIL STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS,

Three other reasons support this approach. Firstly, in the process of defending derogation from a right (e.g., the right of self-determination), one should prefer the alternative that is the least harmful for the right-holder. Allowing mediators to have exclusive decision-making power is more damaging to the parties' right to self-determination than exclusive party decision-making or shared decision-making, which secures the parties a place in the decision-making. It follows that the presumption (which may be rebutted in certain circumstances)[76] should be that party decision-making and shared decision-making are preferable to mediator exclusive decision-making. Secondly, the essence of mediation, and its most distinctive feature in comparison with adjudication and arbitration, is party decision-making. The essence of the mediator's role is to help parties make decisions, not making decisions for the parties. Whenever possible this characteristic of both process and role should be preserved for reasons of integrity. Decision-making by mediators has the potential of undermining the uniqueness and identity of mediation and thus should be done sparingly and for adequate reasons. And thirdly, mediation seeks to offer parties tools for effective communication and negotiation, which can serve them well not only in the mediation room but also elsewhere and in future disagreements.[77] When mediators leave decision-making to the parties and share decision-making with them whenever possible, they contribute to further that desirable goal and assist in sending an educational message to the parties on the ways to engage in a constructive dialogue.

What needs to be done now is to articulate the special, compelling reasons for mediator decision-making and to explore the exceptional circumstances in which—notwithstanding the parties' right to self-determination—mediators may make a decision alone without participation of the parties or even against their will.

CDRC, Standard I (2010), *available at* http://ocmediationconference.org/sitebuildercontent/sitebuilderfiles/cdrcmodelrulesformediators.pdf [California (CDRC) Standards of practice] (on file with the *McGeorge Law Review*) ("While the responsibility for conducting the mediation process rests with the Mediator *in consultation with the parties***,** responsibility for the resolution of a dispute rests with the parties.") (emphasis added); VIRGINIA STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS, Standard D.2.c (2011), *available at* http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf [hereinafter Virginia Standards of Ethics] (on file with the *McGeorge Law Review*) ("The mediator shall reach an understanding *with the participants* regarding the procedures which may be used in mediation") (emphasis added)

76. *See infra* Part IV.B.1.

77. *See e.g.,* Boulle & Nesic, *supra* note 9, at 37 ("The [mediation] process also becomes educative for the participants in that they are involved in and learn a problem-solving process which can be applied in other contexts").

B. The Theory

The theory suggested here replaces the old, unhelpful guidelines for sharing decision-making in mediation. It is submitted that there are two exceptions to the general rule that decision-making authority belongs to the parties. The first exception is when mediators are unable to share decision-making with the parties because it is either practically impossible due to the nature of the decision or because the mediator is prevented from doing so by the code of conduct that governs his behavior. The second exception is when mediators have to make a decision, despite the parties' objection, in order to conduct the mediation in accordance with the governing code of conduct.

1. Decisions Mediation Parties Cannot Make (Decisions Mediators Cannot Share with the Parties)

There are numerous decisions made by mediators in the course of mediation that codes of conduct hardly mention or briefly discuss. What questions to ask the parties? Should certain questions be avoided? What is the right timing to ask a question? Should the mediator summarize or reframe? Should he advise the parties to consult an expert? Should he advise the parties to consider resolution of their dispute through other dispute resolution processes? Should he invite the parties to consider the consequences of failure to bring the dispute to an end?[78] These are decisions that mediators make by themselves,[79] though the applicable rules of conduct might impose limitations on their discretion.[80] It is impossible to subject these decisions to party self-determination because the parties cannot practically participate in the decision-making. Mediators cannot share with the parties the decision of whether to ask a question or make a recommendation. They must make these decisions themselves. Obviously, the moment the question or the recommendation has been put to the parties, the parties regain their right of self-determination and may decide how to respond. For example, they may decide whether to answer the question, how to answer it, whether to accept the mediator's recommendation, etc. This decision is theirs to make and the mediator is not allowed to coerce the parties to accept any decision.

Moreover, there are circumstances in which mediators are ethically prevented from involving the parties in the decision-making. The mediator might consider that the parties should be aware of certain information that is essential for them to exercise self-determination or for the process to be fair. In principle, the parties should first decide whether they want the mediator to provide them with information, i.e. the mediator should ask the parties whether they wish to be

78. *See id.* at 170.

79. *See, e.g.,* Macfarlane, *supra* note 20, at 63.

80. For example, the mediator must phrase the questions in a way that maintains impartiality.

provided with certain information.[81] But there may be circumstances in which the mediator is prevented from sharing with the parties the information or even the considerations for and against bringing the information to the parties' knowledge. The mediator might be under a duty of confidentiality to keep to himself information obtained in a private session from one of the parties who objects to revealing the information to another party, or under a duty to preserve an impression of impartiality in circumstances where provision of information might give an impression of favoritism.[82] In such cases, the mediator must make the decision *alone*, without the participation of the parties, in order to meet his other ethical obligations. Should he advise the parties to consult a professional expert?[83] Should he ask the parties general questions, leading them to search for relevant information by themselves?[84] These type of mediator decisions—to give a professional recommendation or ask a question—are not the type of decisions that can practically be subject to party self-determination. Furthermore, these decisions do not undermine party self-determination; on the contrary, they supply the parties with relevant information and contribute to a quality decision-making by the parties,[85]

2. *Balancing Decisions: Decisions Mediators Must Make in Order to Conduct Mediation in Accordance with Governing Rules of Conduct Notwithstanding Parties' Objection*

The first category of mediator decision-making dealt with decisions the mediator cannot share with the parties and thus is justified in making alone. All other decisions must be left to the parties. Still, there will be times when a mediator puts an issue to the parties to decide but the situation triggers a duty to intervene and override the parties. This could happen because mediators have a duty to conduct the mediation according to the code of conduct that applies to them. The right of the parties to make decisions cannot mean a right to compel mediators to breach other rules of conduct. Thus, if the parties' decision or behavior makes it impossible to conduct the mediation in accordance with the

81. For elaboration *see infra* note 97.

82. *See* Model Standards, *supra* note 4, Standard II., III.

83. *See, e.g.,* Florida Mediator Ethics Advisory Committee, Advisory Opinion 2006-006, 1 (2007), *available at* http://www.mediationtrainingcenter.com/images/MEAC_Opinion_2006-006.pdf ("A mediator is obligated to advise a party of the *right* to seek counsel, if the mediator believes that the party does not understand or appreciate how an agreement may adversely affect the party's legal rights or obligations . . . .").

84. *See, e.g.,* Committee on Mediator Ethical Guidance, Opinion 2009-2, 8 (2009), http://apps.americanbar.org/dch/committee.cfm?com=DR018600 (on file with the *McGeorge Law Review*) ("Where a mediator is concerned about whether a party can make an informed decision without being made aware of confidential caucus information . . . the mediator can use general reality testing questions to ensure that the party has considered risks associated with not reaching a mediated settlement").

85. *See supra,* Part.IV.B.1.

governing rules of conduct, the mediator would be justified in making a decision against the parties' judgment.

I shall call these decisions "balancing decisions": the mediator balances party self-determination and makes a decision notwithstanding the parties' objection. The term "balancing" in the context of mediation decision-making is borrowed from the Model Standards.[86] The Self-Determination Standard in the Model Standards instructs mediators "to balance [such] party self-determination [for process design] with a mediator's duty to conduct a quality process in accordance with these Standards."[87] The Standards do not explain what is meant by balancing,[88] and other codes which have adopted this terminology have not done so either.[89] The logical interpretation of balancing must be some sort of mediator intervention in the parties' decision-making that undermines their self-determination. The use of the word "balance" in the context of decision-making allocation must have several consequences.[90]

First, the authority to make a balancing decision is moved from the parties to the mediator. This has already been argued as an exception to the general rule that decisions are ordinarily made by the parties.[91] The argument thus is that mediators should *limit their intrusions* on the parties' right to make decisions as much as possible and must be able to justify such intrusions.

Secondly, in making the decision the mediator must *consider the parties' wishes.* This is because a decision that does not consider the wishes of the parties cannot be properly described as a balanced decision, rather it is an outright rejection or denial of party self-determination. This is also a key difference between balancing decisions and the first category of decisions discussed above (decisions the parties cannot make). Decisions belonging to the first category do not represent a conflict between the will of the parties and the mediator, as mediators are unable to examine the parties' wishes prior to making the decision but must make the decision themselves. Balancing decisions, on the other hand,

86. Model Standards, *supra* note 4, Standard I.A.1.

87. *Id.*

88. *See e.g.,* Michael L. Moffitt, *The Wrong Model, Again,* 12 DISP. RESOL. MAG. 31, 32 (2006). The Self-Determination Standard of the Model Standards refers to the need to balance party self-determination with mediators' duty to conduct a *quality process*, and it seems therefore that it points to the Quality of the Process StandardQuality of the Process Standard as a justification for balancing. The wording of the Quality of the Process StandardQuality of the Process Standard however does not make it easy to understand what it means to balance party decisions on process design and in what circumstances balancing should be exercised. The standard has many provisions of no relevance to the meaning of balancing: some do not discuss decision-making as to process design, *see, e.g.,* Model Standards, *supra* note 4, Standard VI sections A.1, A.2, A.6, and A.9, and others provisions do not contribute to an understanding of the meaning of balancing party self-determination because they do not discuss limitations which mediators may impose on parties' right to make decisions. *See, e.g.,* Standard VI, § A.4, A.7 and A.8.

89. *See* NY-CDRC Standards of Conduct, *supra* note 26.

90. *See infra* text accompanying note 91–93.

91. *See* Model Standards, *supra* note 4, Standard I.A.. (". . . [A] mediator may need to balance . . .", recognizing that mediators should intervene in the parties' right to decide only when balancing is *needed*.)**.**

requires mediators to consider the parties' will and then, in fulfilling their duties, make a decision which might be against the parties' wishes. Thus, in order to balance, mediators must always *determine the position of the parties* on the issue to be decided, otherwise it would not be an exercise of balancing, but an outright exercise of discretion—replacing the parties' discretion with the mediator's.

A third element of balancing decisions is that in making the decision the mediator has to reflect on considerations other than the parties' wishes. This is because balancing *the parties'* self-determination requires the mediator to weigh considerations of a different source. The primary source for these considerations is the code of conduct which applies to the mediator.[92] Other legitimate sources may be applicable legal norms and ethical norms which are not detailed in the code.[93]

A *proper balancing* of party self-determination is therefore minimal and necessary in order to conduct the mediation in accordance with mediators' ethical obligations under the governing code of conduct. The mediator *does not dictate* to the parties how the mediation is to be conducted; he *does not prevent* them from making decisions; and he *respects their wishes* so long as their wishes are consistent with his ethical obligations. In addition, the mediator involves the parties in making the balancing decision by discussing with them the circumstances which drive him to make the decision and listens to their view unless he is prevented from doing so by the rules of conduct (for example, due to a duty of confidentiality or impartiality). A review of mediators' codes of conduct reveals three legitimate ways in which mediators can properly balance party self-determination.

First, mediators can properly balance party decision-making by *terminating* or *postponing* mediation, or *withdrawing* against the parties' wishes where it is impossible to conduct the mediation in accordance with the governing rules of conduct. This does not mean that the mediator must instantly terminate the mediation. On the contrary, the mediator should first attempt to reconcile the conflicting rules, make the parties a part of this attempt as much as possible, and terminate the mediation only as a last resort. For example, a common provision in mediators' codes of conduct requires mediators in conflicts of interest to disclose all conflicts of interest to the parties and have their consent to proceed with the mediation.[94] These provisions reflect the parties' right to decide whether to allow the mediator to proceed or to replace him according to the principle of self-determination. However, some codes provide that where a mediator's

92. According to the Model Standards, supra note 4, Standard I.A.1, the legitimate consideration which mediators may weigh when balancing party self-determination is their duty to conduct a quality process, but it is unclear what is meant by considerations of quality and why should balancing be restricted to considerations of quality alone. *See supra* note 88.

93. *See infra notes* 100–04 and accompanying text.

94. *See* Model Standards, *supra* note 4, Standard III.C,D.; California Rules of Conduct, *supra* note 4, R. 3.855(b), (c); Florida Rules for Mediators, *supra* note 4, at R. 10.340(b), (c).

conflict of interest might undermine the integrity of the mediation, he must refrain from conducting the mediation regardless of the parties' wishes (i.e., he must act against the parties' decision).[95] This is an act of proper balancing: the parties' right to self-determination is not absolute and the mediator must ignore their decision on the basis of other considerations which reflect his duty toward the process and the profession to protect the integrity of mediation.[96]

Second, mediators can properly balance party decision-making by *refusing a request* of the parties that the mediator perform a specific action if that action conflicts with the applicable rules of conduct. This is so because the parties do not have a right to demand mediators to act against their ethical duties. For example, parties might ask the mediator to provide them with information related to his area of professional expertise.[97] Many codes of conduct permit mediators to provide information to mediation parties but condition it on the mediator's competence (i.e. the mediator having the necessary training and experience to provide the information) and ability to do so consistent with the applicable rules of conduct.[98] This means that sometimes the mediator ought to refuse the parties' request, notwithstanding their right to self-determination, because providing the information would be inconsistent with his ethical obligation, for example where providing the information would make the mediator appear partial.[99] Had the mediator followed their request he would not have conducted the mediation in accordance with the governing rules of conduct and therefore his refusal can be justified.[100]

Third, mediators can properly balance party decision-making by *performing an action* (not mentioned in the first incident of balancing, which is not a

95. *Compare* Model Standards, *supra* note 4. Standard III.E, *and* California Rules of Conduct, *supra* note 4, R. 3.855(f)(2), *with* Florida Rules for Mediators, *supra* note 4, at R. 10.340(c) (the mediator must withdraw if a conflict of interest clearly impairs his impartiality).

96. For more on these duties, *see infra* note 161, 163.

97. Where the parties do not ask the mediator for information in his area of expertise he should not, in my opinion, provide such information on his own initiative or against the parties' wishes because the right to decide whether to receive such information from the mediator (and not, for example, from a professional expert) belongs to the parties and the mediator can and should check first with the parties whether they wish to receive the information from him or from another source. *But see,* California Rules of Conduct, *supra* note 4, at R. 3.853 Advisory Committee Comment (noting that evaluation by mediators should be given with the parties' consent).

98. *See, e.g.,* Model Standards, *supra* 4, Standard VI.A.5; Florida Rules for Mediators, *supra* note 4, R. 10.370(a); California Rules of Conduct, supra note 4, R. 3.857(d).

99. Model Standards, *supra* note 4, Standard VI.A.5; Florida Rules for Mediators, *supra* note 4, R. 10.370(a); California Rules of Conduct, supra note 4, R. 3.857(d).

See also Joseph B. Stulberg, *The Model Standards of Conduct—A Reply to Professor Moffitt,* 12 DISP. RESOL. MAG. 34, 34 (2006).

100. *See* Florida Mediator Ethics Advisory Committee, Advisory Opinion 2007-002, at 2 (2007), *available at* http://www.mediationtrainingcenter.com/images/MEAC_Opinion_2007-002.pdf (on file with the *McGeorge Law Review*) (an example of a justified refusal of a party's request to submit a mediated agreement to court "because, necessarily, [the mediator] would not have the consent of all parties" [as required by Rule 1.730(b), Florida Rules of Civil Procedure]).

decision to terminate or postpone mediation, or withdraw from it) notwithstanding the parties' objection, in circumstances where the mediator is required to perform the act by a compelling external standard or by an express provision in the applicable rules of conduct. For example, a mediator might be under a legal duty to disclose mediation information[101] (such as child abuse[102]), or to prevent persons who are not the parties or their lawyers from participating in the mediation.[103] These are decisions which mediators might be required to make without the consent of the parties or against their wishes. Similarly, a mediator might be under an ethical duty of the governing code of conduct that is not dependent on the parties' will to provide information to the parties. For instance, a mediator must disclose to the parties conflicts of interest,[104] and the parties' right to self-determination cannot override that duty of disclosure.

Proper balancing should be distinguished from *improper balancing*, which means dictating to the parties how to behave or how the mediation is to be conducted, or refusing a request made by the parties even though it is not inconsistent with the rules of conduct. Such balancing is improper because it violates unjustifiably the parties' right to participate in a process conducted according to their choices and consistent with the applicable rules of conduct. It could be argued that proper and improper balancing cannot, in fact, be distinguished. Where a mediator terminates mediation notwithstanding the parties' objections, the mediator "dictates" a decision to the parties. Additionally, where a mediator refuses to act in accordance with or frustrates party wishes by terminating the mediation, this "prevents" them from making a decision.

This argument should be rejected because there are substantial differences between proper and improper balancing. First, in the case of terminating the mediation or postponing it, the intrusion on the parties' right to self-determination is minimal. The mediator does not dictate to the parties *how the mediation is to be conducted* or prevent them from making a decision on the way the mediation is to be conducted, but decides *not to conduct* the mediation. The mediator is under an obligation to *conduct* the mediation on the basis of the principle of party self-determination,[105] and the decision to terminate the mediation is an exceptional mediator intervention, which brings the process to an end on the rare occasion where a decision of the parties makes it impossible to

101. Model Standards, *supra* note 4, at Standard V.A.; Florida Rules for Mediators, *supra* note 4, R. 10.360(a); California Rules of Conduct, *supra* note 4, R. 3.854(a).

102. Kovach, *supra* note 57, at 275 ("Statutes . . . mandate the disclosure of certain types of information. The most common is a duty to report child abuse.").

103. *See, e.g.,* Florida Mediator Ethics Advisory Committee, Advisory Opinion 2007-004 (2007), *available at* http://www.mediationtrainingcenter.com/images/MEAC_Opinion_2007-004.pdf (on file with the *McGeorge Law Review*) (An order by a judge to limit participation in mediation to the parties and their lawyers).

104. *See supra* note 94.

105. *See e.g.,* Model Standards, *supra* note 4, Standard I.A.; California Rules of Conduct, *supra* note 4, R. 3.853); Florida Rules for Mediators, *supra* note 4, R. 10.310(a).

conduct the mediation consistent with the applicable rules of conduct. Second, in the case of a refusal to act in accordance with a request by the parties, the mediator does not prevent the *parties* from acting according to their wishes, but refrains *himself* from acting as they desire in circumstances where he can justify his refusal.[106] And third, in the case of performing an act that the mediator is under a duty to perform, it is the *mediator* who performs the action; it is a specific action which he is obligated to perform in order to discharge his ethical duties,[107] and he does not dictate to the *parties* how to act or refrain from acting even though his decision conflicts with their wishes.

It should be noted, however, that the line between proper and improper balancing might sometimes become blurred. For example, it would be an exercise of improper balancing for the mediator to threaten the parties with termination of the mediation if they do not agree with his position, because the mediator is using his authority to terminate the mediation in a coercive manner in order to dictate a decision to the parties or to prevent them from making a decision that the mediator disagrees with. But consider the following scenario: the parties make a decision that the mediator disagrees with because the decision prevents him from conducting the mediation according to the rules of conduct. The mediator explains to the parties that if they insist on making that decision he will have to terminate the mediation. In response, the parties change their mind and the mediation continues. I would argue that the mediator acted properly. He did not dictate a decision or prevent the parties from making a decision because (and so long as) the parties were able to exercise self-determination with regard to the decision they made, i.e., the decision was voluntary, un-coerced, and informed, and the mediator persuaded the parties and explained his position, as opposed to coercing the parties[108] or taking advantage of the parties' circumstances.[109] In doing so, the mediator discharged his duty to conduct the mediation on the basis of the principle of party self-determination in accordance with the rules of conduct.

106. That is, following their wishes would result in the mediator breaking an ethical duty under the code of conduct.

107. His general duty to honor the parties' right to self-determination gives way to a concrete duty which applies in the circumstances.

108. *See, e.g.,* California Rules of Conduct, *supra* note 4, Advisory Committee Cmt. to R. 3.853 (noting that mediators may legitimately try to persuade mediation parties not to withdraw from mediation so long as they do not do so in a coercive manner).

109. Taking advantage of the parties' circumstances may happen where the parties do not understand the limits on the mediator's role or treat the mediator as an authority figure who ought to be obeyed.

V. ILLUSTRATING SHARED DECISION-MAKING AND PROPER BALANCING OF PARTY DECISIONS

This Part demonstrates the application of the theory to decision-making in mediation. The theory applies to all the decisions that are made in mediation. However, for reasons of convenience, this Article focuses on four types of decisions that are commonly mentioned in mediators' codes of conduct: decisions on process, mediator selection, participation in or withdrawal from the process, and outcome.

A. Decisions on Process

Decisions on process encompass decisions on procedure and management of the process, such as decisions on the timing of meetings, who talks and when, who participates in meetings, setting an agenda, use of private sessions, and making an evaluation. These decisions are important for mediation to achieve its goal: promote constructive communications between the parties to enable them to reach decisions on the issues in dispute.[110] Codes of conduct tend to say little on the procedural aspects of conducting mediation, and as a result it is not clear whether the parties or the mediator have the authority to make *specific* decisions on process.[111] Clearly, mediators are to conduct the mediation. However, there is no necessary contradiction between mediator leadership or management of process and party decision-making.[112] Mediators can and should show leadership, encourage parties to participate in the process, and be willing to intervene when necessary; but their main role is not to make decisions for the parties, decisions on process included. The following discussion draws on examples of process decisions from mediation practice.

1. Order of Speaking

Codes of conduct are silent on whether the parties or the mediator make the decision as to which party should speak first. According to the process/content and substantive/non-substantive approaches, the mediator is entitled to make that decision if it is considered procedural and not substantive. At least some writers

110. *See, e.g.,* Model Standards, *supra* note 4, pmbl. ("Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute").

111. Even the Model Standards, which authorize the mediator to balance parties' self-determination on process, do not include any provision relating *expressly* to a *specific* occasion in which mediators might have to balance a decision of the parties on process design. The Model Standards Reporter's Notes refer to process design as "designing procedural aspects of the mediation process to suit individual needs." Model Standards Reporter's Notes, *supra* note 20, at 9.

112. *See, e.g.,* Boulle & Nesic, *supra* note 9, at 161.

would agree that such a decision might have substantive effect on the content and outcome of the mediation,[113] thus making it a decision that the parties should make. Others might feel that it is an insignificant, procedural decision that mediators are authorized to make. The theory advanced in this Article avoids these conflicting views. This Article asserts that it would be wrong for mediators to make a decision on who speaks first without consulting the parties because the right to decide *all* issues belongs to the parties. This is not a decision that parties cannot make and there is no ethical reason to prevent them from making it.

Now, it is possible that sometimes parties might not be able to reach an agreement on this issue. In such cases, mediators may suggest the first speaker, but if the parties reject the suggestion the mediators have no authority to make the decision unless the parties agree that the mediators should decide. This procedure supports each party's right to make decisions. But how should mediators act when parties cannot agree on who speaks first and reject the mediators' suggestion on that matter? According to the theory, these circumstances activate mediators' duty of balancing and give them authority to make a decision despite the parties' objection. The parties' lack of cooperation makes the conduct of the process impossible, and thus the mediator is authorized to balance the parties' decision (i.e. each party's decision to be the first speaker or the parties' wish to continue the process on their conflicting terms) with his duty to fulfill his role and conduct a quality process. This does not mean making the decision on who speaks first for the parties because to do so would be an unjustified and unnecessary intervention with the parties' right to self-determination. The mediator should explain to the parties that if they cannot reach an agreement on that issue the mediation will have to be terminated, and end the mediation as a last resort.[114]

2. Rules of Behavior and Their Enforcement

Codes of conduct tend not to lay down specific rules of behavior for mediation participants.[115] How should mediators act, for example, where parties interrupt each other? As this is a procedural matter one might think that mediators have a free hand to deal with such behavior and decide these issues. The theory advanced in this Article supports a different view. Mediators should

113. *See, e.g.,* Riskin, *supra* note 9, at n. 123 (referring to Sara Cobb & Janet Rifkin, *Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation,* 11 STUDIES IN LAW, POLITICS & SOCIETY 69, 71-73 (1991) ("The decision about who speaks first can have a powerful effect on determining the dominant 'story' of the dispute for purposes of the mediation").

114. *Compare* Florida Rules for Mediators, *supra* note 4, R. 10.420(b)(3), *with* NY-CDRC Standards of Conduct, *supra* note 26, Standard VI.B, *and* California (CDRC) Standards of practice, *supra* note 75, Standard 3.

115. Some codes, however, state that the mediator should promote mutual respect among the participants. *See e.g.,* Model Standards, *supra* note 4, Standard VI.A; Florida Rules for Mediators, *id.* R. 10.410; A Guide for Federal Employee Mediators, *supra* note 20, Standard VI.A.

not be authorized to dictate a decision to a party or to prevent a party from making a decision because parties are capable of making these decisions at the outset of mediation. Mediators should discuss with the parties ground rules of behavior at the beginning of mediation and reach an agreement on those rules.[116] If one of the parties deviates from this prior understanding, the mediator may draw his attention to the rules that he has consented to and enforce this prior consent.[117] Thus, the mediator's intervention and the restrictions on the behavior of parties can be justified on the basis of the parties' consent.

Still, let us assume either that no discussion of ground rules took place or that the parties refuse to honor the agreed upon rules. Clearly, a constructive dialogue cannot be maintained where each party says whatever he wants to say at any moment he chooses to say it, such as at a time that another party or the mediator is speaking. These are the kind of implied rules that must be observed. In these circumstances mediators may rightfully intervene and call that party to order. They cannot order the party how to behave, but can explain that the mediation cannot proceed in such conditions. In effect, the mediator in such occasions balances party self-determination (on how to behave in mediation) with mediators' duty to conduct a process of quality and integrity according to the applicable rules of conduct. This contention is supported by the existence of a duty, imposed on the mediator in some codes of conduct, to promote mutual respect among the parties.[118] Mediators have no authority to force a party to respect another party, but the mediators should encourage that behavior and consider terminating the mediation as an act of balancing a party's unacceptable behavior.

Mediators' interventions to control party use of abusive language should be viewed similarly. Mediators should bring common rules of behavior in mediation to the attention of parties, ensure they understand them and accept their content, and, in the event of a breach by a party, refer him to the rules and demand adherence. However, in the absence of prior consent for such rules, the mediator lacks authority to dictate to the parties how to express themselves; if he considers conducting the mediation in these circumstances that are impossible or improper according to the applicable rules of conduct, he should reflect that to the parties and, as a last option, terminate the process.

116. *See, e.g.,* Moore, *supra* note 55, at 162 ("The mediator should be careful not to create a dynamic in which he or she is the authority and the parties are obedient subjects. To work effectively, guidelines must be agreed on by consensus."). But, note that Moore's reason for this assertion is the effectiveness of the process rather than party right to self-determination.

117. *See* Moore, *supra* note 55, at 220.

118. *See supra* note 115.

3. Separate Meetings

Many codes of conduct do not find it necessary to expressly authorize mediators to meet parties in separate sessions or to offer any guidance of how a decision to hold a separate meeting should be made.[119] Instead, that possibility is taken for granted and referred to in provisions that discuss mediation confidentiality[120] or other aspects of mediation.[121] According to the process/content and substantive/non-substantive approaches, the issue depends on whether the decision to hold a private meeting is viewed as procedural, making it a decision for the mediator to make, or substantive, making it a decision for the parties. It would be difficult to generate consensus on that issue. On the one hand, the holding of meetings is a matter of procedure; on the other hand, these meetings affect the content of mediation and pose dangers to the parties, thus, making the decision to hold them a substantive decision[122] that should be made by the parties. The theory advocated in this Article resolves this ambiguity.

According to the theory, where a mediator believes a private meeting should be held, he should say so to the parties and seek their consent because, like all decisions, this decision should be made by the parties.[123] A decision on holding private meetings should not be viewed as a decision within the mediators' exclusive decision-making authority because parties are capable of making that decision, and there is no ethical reason that prevents them from making it.[124] Thus, if one party or more objects, mediators should explain the benefits of such meeting and the reasons why it should be held, but have no authority to force a private session.[125] Nevertheless, if a mediator considers a private meeting *necessary* for the continuance of the mediation, for example, in order to assess a

119. *See supra* note 120.

120. *See, e.g.,* Model Standards, *supra* note 4, Standard V.B; California Rules of Conduct, *supra* note 4, R. 3.854(c); Florida Rules for Mediators, *supra* note 4, R. 10.360(b); OMA Standards of Practice, *supra* note 4, Standard IV cmt. 3.

121. *See, e.g.,* MCI Standards of Practice, *supra* note 42, Standard I.F.2 (domestic abuse); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION Standard III.A.6 (2000), *available at* http://www.afccnet.org/pdfs/modelstandards.pdf, (on file with the *McGeorge Law Review*) (providing information to the participants); ETHICAL GUIDELINES FOR MEDIATORS Guidline 12 (2005) *available at* http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf [hereinafter Texas Ethical Guidelines] (on file with the *McGeorge Law Review*) (mediator serving in a judicial or quasi-judicial capacity).

122. *See, e.g.,* Gary Friedman & Jack Himmelstein, *The Understanding-Based Model of Mediation* in Menkel-Meadow et al., *supra* note 58, at 120, 247; Moore, *supra* note 55, at 375-376, Boulle & Nesic, *supra* note 9, at 137, 152.

123. *But see* NY-CDRC Standards of Conduct, *supra* note 26, at n. 9 ("A party may request, or a mediator may offer to the parties as an option, the opportunity to meet individually with the mediator.").

124. *But see* Virginia Standards of Ethics, *supra* note 75, Standard D.2.c. ("The mediator shall reach an understanding with the participants regarding the procedures which may be used in mediation. This includes, but is not limited to, the practice of separate meetings (caucus) between the mediator and participants . . . .").

125. *Compare* Moore, *supra* note 55, at 372 ("if the parties do not consider a caucus necessary, the mediator should accede to their decision").

party's competency, he should explain that to the parties, and in the event that his view is rejected, consider termination of the process. Termination of the mediation in these circumstances should be regarded as a proper and proportional balancing of the parties' determination: the mediator does not dictate a private meeting (an unacceptable usurpation of the parties' decision-making authority) though he frustrates their wishes to conduct the mediation without resort to private meetings.[126]

4. Presence of Persons at Mediation

Decisions on the presence of persons at mediation or their exclusion are another example of the futility of attempting to divide decision-making authority on the basis of process/content or substantive/non-substantive distinctions. These decisions can be viewed as process decisions that are both procedural and substantive. They are procedural in the sense that they determine the participants in the process, and they are substantive in the sense that the presence or absence of persons might affect the content of the mediation, the self-confidence of the parties, the power relations between the parties themselves and between the parties and the mediator.[127] The approach suggested in this Article avoids these ambiguities and provides the rationale for placing the decision in the hands of the parties. The parties should decide who is present in the mediation because there is nothing that makes them incapable of making that decision and there is no ethical reason that prevents them from making that decision. The mediator, as an expert in dispute resolution, might think that the presence of some persons can contribute to the mediation or might even be vital, but this cannot justify the parties' right to self-determination because the mediator can simply share this information with the parties and leave the decision to them. The mediator will acquire decision-making powers on that issue if the circumstances are such that the presence or absence of a person prevents the mediator from conducting the mediation in accordance with his duties under the applicable rules of conduct. If this is the case, the mediator should convey that information to the parties and be prepared to terminate the mediation if the parties insist on their view.

Codes of conduct sometimes take a different approach. For example, the Model Standards provide that the mediator and the parties should make these

126. For these reasons I disagree with Model Standards of Practice for Family and Divorce Mediation, *supra* note 121, Standard X.D.2 ("If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants and the mediator including, among others. . .holding separate sessions with the participants even without the agreement of all participants . . . .").

127. For example, an accompanying friend or a representative who is an expert can increase a party's power position. *See* Omer Shapira, *Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics,* 24 OHIO STATE J. ON DISP. RESOL. 535, 564 (2009) (discussing the expert power of mediation parties); Nolan-Haley, *supra* note 10, at 831-834 (discussing the implications of representation or lack of representation in mediation on the ability of parties to engage in a meaningful decision-making).

decisions *together*.[128] At first glance, it seems that the provision supports party self-determination: these decisions are not within the exclusive decision-making authority of mediators and a decision on the presence or absence of persons must be made with the consent of the parties. Alternatively, the provision might be construed to mean that the parties cannot make the decision themselves, and the mediator's consent is required for such decision. If this interpretation is correct, then this would be a case of improper balancing of the parties' right to make decisions. The mediator in effect *prevents* the parties from making a *specific decision* on whether to allow a person to be present at the mediation or to exclude from the mediation a person whose presence the mediator considers to be important. Although some codes of conduct adopt a similar approach with regard to mediators' decision-making authority on these matters,[129] according to the theory advanced in this Article, such an approach is wrong and results in improper balancing of the parties' right to decide. Deciding who the participants will be in a given mediation, like any other mediation decision, should rest with the parties in accordance with their right to self-determination. Some codes[130] and commentators[131] seem to accept this view. If a mediator believes that the participation of a person, whom the parties wish to be present, endangers the process, he should explain this to the parties and try to persuade them to accept his position. If the parties continue to insist, all that is left for the mediator to do is to explain that he must discontinue the mediation because to continue under such circumstance would conflict with his duties under the applicable rules of conduct.

The same analysis applies where the mediator believes that the presence of a person is required, but the parties object to that person's presence. The mediator may explain why this person's presence is important, but in the face of parties' objection, the mediator has no authority to dictate a course of action to the parties and cannot allow that person to participate without their consent. Again, if the mediator believes that the mediation cannot be conducted without the participation of that person, he may properly balance the decision of the parties with his duty to conduct a quality process and terminate the mediation.

Sometimes the *parties* are divided on the decision; in such circumstances, the mediator may not make a decision that undermines the opposing party's right to

128. Model Standards, *supra* note 4, Standard VI.A.3.

129. *See, e.g.,* Model Standards of Practice for Family and Divorce Mediation, *supra* note 121, Standard III.A.7.

130. *See, e.g.,* Virginia Standards of Ethics, *supra* note 75, Standard D.2.c. ("The mediator shall reach an understanding with the participants regarding the procedures which may be used in mediation. This includes, but is not limited to . . . the involvement of additional interested persons."); Florida Mediator Ethics Advisory Committee, Advisory Opinion 2006-007 at 2 (2006), *available at* http://www.mediationtrainingcenter.com/images/MEAC_Opinion_2006-007_corrected_.pdf (on file with the *McGeorge Law Review*) ("It is not permissible for a mediator to dictate, over the parties' objections, who attends mediation").

131. *See, e.g.,* Menkel-Meadow, Love & Schneider, *supra* note 58, at 220 ("The mediator guides parties in deciding about the best mix of participants … the parties ultimately determine who participates…").

self-determination. For example, if one party objects to the presence of a person in a mediation session and another party insists that this person should participate, the mediator may not allow that person to be present at the mediation. The result would be the continuance of the mediation in the absence of that person (assuming that the party who has wished him to be present agrees to go on with the mediation) or its termination by the mediator if he considers the presence of this person to be vital.[132]

Another example relates to the presence of the parties' lawyers in the process. The decision whether the parties' lawyers will be present in the mediation meetings should be made by the parties.[133] A mediator should not prevent parties from making a decision on that matter or impose his view.[134] However, what if the mediator considers the presence of lawyers necessary, for instance, where only one party is represented or where all parties are represented but one of them maintains a weaker position in relation to other parties? Here, as suggested before, the mediator may not impose his opinion on the parties; instead, he should explain the importance of having a lawyer present in the circumstances, and where he believes the lawyer's presence is necessary for conducting the mediation according to the rules of conduct—for example in order to preserve the fairness of the mediation—he should consider, as a last resort, balancing party self-determination by terminating the mediation.

B. Mediator Selection

Is the selection of a mediator different than other decisions on process? Is it a decision that the mediator may balance in certain circumstances? It seems obvious that mediation parties have a right to select the mediator in their dispute, and that this is an exercise of their right to self-determination.[135] Ethically, a mediator should not insist that parties select him to conduct their mediation.[136]

132. *See, e.g.,* Florida Mediator Ethics Advisory Committee, Advisory Opinion 2008-006, at 2 (2008) *available at* http://www.mediationtrainingcenter.com/images/MEAC_Opinion_2008-006.pdf at 2 ("[I]f the parties are not in agreement regarding a non-party's participation, the mediator may not allow that person to participate . . . . If a party decides not to participate in a mediation without the involvement of a non-party or a mediator believes that the party will be unable to participate meaningfully in the process, the mediation must be adjourned or terminated.").

133. *See, e.g.,* Boulle & Nesic, *supra* note 9, at 180; UNIFORM MEDIATION ACT S.10 (2001), *available at* http://www.uniformlaws.org/shared/docs/mediation/uma_ final_styled_draft.pdf (on file with the *McGeorge Law Review*).

134. *See, e.g.,* NY-CDRC Standards of Conduct, *supra* note 26, Standard VI.C; Kovach, *supra* note 57, at 149. *But see* California Family Code § 3182(a) (giving the mediator authority to exclude counsel from the mediation; Nolan-Haley, *supra* note 10, at n. 270 (referring to statutes which authorize the mediator to exclude lawyers from the mediation).

135. Model Standards, *supra* note 4, Standard I.A; Florida Rules for Mediators, *supra* note 4, Committee Notes to R. 10.340.

136. *See, e.g.,* Florida Mediator Ethics Advisory Committee, Advisory Opinion 2000-005 at 4 (2000), *available at* http://www.flcourts.org/gen_public/adr/bin/meac%20opinions/2000%20opinion%20005.pdf (on

Practically, this makes sense because mediators need cooperation to fulfill their role successfully and a mediator who is not acceptable to the parties would find it difficult to win the parties' trust and cooperation.[137] But is it an absolute right of the parties or are there circumstances in which the mediator would be compelled to place limitations on the parties' right to make that decision?

The theory advocated in this Article can clarify these issues not dealt with adequately in the codes of conduct. For example, the Self-Determination Standard of the Model Standards, which allows mediators to balance party decisions on process design, does not refer to any limitation on the parties' right to select the mediator in their case. One could wrongly interpret it to mean that mediators may not balance parties' decisions on mediator selection. However, the parties' right of self-determination is not absolute because in certain circumstances the selected mediator will not be able to follow the parties' decision to select him as mediator and would have to act against the parties' will. In fact, the Model Standards Reporter's Notes recognize this possibility in their comment on the Self-Determination Standard and refer to the standards of conflicts of interest and competency to illustrate such limitations on parties' wishes.[138]

Other codes of conduct, such as the Florida Rules for Mediators and the California Rules of Conduct, also provide that a mediator who is in a conflict of interest that might undermine the integrity of the mediation must end his involvement in the mediation, notwithstanding the desire of the parties that he continue to conduct the mediation.[139] There may be other circumstances in which mediators would be under a duty to refuse to take on a mediation case, despite the parties' wishes, for example, where a mediator cannot "commit the attention essential to an effective mediation."[140] It seems, therefore, that even though mediator selection is subject to party determination, in some circumstances mediators would be under a duty to decline a mediation or withdraw from it against the parties' wishes. In this respect, mediators balance parties' right to

file with the *McGeorge Law Review*) ("A mediator should not continue to mediate when a party objects to that mediator."). A limitation on the parties' right to self-determination with regard to mediator selection may come from a source other than the mediator. In court-connected mediation programs it is common that mediators must be on an approved list of certified mediators. In these cases, the parties' choice of mediator is restricted to mediators who are on the list, though the parties retain their right to withdraw from mediation at any time. *See, e.g.,* Boulle & Nesic, *supra* note 9, at 109. Discussion of this intrusion into party self-determination is beyond the scope of this Article, which focuses on the *mediator's* duty to conduct the mediation on the basis of party self-determination.

137. *See* Moore, *supra* note 55, at 93 ("The greatest factor in the acceptability of an intervenor is probably the personal rapport he or she establishes with the disputants").

138. *See* Model Standards Reporter's Notes, *supra* note 20, at 9.

139. *See supra* note 95; *see also* California Rules of Conduct, *supra* note 4, R. 3.855f(2); Florida Rules for Mediators, *supra* note 4, R. 10.620.

140. Model Standards, *supra* note 4, Standard VI.A.1.

self-determination (as to who shall mediate their case) with their duty to conduct mediation according to the applicable rules of conduct.

C. Party Participation and Withdrawal

The right of mediation parties to decide whether to participate in mediation or withdraw from the process at any time, which is a part of self-determination provisions in codes of conducts,[141] serves as another example of decisions which at first seem immune to mediator intervention, but after a careful look prove to be subject to legitimate restrictions through mediator balancing. The decision to participate in mediation has several meanings: a decision to *enter* the mediation and give it a try; a decision to *continue* to participate in the process; and a decision on the *manner* of participation in the process. The decision of whether to *enter* mediation and experience it is a precondition for participation in the process.[142] It is within the exclusive authority of the parties in the sense that mediators may not compel parties to enter mediation and participate in the process against their will. This ethical right is sometimes limited by legal means, as is the case with mandatory mediation, which compels parties to participate in a mediation session; but note that it is not the mediator who undermines party self-determination, but the legislator.[143]

The decision to *continue* to participate in the mediation belongs to the parties as well, in the sense that mediators are not authorized to coerce parties to remain in the process.[144] This does not mean that mediators are not allowed to discuss with parties the parties' decision to withdraw from the process and consider, together with the parties, their motives for withdrawal and the consequences of their decision. Mediators may do so as long as they refrain from coercing the parties to continue the mediation and leave the final decision in the parties' hands.[145] Similarly, mediators may not compel parties to withdraw from the process.

141. *Id.* Standard I; California Rules of Conduct, *supra* note 4, R. 3.853(2); Florida Rules for Mediators, *supra* note 4, R. 10.310(b).

142. *See, e.g.,* Nolan-Haley, *supra* note 10, at 819 ("Consent to participate in the mediation process … has several dimensions. It involves a conscious, knowledgeable decision to enter into the mediation process and to continue participating in mediation . . . .").

143. *See, e.g.,* Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation,* 49 DRAKE L. REV. 367 (2000). A moral or ethical justification of such legislation is a matter beyond the scope of this article, which focuses on mediators' professional ethics.

144. *See* California Rules of Conduct, *supra* note 4, R. 3.853(3); Florida Rules for Mediators, *supra* note 4, R. 10.310(b).

145. *See, e.g.,* NC Standards of Conduct, *supra* note 42, Standard IV.B ("[A] mediator shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse."); California Rules of Conduct, *supra* note 4, Advisory Committee Cmt. to R. 3.853 (noting that a mediator may encourage "[t]he parties to continue participating in the mediation when it reasonably appears to the mediator that the possibility of reaching an uncoerced, consensual agreement has not been exhausted").

Decisions on the *manner* of participation are more complex. The manner of participation relates to issues such as what parties are going to say in mediation sessions (for example, what information should they reveal?), when are they going to say it, whether the parties should share their feelings, and whether the parties should participate directly or have their lawyers speak on their behalf. Clearly, party participation is important for a quality process, and mediators should encourage parties to actively participate in mediation.[146] However, mediators are not allowed to *force* parties to participate actively.[147] Of course, lack of authority to mandate party participation does not mean that mediators cannot discuss with the parties their manner of participation. Thus, where parties do not actively participate in mediation, or where their lawyers are too dominant at the expense of the parties, mediators should bring up the issue of party participation in order for the parties to make an informed decision regarding the manner of their participation in the process. In addition, as discussed above, if parties conduct themselves in ways that make effective conduct of the mediation impossible (for example, due to party outbursts), mediators may demand that the parties behave in accordance with process rules agreed upon by them at the outset of the mediation.[148]

Thus, mediators may not decide for parties whether to enter mediation, whether to continue to participate in mediation, or how to participate. However, as the theory advocated in this Article suggests, these decisions may be balanced in certain circumstances in the sense that a mediator might decide to *withdraw* from or *terminate* the mediation against the parties' wishes when he cannot conduct the mediation consistent with the applicable rules of conduct due to the parties' behavior.[149] Many provisions in codes of conduct for mediators support this view without spelling out this rationale or linking it to mediator balancing.[150] For example,[151] some codes provide that mediators should not allow the parties to use mediation to further criminal conduct and should terminate the process on such event.[152] What this in effect means, is that notwithstanding the parties'

146. *See e.g.,* MODEL STANDARDS, *supra* 4, Standard VI.A ("A mediator shall conduct a mediation . . . in a manner that promotes … party participation . . . .").

147. *See, e.g.,* CALIFORNIA RULES OF CONDUCT, *supra* note 4, R. 3.853 (2) ("a mediator must . . . [r]espect the right of each participant to decide the extent of his or her participation in the mediation . . . ."). *See also* California (CDRC) Standards of practice, *supra* note 75, Standard 1.

148. *See supra* note 116 and accompanying text.

149. Of course, the parties may decide to continue the mediation with another mediator or through direct negotiation without a mediator.

150. *See infra* note 150–153 and accompanying text.

151. Incidents of conflicts of interest which jeopardize mediation integrity and mediator incompetence have been discussed above, *supra* notes 138–39 and accompanying text, to illustrate a balancing of parties' decisions on mediator selection; they are relevant in the context of frustrating parties' wishes to *enter* mediation or to *continue* the mediation with a particular mediator (for a reason connected with the mediator himself) as well.

152. *See e.g.,* Model Standards, *supra* note 4, Standard VI.A.9; California Rules of Conduct, *supra* note 4, R. 3.857(i)(1); Florida Rules for Mediators, *supra* note 4, R. 10.420(b)(4). *See also* Model Standards of

wishes to continue the process, the mediator should balance their right to self-determination with his obligation to conduct the mediation according to the applicable rules of conduct.[153]

Some codes of conduct state that mediators must take appropriate steps when they become aware of domestic abuse or violence among the parties.[154] In such cases, if one or all of the parties wish to continue the mediation, the mediator might have to balance the parties' self-determination (by postponing, withdrawing from, or terminating the mediation) with his duty to conduct the mediation on the basis of party self-determination (when he believes that one of the parties is incapable of exercising self-determination) or his duty to conduct a quality process (when the fairness of the process is in danger).[155] According to some codes of conduct, where one of the parties is unable to exercise self-determination due to incompetence, lack of information, or coercion, mediators are under a duty to terminate the mediation.[156] I would add that the mediator must do so even if all the parties desire the mediation to proceed. The reason is that the decision of the party who is incompetent, or acts under coercion or on the basis of missing information, is not an exercise of real self-determination, and therefore if the mediator continued the mediation, he would be in breach of his duty to conduct the process on the basis of party self-determination.

Practice for Family and Divorce Mediation, *supra* note 121, Standard XI.A.5.

153. The purpose of this obligation is to maintain the integrity of the mediation process and of mediators as a professional group. *See infra* notes 161, 163.

154. *See e.g.,* Model Standards, *supra* note 4, Standard VI.B; Florida Rules for Mediators, *supra* note 4, Committee Notes to R. 10.310(d)*; see also* MCI Standards of Practice, *supra* note 42, Standard F; Model Standards of Practice for Family and Divorce Mediation, *supra* note 121, Standard X.D.6.

155. *See* Model Standards Reporter's Notes, *supra* note 20, at 19 ("Mediator guidance for addressing challenges posed by the threat of violent conduct among participants is reinforced through such other provisions as Standards I [Self-determination] and VI (A) [Quality of the Process]."); Florida Rules for Mediators, *supra* note 4, Committee Notes to R. 10.310(d) & R. 10.410.

156. *See, e.g.,* Florida Rules for Mediators, *supra* note 4*,* R. 10.310(d) ("If, for any reason, a party is unable to freely exercise self-determination, a mediator shall cancel or postpone a mediation"); Florida Mediator Ethics Advisory Committee, Advisory Opinion 2006-002 at 2 (2007), *available at* http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202006-002.pdf (on file with the *McGeorge Law* Review) ("[T]he mediator must carefully monitor the parties' participation in the mediation to ascertain the parties' ability to exercise self-determination and must be prepared to terminate the mediation if any party is unable or unwilling to participate meaningfully in the process."); Boulle & Nesic, *supra* note 9, at 173 para. (d). Surprisingly, express provisions to that effect cannot be found in the Model Standards, *supra* note 4. However, since the Model Standards instruct the mediator to withdraw from mediation where, for example, he is in conflict of interest which might undermine the integrity of mediation, where he cannot maintain impartiality, where he is incompetent, and in circumstances which jeopardize the quality of the process, *see supra* note 29, it should be clear that it is the mediator's duty to terminate the mediation where any party is unable to exercise self-determination, and the Model Standards should have expressly stated so.

D. Mediation Outcome

A fundamental characteristic of mediation in consensus in all codes of conduct for mediators, which distinguishes mediation from court proceedings and arbitration, is that mediation parties have an exclusive decision-making authority over the outcome of mediation; thus, mediators are not authorized to make decisions on the outcome of mediation by themselves or dictate the terms of mediated agreements.[157] However, it would be wrong to see decisions on outcome as a special category different from decisions on process, mediator selection, participation, and withdrawal. Decisions on outcome are also subject to balancing by the mediator in appropriate cases.

Consider mediations in which the parties reach, or are about to reach, an illegal agreement or a grossly unfair or unconscionable agreement. The public might hold the mediators responsible for the inappropriate behavior of the parties that the mediators could have prevented. Such mediated agreements might adversely affect the public perception of mediation and mediators, the public's trust in mediation, and the willingness of the public to use the process.[158] For example, a mediation that produces an illegal agreement jeopardizes mediation integrity because it might be perceived as an abuse of process for unworthy goals, undermining important social interests such as preservation of the rule of law and encouragement of public use of mediation. An illegal mediated agreement ignores the rule of law, and a process associated with such outcome might deter ordinary, law-abiding people from using it.[159] Codes of conduct and some commentators correctly acknowledge that mediators owe duties not only to the parties, but also to the public,[160] to the profession,[161] and to the court (where mediation is court-connected).[162]

157. *See, e.g.,* California Rules of Conduct, *supra* note 4, R. 3.853(1); Florida Rules for Mediators, *supra* note 4*,* R. 10.420(a)(2); ETHICAL STANDARDS FOR MEDIATORS Standard I.A.1 (1995), *available at* http://www.godr.org/files/APPENDIX %20C,%20Chap%201,%201-19-2010.pdf [hereinafter Georgia Ethical Standards for Mediators] (on file with the *McGeorge Law Review*); Alabama Code of Ethics for Mediators, *supra* note 30, Standard 3 & 4(b).

158. On the importance of public trust in mediation *see e.g.,* Florida Rules for Mediators, *supra* note 4, R. 10.200 ("The public's use, understanding, and satisfaction with mediation can only be achieved if mediators embrace the highest ethical principles."); California Rules of Conduct, *supra* note 4, R.3850 ("For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process."); California (CDRC) Standards of practice, *supra* note 75, pmbl. ("Every mediator bears the responsibility of conducting mediations in a manner that instills confidence in the process, promotes trust in the integrity and competence of mediators, and handles disputes in accordance with the highest ethical standards."); NC Standards of Conduct, *supra* note 42, Preamble ("As with other forms of dispute resolution, mediation must be built upon public understanding and confidence.").

159. *See* Boulle & Nesic, *supra* note 9, at 174 (noting that "[p]olicy considerations require that mediation should not serve to conceal illegality . . . ."); Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. OF DISP. RESOL. 1, 24 (1994) ("[I]f [the mediator] does nothing, he may bring mediation into disrepute if the illegal agreements are later discovered.").

160. On mediators' duties to society and the public *see, e.g.,* California Rules of Conduct, *supra* note 4, R.3850; NC Standards of Conduct, *supra* note 42, Preamble; Texas Ethical Guidelines, *supra* note 121,

These duties are sometimes presented in codes of conduct as a duty of integrity, even though an express definition of integrity is often missing.[163] The general duty of integrity places mediators, in some cases, under a specific ethical duty to prevent parties from reaching a mediated agreement due to its content, notwithstanding the parties' desire to make the agreement. In these cases, mediators have to balance the parties' right to determine the mediation outcome with their duties, according to the applicable rules of conduct, to protect the parties, the integrity of mediation and mediators, or the integrity of the court when the mediation is connected with a court program.[164] The balancing decision, usually in the form of termination of the mediation,[165] frustrates the wishes of the

Preamble. *See also* Boulle & Nesic, *supra* note 9, at 459 ("Some mediator standards require mediators to act as trustees of public policy in respect of certain matters. For example, mediators in family cases must ensure that the participants consider the best interests of the children . . . ."); Lawrence Susskind, *Environmental Mediation and the Accountability Problem,* 6 VT. L. REV. 1, 14–18 (1981) (arguing that mediators of environmental disputes should ensure that mediated agreements take into account the interests of third parties). On the public role and duties of court connected mediators *see, e.g.,* Elad Finkelstein & Shahar Lifshitz, *Bargaining in the Shadow of the Mediator: A Communitarian Theory of Post-Mediation Contracts*, 25 OHIO ST. J. ON DISP. RESOL. 667, 682–84 (2010); Judith L Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. DISP. RESOL. 347, 348, 358 (1990).

161. On mediators' duties to the profession *see, e.g.,* Florida Rules for Mediators, *supra* note 4, R. 10.600 ("A mediator shall preserve the quality of the profession."); Model Standards, *supra* note 4, Standard IX; OMA Standards of Practice, *supra* note 4, Standard X; Alabama Code of Ethics for Mediators, *supra* note 30, Standard 12; Colorado Code of Conduct, *supra* note 20, Standard IX.

162. On mediators' duties to the court *see, e.g.,* California Rules of Conduct, *supra* note 4, R.3850 & R. 3.855(f)(2); Florida Rules for Mediators, *id.* R. 10.500; MCI Standards of Practice, *supra* note 42, Standard V.B; NC Standards of Conduct, *supra* note 42, Preamble; Texas Ethical Guidelines, *supra* note 121, pmbl.. ; Committee on Ethics of the Georgia Commission on Dispute Resolution, Ethics Opinion 2002-1, at 2–3 (2002), *available at* http://www.godr.org/files/Formal%20opinion%202002-1%203-23-04TP.pdf (on file with the *McGeorge Law Review*) ("The parties are required to participate by the court, and the mediator serves as a representative of the court system. Vulgar, offensive and demeaning remarks are a reflection on the referring court, the local ADR program and the process of mediation in general.").

163. *See, e.g.,* Georgia Ethical Standards for Mediators, *supra* note 157, Standard IV.B ("A mediator is the guardian of the integrity of the mediation process."); California (CDRC) Standards of practice, *supra* note 75, pmbl. ("Every mediator bears the responsibility of conducting mediations in a manner that … promotes trust in the integrity and competence of mediators . . . ."); California Rules of Conduct, *supra* note 4, R. 3.850(a).

164. *See supra* notes 160–62 and accompanying text.

165. *See, e.g.,* A Guide for Federal Employee Mediators, *supra* note 20**,** Federal Guidance Notes 1 to Standard I (guiding mediators to withdraw from the mediation if the parties insist on an illegal agreement); Boulle & Nesic, *supra* note 9, at 173 (discussing the termination of mediation where "the agreement which the parties want to conclude is illegal in some respects."); Florida Rules for Mediators, *supra* note 4, R. 10.420(b)(4) ("[A mediator shall] terminate a mediation entailing . . . unconscionability . . . ."); Virginia Standards of Ethics, *supra* note 75, Standard J (requiring mediators to withdraw if they "believe that manifest injustice would result if the agreement was signed."). *See also* John W. Cooley, *A Classical Approach to Mediation - Part I: Classical Rhetoric and The Art of Persuasion in Mediation,* 19 DAYTON L. REV. 83, 130 (1993) ("[W]here the mediator or nonparties perceive, or could perceive, the resulting agreement to be illegal, grossly inequitable, or based on false information . . . . the mediator must apprise the parties of the problem, redirect their efforts toward generating new, acceptable options, and, as a last resort, withdraw as mediator and terminate the mediation."). Some codes leave mediators with *discretion* as to whether to terminate the mediation in circumstances of grossly unfair agreements, a wrong approach in my opinion. *See, e.g.,* Georgia Ethical Standards for Mediators, *supra* note 157, Standard IV.A; Model Standards of Practice for Family and Divorce Mediation, *supra* note 121, Standard XI.A.4.

parties to reach a mediated agreement.[166] The justification for limiting the parties' right of self-determination in these cases lies in the acceptance of interests other than the parties' as worthy of protection, and the recognition that mediators, as professionals, are under a duty to protect those interests.[167]

VI. CONCLUSION

This Article has focused on the allocation of decision-making authority in mediation between mediation parties and mediators, an issue that suffers from ambiguity and has not received adequate attention in academic writing and in mediators' codes of conduct. A review of codes of conduct for mediators, which focused on the California Rules of Conduct and the Florida Rules for Mediators, has shown that codes generally ignore the tension between mediation parties' *right* to make decisions, which is a fundamental feature of mediation, and mediators' *duty* to make decisions, which is a necessity if they are to conduct a quality process for the benefit of the parties. The Model Standards have served as a rare exception since they recognize the need to balance party self-determination with a mediator's duty to conduct a quality process. However, even the Model Standards leave mediators and participants in a state of confusion because they fail to explain what balancing means, in what circumstances it should take place, and why balancing is formally restricted to decisions on process when in fact the Standards contain many other occasions in which the mediator is authorized to make decisions against the parties' will.

Moreover, the review of mediators' codes of conduct and mediation literature has demonstrated that current approaches to decision-making in mediation, which seek to allocate decision-making powers on the basis of distinctions between process, content, and substance, (i.e., between decisions relating to process, decisions relating to content and outcome, substantive decisions, and decisions which are not substantive) are not successful in providing guidance to mediators. Nor do these approaches offer information to users of mediation on the allocation of decision-making authority in mediation. This Article has pointed out that it is impossible and impracticable to draw a clear line between decisions on process and decisions on content, or between decisions of substance and non-substance. There is no sense in arguing that the principle of party self-determination applies only to content as opposed to process or to substantive decisions as opposed to decisions that are presumably not substantive. Thus, this Article has argued mediators should respect a general right of mediation parties to make decisions

166. Though, of course, mediators have no means to prevent parties from reaching the same agreement outside mediation.

167. The injury to interests of individuals in codes of conduct is sometimes justified by the protection of public good. *See, e.g.,* Kevin Gibson, *Contrasting Role Morality and Professional Morality: Implications for Practice,* 20 J. OF APPL. PHIL. 17, 22 (2003) (noting that "[p]rofessional codes may occasionally override individual interests but this may be justified on the basis of the overall good").

on process as well as on content, outcome, and substance. Instead of the old unhelpful dichotomy, a theory of shared decision-making in mediation (summarized below) has been suggested. The theory offers guidelines to mediators and informs mediation parties on their respective parts in the decision-making process in mediation. It consists of three general principles:

A. Party Decision-Making. The authority to make decisions in mediation rests with the parties by virtue of the principle of self-determination. The parties have a right to self-determination in relation to any issue that has to be decided in the course of mediation, procedural or substantive.

B. Shared Decision-Making. Mediators have authority to make those decisions that are necessary to conduct mediation in accordance with the applicable rules of conduct. However, due to the general applicability of the parties' right to self-determination, where mediators exercise their authority to make decisions, they must involve the parties in the decision-making process, and either have their consent to the decision or follow the parties' determination on the issue.

C. Mediator Independent Decision-Making. Notwithstanding the aforementioned, mediators have authority to make decisions without the parties' consent or against their wishes in the following circumstances:

1. Where shared decision-making is practically impossible or inconsistent with applicable mediators' rules of conduct;[168] or

2. Where the mediator is required by the applicable mediators' rules of conduct or an overriding external standard to make one of the following decisions (*a duty of balancing*):[169]

   (a) Terminate, postpone, or withdraw from mediation because he cannot conduct the mediation consistent with the applicable rules of conduct; or

   (b) Refuse to perform an act requested by the parties, which would be inconsistent with the applicable rules of conduct; or

168. *See supra* Part IV.B.1.

169. *See supra* Part IV.B.2.

> (c) Perform a specific act that he is under a duty to perform by an express provision in the applicable rules of conduct or by a compelling external standard.

The theory fills a gap in the existing codes of conduct for mediators and mediation literature. It explains the allocation of decision-making powers between mediation parties and mediators, and it clarifies the general applicability of the principle of party self-determination to all mediation decisions except those that cannot be left to the parties. The theory also instructs mediators to share decision-making with the parties and obtain their consent for decisions made in the course of mediation, while at the same time, recognizing the existence of independent mediator decisions which cannot be subjected to party self-determination—thus, clarifying the meaning of mediators' balancing authority. Additionally, it refutes the unjustified distinction between decisions on process and decisions on other issues. The theory clarifies that mediators' balancing authority applies to all mediation decisions other than those that are practically impossible or that would be inconsistent with mediators' rules of conduct, if shared with the parties.