

4-1-2009

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Recommended Citation

Gabriel Hallevy, *The Defense Attorney as Mediator in Plea Bargains*, 9 Pepp. Disp. Resol. L.J. Iss. 3 (2009)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol9/iss3/3>

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The Defense Attorney as Mediator in Plea Bargains

Gabriel Hallevy*

I. INTRODUCTION: THE COMMON SCENARIO

Has the criminal defense attorney a role of mediator in plea bargain negotiations between the prosecution and the defendant? A very common scenario, for example, is when the criminal defense attorney in a murder case goes to the District Attorney's offices in order to work out a possible plea bargain. The defense attorney's client maintains that he has never stabbed the victim, while the District Attorney claims that he has substantial evidence to the contrary. The client's position is that he is innocent of the charge and is entitled to a full acquittal, while the District Attorney demands that the full weight of the law be brought to bear against him, including a hefty custodial sentence. Defense counsel knows from reading the evidential material that an integral part of his client's posturing, and that of the District Attorney, merely amounts to rhetoric for the purposes of conducting negotiations and that it would be an uphill battle to prove either of the two extreme positions. Defense counsel has enough experience to know that there is insufficient evidence in the case to convict his client of murder, but the chances of an acquittal are also unclear. The acceptable solution in the attorney's view is to reach a plea bargain, according to which the client will admit to manslaughter¹ in return for a relatively light sentence and enabling the prosecution also to feel vindicated. With this aim in mind, the defendant's attorney travels to the District Attorney's office. Under these circumstances, the client also needs convincing that this is the best deal or, at least, it amounts to the lesser of two evils.

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1. Defense attorneys use this approach even though, in most jurisdictions, manslaughter is an offense which is separate and distinct from, rather than merely a degree of, the crime of murder. *See, e.g.*, State v. Brown, 126 A.2d 161 (N.J. 1956); WAYNE R. LAFAYE, CRIMINAL LAW 775 (4th ed., 2003).

Such a scenario is the standard practice of defense attorneys in the overwhelming number of cases.² In this article, it will be argued that defense counsel's function in such instances is identical to that of a mediator, seeking to reconcile the positions of the defendant and the prosecution. Within this framework, the plea bargain should be seen as part of the broad conception of Alternative Dispute Resolution (ADR) which first made its appearance at the end of the 1970s. An analysis of plea bargains in the Western world as part of the broader concept of ADR actually shows that it is the defense attorney, rather than the court or the other parties to the issue, who functions as mediator, assessing the interests of the parties caught up in the dispute.³ This also gives expression to the philosophy of privatization upon which mediation is based.⁴ The tactics of influence and use of an impression of force employed by the defense attorney in plea bargains are identical in every way to those used by mediators. The methods of persuasion, use of pressure, delineation of the debate, manipulations, and numerous other parameters are identical to those employed by the mediator. As a result, if indeed the mediation function of the defense attorney in plea bargaining may be recognized, it will be argued that this has implications rooted in applying the accumulated experience of the mediator in private litigation to plea bargains in criminal cases.

II. PLEA BARGAINS AS ALTERNATIVE DISPUTE RESOLUTION IN CRIMINAL CASES

In the modern Anglo-American legal systems, plea bargains are increasingly a part of the *modus operandi* in criminal cases.⁵ The plea bargain is the result of negotiations between the prosecution and the defendant regarding the fate of the criminal case at its various stages.⁶ The plea bargain may be concluded at any stage of the criminal proceedings—from the time when the prosecution has resolved to file charges against the

2. See JOHN F. KLEIN, *LET'S MAKE A DEAL: NEGOTIATING JUSTICE* (1976); Gerard A. Ferguson & Darrell W. Roberts, *Plea Bargaining: Directions for Canadian Reform*, 52 CAN. B. REV. 497 (1974); Michael Zander, *Bail: A Reappraisal*, 1967 CRIM. L. REV. 25, 30; DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 3 (1966).

3. See MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS* 84 (1978).

4. See Jean L. Cohen, *Regulating Intimacy: A New Legal Paradigm* 192 (2002).

5. See Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 696 (2001); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 487 (1996).

6. *Id.* at 696 n.3.

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suspect, throughout the defendant's trial, or often even during an appeal.⁷ In a plea bargain, the power to determine the fate of the case is passed on to the parties who set out its terms in a contractual agreement.⁸ Within the framework of a plea bargain, it is possible for the parties to reach agreement regarding every detail connected with the criminal proceedings that is within their power to determine.⁹ The most common plea bargains include agreement as to the relevant charges, their seriousness, number, and specific identity because these are matters that the prosecution has the authority to determine.¹⁰ The prosecution may also agree to limit its demands in relation to the sentence to be imposed, thereby requesting a more lenient punishment than the maximum one stipulated in the specific definitions of the offenses in question.¹¹ Within the framework of the plea bargain, the defendant agrees to these limitations, which the prosecution has taken upon itself, cooperates, and admits to the charges.¹² While the courts are not bound by the details of the plea bargain and are at liberty to disregard them, this is a relatively rare occurrence.¹³

In the adversarial system of justice, practiced mainly in the Anglo-American legal systems, the hearing takes the form of a legal confrontation (*lis*) between the parties involved in the case, and the court is then obliged to decide between their respective arguments.¹⁴ The parties to a matter designated to be heard under the adversarial system play a pivotal role during the proceedings, while the court's role is a relatively passive one, limited essentially to determining the conflict between them.¹⁵ The adversarial system, where practiced, applies to both civil and criminal

7. *Id.* at 702-03.

8. See Justin H. Dion, Criminal Law—Prosecutorial Discretion or Contract Theory Restrictions?—The Implications of Allowing Judicial Review of Prosecutorial Discretion Founded on Underlying Contract Principles, 22 W. NEW ENG. L. REV. 149, 160-61 (2000).

9. See, e.g., Colquitt, *supra* note 5, at 711.

10. See *id.* at 701.

11. See *id.* at 702-03.

12. See *id.* at 701.

13. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 50 (1968); See generally JOHN BALDWIN & MICHAEL MCCONVILLE, *NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY* 46 (1977) (implying that courts failed to sufficiently investigate plea bargains by giving examples of how defendants felt instructed or ordered to plead guilty by barristers).

14. See, e.g., P.S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* 162 (1987).

15. *Id.* at 162-65; JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 1 (2003).

hearings.¹⁶ In civil cases, the dispute is between plaintiff and defendant, and the court determines the argument between them. In a criminal trial, the conflict is between the prosecution and the defendant, and the court is required to rule on all aspects of the dispute between them, whether these relate to the defendant's criminal liability or the punishment the defendant should receive after being convicted. Similarly, the court is required to rule on any procedural disputes arising regarding the manner in which the proceedings themselves are conducted and the behavior of the parties before it.¹⁷ As already pointed out, the hearing of such disputes under the adversarial system is based on the *lis-model* of conflict between the parties, with the points of conflict between them being resolved by the court.

Within the framework of the *lis-model*, there should not be any special significance to the fact that one of the parties is the State, but rather, both parties should be treated in this specific context of resolving the dispute as private litigants. Thus, just as in a civil suit where the State may sue or be sued, in resolving the dispute the law should treat the State in the same way as it does the opposing side, who is in fact a private party. In a criminal case and therefore, within the *lis-model* framework of the adversarial system of trial, legal disputes exist between the parties, one of whom happens to be the State and the other the defendant, and the court is required to give its ruling on the issues in contention between them. It should be pointed out that, in those legal systems which allow the possibility of a private criminal complaint, the criminal trial is conducted between two parties, neither of whom has any legal ascendancy over the other.¹⁸ The criminal trial held as a private criminal proceeding utilizes the same methods of justice as does its public counterpart.¹⁹

In noncriminal cases, alternative frameworks exist for resolving disputes out of court.²⁰ Such frameworks may take the form of arbitration, mediation, compromise settlements, etc. The use of alternative methods of conflict resolution in many instances has the effect of transferring the burden

16. See LANGBEIN, *supra* note 15, at 7-8.

17. Shelby R. Grubbs, Peter Machin North & World Law Group, *Int'l Civil Procedure* 737 (2003).

18. See, e.g., ALBERT FREDERICK WILCOX, *THE DECISION TO PROSECUTE* 3 (1972) (stating how prosecutions in England and Wales need not be referred to a public prosecutor but can be undertaken by any citizen).

19. See *id.* at 5, stating that the public prosecutor may intervene at any stage of the prosecution if the private prosecutor does not abide by the public prosecution procedures. See generally PATRICK DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 1-30 (1958) (describing the historical background of private and public criminal prosecutions in England and the general structure of private prosecutions).

20. This is due to the concept of ADR.

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of finding a solution to the impasse to the parties themselves.²¹ Transferring this responsibility for resolving their dispute to the parties themselves amounts to a “privatization” of the traditional legal process conducted in court because what is actually happening is the transfer of a public service provided by a public institution to private hands.²² The public service in this instance is the service of resolving disputes in a peaceful fashion—the public body entrusted with the task of doing so is the court—and the private hands are those of the parties, who have taken upon themselves the responsibility of resolving the legal dispute between them.

This description is no different in relation to criminal proceedings. Resolution of legal conflict between the prosecution and the defendant out of court in a criminal proceeding under Anglo-American legal systems is achieved mainly within the framework of a plea bargain.²³ The parties take upon themselves the responsibility for resolving the conflict and, in so doing, “privatize” the criminal process by removing it to their own private domain.²⁴ Because substantial public interests are also involved in plea bargains, the court is required to approve each of them in order to protect those interests and to ensure they are given due weight.²⁵ Nevertheless, as already stated, rejection of or departure by the court from a plea bargain is a rare occurrence and constitutes the exception rather than the rule.²⁶

21. Thomas R. McCoy, *The Sophisticated Consumer's Guide to Alternative Dispute Resolution Techniques: What You Should Expect (or Demand) from ADR Services*, 26 U. MEM. L. REV. 975, 990 (1996).

22. See generally Jana B. Singer, *The Privatization of Family Law*, WIS. L. REV. 1443, 1497-98 (1992) (describing the placement of responsibility on the parties to resolve a conflict through mediation as a key component in the privatization of family law).

23. JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY 73-74*, 87 (1977). See also Jonas A. Myhre, *Conviction Without Trial in the United States and Norway: A Comparison*, 5 Hous. L. REV. 647, 655-56 (1967) (stating that the practice of plea bargaining is commonplace and detailing how the process works); John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287, 287 (1979) (noting that the most common method for prosecutors to try to resolve a case by obtaining a verdict of guilty is through plea bargain negotiations).

24. See generally Singer, *supra* note 22, at 1497-98.

25. See Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 206-09 (1956).

26. See generally *id.* (providing statistics to show that most judges state that they will give a more lenient sentence to a defendant entering a plea bargain and that defendants are willing to enter plea bargains for that reason and not because they hope to have the plea overturned at a later time by the court); Donald J. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L. C. & P. C. 780, 783-785 (1956) (stating that those who typically agree to plea bargains are

In fact, the plea bargain is an alternative to conducting a full criminal trial in court (i.e., it offers a solution to the conflict in court) and, as such, is an integral part of the broad and inclusive idea of the ADR. Because the court's rejection of a plea bargain or departure from it is a rare event, the essential elements of the deal are agreed upon out of court. The court is then presented with a completed plea bargain for its approval. The discussions on a plea bargain within the framework of ADR out of court should, therefore, concentrate on negotiations between the parties leading up to the formation of the plea bargain.²⁷ The defense attorney is responsible for brokering the system of interaction within the framework of the negotiations between the parties. As a result, two different systems of interaction are created within the framework of the negotiations between the parties, a system of interaction between the defense attorney and the defendant and a system of interaction between the defense counsel and the prosecution.

III. PLEA BARGAINS AS A MEDIATION PROCESS IN CRIMINAL CASES

If we accept the proposition that the plea bargain is an integral part of the broad and inclusive concept of ADR, then amongst the various recognized, existing methods within the ADR framework, the plea bargain can be categorized as a mediation process.²⁸ The general structure of this mediation process is mediation between the defendant and the prosecution, the defense attorney serving, for all intents and purposes, as a mediator during the negotiating process. Initially, we shall evaluate the plea bargain as a mediation process and, then, examine the status of the defense attorney as mediator. It is difficult to present a single, broad, and comprehensive definition of the mediation process because of the extensive variety of ways in which the mediation process can take place.²⁹ Nevertheless, it is possible to point to four main characteristics of the mediation process, which constitute a broad common denominator regarding all types of mediation.

recidivists who expect to be convicted of something and are seeking a less severe sentence rather than first-time offenders who hope that the court will overturn the plea at some point).

27. See Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 L. & SOC'Y REV. 349, 351 (1979) (suggesting that the court would have more input if it were allowed to participate in the formation of the plea through a settlement conference).

28. See Brandon J. Lester, *System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563, 579-84 (2005).

29. See, e.g., Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); LAURENCE BOULLE & MIRYANA NESIC, *MEDIATION: PRINCIPLES, PROCESS, PRACTICE* 14-21 (2001); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 16-17 (1994).

These characteristics are the autonomy of the parties and their right to self-determination, the parties' informed consent, fairness, and impartiality.³⁰ These characteristics derive from general perceptions of the nature of mediation according to which the object of mediation is to resolve disputes by the parties reaching an agreement—the product of a joint commitment with an attempt being made to develop consensus rather than dwelling on conflicting rights and interests—with the assistance of a third party who lacks any legitimate authority to determine the outcome of the dispute or to impose an agreement.³¹ These characteristics may partly overlap and complement one another in achieving the aforesaid, overall goal of mediation.³² We shall now examine the compatibility of the plea bargain to the mediation process in the light of these four characteristics.

A. *The Autonomy of the Parties and Their Right to Self-Determination*

The autonomy of personal aspirations within the context of modern law finds its clearest expression in the laws of contract.³³ Recognition is given to the autonomy of personal aspirations by the modern law,³⁴ which gives binding legal effect to contracts and recognizes the obligations resulting from them. The plea bargain when stripped to its bare bones is a contract between the defendant and the prosecuting authorities. The defendant is not obliged to adopt a plea bargain or to take part in the negotiations that preceded it.³⁵ The plea bargain is formed as a result of the parties' wishes. If the autonomy of the parties' individual aspirations in a specific case leads them to resolve their dispute within the framework of ADR, then giving

30. See OMER SHAPIRA, *USE OF POWER AND INFLUENCE IN MEDIATION: PRACTICE AND APPLIED ETHICS* 7 (2007).

31. Susan Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 L. & POL'Y 7, 7 (1986).

32. See SHAPIRA, *supra* note 30, at 7.

33. See GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 12-13 (1988); JOSEPH A. KUPFER, *AUTONOMY AND SOCIAL INTERACTION* 10-14 (1990). *But see* Camille A. Gear, *The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship*, 107 YALE L.J. 2473, 2477-79 (1998) (noting the difficulty of preserving client autonomy in the contractual relationship between attorney and client).

34. See, e.g., Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 336 (1987); 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, 830 (1990).

35. See generally DWORKIN, *supra* note 33, at 12-13.

validity to the plea bargain and its legal recognition represent the realization of the autonomy of these individual aspirations.³⁶ The autonomy given to the parties within the framework of a plea bargain includes recognition that they should be free to resolve their dispute independently. This freedom is not unlimited because the plea bargain must be consistent with the public interest. Nevertheless, because the prosecution service is entrusted with and responsible for the public interest and the public interest is one of the factors to be considered by the prosecution in reaching a plea bargain, the presumption is that the public interest finds expression within the framework of the final plea bargain, a factor that also explains the courts' reluctance to interfere in plea bargains.

The characteristic of the parties' autonomy and the right of the parties to self-determination has been recognized as the main characteristic of the mediation process in its many varied forms.³⁷ The parties to mediation choose to use the mediation alternative as part of the autonomy of their aspirations in order to exercise their right to self-determination. The parties are not obliged to refer their dispute to mediation but, rather, make an autonomous choice to do so. The conclusion to be reached is that the characteristic of the parties' autonomy and their right to self-determination is the dominant characteristic in the context of both mediation and plea bargains. The role of the mediator in this connection is to preserve the parties' autonomy and their right to self-determination and to do so in such a way that limits the damage to their aspirations. Mediation efforts that preserve the parties' autonomy and their right to self-determination are, by their nature, supportive rather than coercive.³⁸ This is not to say necessarily that the mediator may not take an interventionist approach;³⁹ however, the mediator should refrain from actions that might restrict the aforementioned autonomy, including the giving of professional advice, applying pressure, and using any similar actions. In light of this, there is some doubt as to whether the defense attorney can satisfy these mediation criteria and is in a position to act as a mediator in plea bargain negotiations.⁴⁰

36. Cf. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 777 (1990) (explaining that parties feel their personal aspirations respected when they can control the outcome of the ADR process).

37. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n, Am. Bar Ass'n, & the Ass'n for Conflict Resolution 2005) [hereinafter MODEL STANDARDS, MEDIATORS], http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (“[S]elf determination . . . is a fundamental principle of mediation . . .”).

38. See Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 502 (1997).

39. See *id.* at 503-04.

40. See discussion *infra* Part IV.B.

B. *Informed Consent*

The characteristic of informed consent in the context of mediation complements the characteristic of the parties' autonomy and right to self-determination.⁴¹ Informed consent emphasizes two important facts. First, it emphasizes that the parties have agreed to refer the dispute between them to an alternative process and that they consent to the manner in which the dispute is to be resolved. This is in contrast to a solution forced upon them in the manner of a traditional court judgment.⁴² Second, it emphasizes that this agreement amounts to informed consent. Informed consent means that the parties have at their disposal all the relevant information required to reach a decision on an agreed solution within the framework of mediation.⁴³ Informed consent is regarded as a fundamental characteristic of the mediation process.⁴⁴ This obligation results from the relationship of trust between the mediator and the parties. Informed consent is also a sweeping form of agreement in terms of the implications that stem from the solution agreed upon by the parties, which may detrimentally affect one or both of them. Meticulousness in providing the parties with access to information is also intended to prevent exposure to manipulation and trickery, the decisions they take being made on the basis of maximum certainty.

Informed consent is an essential element of the plea bargain. In order for the parties to the plea bargain to correctly assess the risks and opportunities contained within the plea bargain, they must, at the very least, be completely familiar with the evidence in the criminal case. Familiarity with the relevant legal interpretation of that evidence, including precedents in the appropriate field, is also likely to be of substantial importance in

41. See Nolan-Haley, *supra* note 36, at 840. See generally Gabriel Hallevy, *Victim's Complicity in Criminal Law*, 22 INT'L J. OF PUNISHMENT AND SENT'G 72, 72-93 (2006) (discussing the general status of the informed consent in criminal law).

42. See HENRY J. BROWN & ARTHUR L. MARIOTT, *ADR PRINCIPLES AND PRACTICES* 110 (1993); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 10 (1984); James J. Alfini, *Trashing, Bashing and Hashing It Out: Is This The End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 74 (1991).

43. See Weckstein, *supra* note 38, at 503 ("The key to self-determination is informed consent. A disputant who is unaware of relevant facts or law that, if known, would influence that party's decision cannot engage in meaningful self-determination.").

44. See, e.g., *CODES OF PROFESSIONAL RESPONSIBILITY: ETHICS STANDARDS IN BUSINESS, HEALTH, AND LAW* 595 (Rena A. Gorlin ed., 4th ed. 1999) ("The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationships to the neutral.").

assessing the possibilities and risks involved. Occasionally, information obtained may also include the identity of the judge who is expected to hear the case and the position the judge has adopted until now in similar cases; the policy of the prosecution, if one exists, with regard to the type of offense(s) in question; statistical data on the severity or otherwise of punishment; and the conviction rate in such cases. In any event, the nature of the evidence in the case and its legal interpretation are the main factors to which the parties must be exposed prior to entering into the process of plea bargaining. Clearly, awareness of this information should be mutual because any inequality in this regard would give an unfair advantage to one party at the expense of the other. In light of this, it is apparent that the characteristic of informed consent is a dominant factor in the mediation process leading to the plea bargain. The role of the mediator in this context is to enable free access to relevant information, especially information that the mediator has and that touches upon the mediator's role during the mediation proceedings, and even to bring this information to the parties' attention if they were unaware of it. This raises the question of whether the defense attorney fulfills the criteria applying to a mediator in plea bargain negotiations, especially when it comes to transferring information to the prosecution that relates to the defense of his client.⁴⁵

C. *Fairness and the Half-A-Loaf Theory*

The characteristic of fairness in mediation is perceived differently from the fairness to be expected during a trial because of the contrasting nature of mediation vis-à-vis the judicial process. While the fairness to be expected in court proceedings relates to guaranteeing conditions of objectivity and the absence of favoritism, fairness in mediation is customarily identified with the parties' ability to realize their freedom of choice within the framework of their autonomy and right to self-determination.⁴⁶ Fairness in the context of mediation is not limited to the parties themselves, but should also be shown towards third parties. For example, this can be done when relating to the welfare of children whose parents are participating in mediation efforts during divorce proceedings⁴⁷ by bringing the parties to mediation broader and inclusive information to assist them in reaching their decisions. In this

45. See discussion *infra* Part IV.C.

46. See SARAH R. COLE, CRAIG A. MCEWEN & NANCY H. ROGERS, *MEDIATION: LAW, POLICY, PRACTICE* § 2:2 (2d ed., 2001); Joseph P. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 910-14 (1998).

47. See, e.g., CAL. FAM. CODE §§ 3161-3162, 3180, 3184 (West 2004); KAN. STAT. ANN. § 23-604 (West 2008).

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regard there is also somewhat of an overlap with the characteristic of informed consent discussed above. Fairness in mediation by way of realizing the parties' freedom of choice is designed to prevent the creation of an imposed solution; thus, its essential features are procedural and deal with the manner in which the mediation process is conducted⁴⁸ as opposed to the fairness of the results of that process.⁴⁹ The main difficulty in ensuring procedural fairness in the mediation process has its roots in the fact that the process is not based on strict, formal proceedings, a feature which distinguishes it from the judicial process.⁵⁰ There are those who have proposed imposing conditions to guarantee the fairness of the mediation process, to ensure that it facilitates a dialogue which maintains the parties' right to dignity and to be appreciated, to balance the parties' relative strengths, to guarantee an absence of bias on the part of the mediator, and to encourage informed decisions to be made.⁵¹

Fairness in plea bargaining is different from that expected in the courtroom. A plea bargain is not an objective affair because it reflects contractual negotiations conducted between two interested parties. Nevertheless, the plea bargain represents part of the parties' ability to realize their freedom of choice within the framework of their autonomy and right to self-determination.⁵² The parties' freedom of choice in this case is to minimize the risks inherent in conducting a criminal trial, in all its aspects, in favor of a prior agreed determination as to the results of the process.⁵³ The fairness of the plea bargain in this context is in allowing the parties to

48. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1402 (discussing one of the goals of ADR to be balancing the power imbalances between the parties to ensure that the process is fair); Trina Grillo, *The Mediation Alternative – Process Dangers for Women*, 100 YALE L.J. 1545, 1582-93 (1991) (discussing the importance of ensuring a fair process in the marriage dissolution context); JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 144-45 (1983).

49. See Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 576-81 (1997) (discussing the role of good faith in mediations); BROWN & MARIOTT, *supra* note 42, at 340 (opining that mediators have responsibility for the fairness of the mediation process while it is up to the parties to determine the outcome).

50. BOULLE & NESIC, *supra* note 29, at 69-70.

51. See Stulberg, *supra* note 46, at 944-45 (proposing a statute for negotiation and mediation regulation that would ensure fairness and party autonomy).

52. See Stephen F. Ross, *Bordenkircher v. Hayes: Ignoring Prosecutorial Abuses in Plea Bargaining*, 66 CAL. L. REV. 875, 875 (1978) (giving the constitutional premise that plea bargaining creates a "mutuality of advantage" between the prosecutor and the defendant).

53. See *id.* at 879 (reasoning that plea bargaining is fair to both sides because a plea of guilty also yields a dismissal of some of the prosecutor's charges toward the defendant).

realize their said freedom of choice.⁵⁴ The negotiations conducted by the parties, leading to a plea bargain, amount to a dialogue between them, which maintains their right to dignity and appreciation. The plea bargain acts to balance the disproportionate relationship between the prosecution and the defendant by ensuring that neither walks away empty handed (the half-a-loaf theory),⁵⁵ which, in turn, is the result of the need to compromise. While the plea bargain does not guarantee that a state of complete equilibrium will be achieved between the relative strengths of the parties, it does represent a substantial step forward in reaching this goal.⁵⁶ Even general mediation does not guarantee that absolute balance will be achieved between the disproportionate strengths of the parties, but it is a step in this direction. While a dominant party will continue to be dominant due to its resources and abilities, the mediation process does go some way towards neutralizing those advantages. The conclusion to be reached is that the characteristic of fairness is a relevant factor both in conducting the mediation process and in reaching a plea bargain. This raises the issue of whether the defense attorney fulfills the criteria of fairness in mediation proceedings as a mediator in plea bargain negotiations because the defense attorney also represents the interests of his or her client, which happen not to coincide with those of the prosecuting authorities.⁵⁷

D. *Neutrality*

The characteristic of neutrality relates directly to the relationship between the mediator and the parties to mediation as an integral part of the mediation process. In accordance with the characteristic of neutrality, the mediator must be impartial in relations with the parties within the framework of the mediation process.⁵⁸ Neutrality means the absence of bias and an

54. See *id.* at 879-80 (stating that if prosecutors have discretion in charging the defendant's offenses, then a plea bargain which dismisses some charges in return for a plea will be beneficial to both sides).

55. HERBERT S. MILLER, WILLIAM F. McDONALD & JAMES A. CRAMER, *PLEA BARGAINING IN THE UNITED STATES* 97-99 (1978). Miller discusses the half-loaf theory as follows: prosecutors and defense attorneys arrive at a negotiated conviction for the defendant that is not as severe as originally charged but also not an acquittal; the bargain allows for the prosecutor to get a conviction and not risk trial while the defendant is assured of less jail time than under a conviction. *Id.* at 98. Some argue that plea negotiations result in a more intelligent result than trial because juries are often left with the extreme alternatives of conviction or acquittal when an "intermediate judgment" would be most just. *Id.* at 99.

56. *Id.*, discussing the value to an "intermediate" judgment achieved through plea bargaining.

57. See discussion *infra* Part IV.D.

58. See Orna Cohen, Naomi Dattner & Ahron Luxenburg, *The Limits of the Mediator's Neutrality*, 16 *MEDIATION Q.* 341, 341-43 (1999) (discussing the complex and multi-faceted aspects

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evenhanded approach by the mediator in addressing the parties, the absence of conflicts of interest with the parties, and also equidistance—maintaining an equal distance from both parties in conducting the mediation process.⁵⁹ The general guideline for mediators is to refrain from taking any action that might be interpreted as showing favoritism to one of the parties and from displaying prejudice and preconceived notions regarding the personal characters of the parties and their behavior during the course of the mediation proceedings.⁶⁰ Different rules that have been drafted for mediators with respect to the characteristic of neutrality emphasize the need for the mediator to resign if the mediator cannot be impartial or if the mediator's objectivity might be compromised by personal background, experience, or personal or professional relationship with one of the parties to the mediation.⁶¹

The need for neutrality in mediation often prevents the process from beginning. Accordingly, it has been suggested that a distinction be drawn between neutrality and impartiality. Neutrality relates to the absence of conflicts of interest between the mediator and the parties; whereas, impartiality relates to neutrality as fairness—the manner in which the mediator should conduct the proceedings and relate to the parties. Neutrality touches upon the mediator's background and relationship with the parties, including any prior association with either of them, as well as the existence of any personal interest the mediator may have in the outcome of the mediation; impartiality merely implies evenhandedness, objectivity, and fairness towards the parties to the mediation, including the time apportioned

of mediator neutrality); JONATHAN G. SHAILOR, *EMPOWERMENT IN DISPUTE MEDIATION: A CRITICAL ANALYSIS OF COMMUNICATION* 8 (1994) (investigating the essential aspects of the mediator as a neutral).

59. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 52 (2d ed., 1996). See also REBECCA J. WEINSTEIN, *MEDIATION IN THE WORKPLACE: A GUIDE FOR TRAINERS, PRACTICE AND ADMINISTRATION* 68 (2001) (distinguishing between neutrality and impartiality); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers Responsibilities*, 38 S. TEX. L. REV. 407, 443 (1997) (introducing the argument for a departure from the traditional view that mediators are distanced, unbiased, impartial, and neutral); Janet Rifkin, Jonathan Millen & Sara Cobb, *Toward a New Discourse for Mediation: A Critique of Neutrality*, 9 *MEDIATION Q.* 152-153 (1991) (defining neutrality as impartiality and equidistance).

60. See UNIF. MEDIATION ACT § 9 (2001), available at www.pon.harvard.edu/guests/uma (last visited Mar. 21, 2009).

61. See, e.g., MODEL STANDARDS, *MEDIATORS*, *supra* note 37, at § 2; MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION § 2 (Symposium on Standards of Practice 2000), available at <http://www.afccnet.org/pdfs/modelstandards.pdf> (last visited Mar. 21, 2009).

between them, together with the absence of any external impression of bias shown towards one of the parties.⁶² In light of this dichotomy between neutrality and impartiality, it is suggested that impartiality be treated as an essential and indispensable component of mediation proceedings; whereas, neutrality may be regarded as a less than absolute concept and may be realized or diminished without detrimentally affecting the essential character of the proceedings as a mediation process.⁶³

This distinction must be recognized in both mediation proceedings and plea bargains. The neutrality of the defense attorney, who functions as mediator in plea bargain negotiations, shall be discussed below.⁶⁴ However, it may already be indicated at this stage that the defense attorney first and foremost represents a client against the prosecuting authorities within the framework of negotiations leading to a plea bargain. This begs the unavoidable question of whether the defense attorney can be neutral in relation to the defendant and the prosecution while, at the same time, representing the defendant, who is, after all, paying the attorney's fees.⁶⁵

IV. THE DEFENSE ATTORNEY AS MEDIATOR IN PLEA BARGAIN NEGOTIATIONS

A. *Formation of the Plea Bargain From an Alternative Dispute Resolution Perspective in Plea Bargains*

In light of the foregoing discussion of the four central characteristics of the mediation process, the question arises as to whether the defense attorney may be regarded as a mediator when a plea bargain is being negotiated between the prosecutor and the defendant. The main difficulty regarding this matter is the defense attorney's formal role in the case as the defense attorney and not as mediator. However, the central argument, which shall be made hereinafter, is that, notwithstanding the formal role as the defense attorney, the defense attorney does fulfill the essential role of mediator in the plea bargain between the prosecutor and the defendant. For the purposes of analyzing the defense attorney's essential function as a mediator in the plea bargain, it is necessary to distinguish between two types of interested parties

62. See BOULLE & NESIC, *supra* note 29, at 448.

63. See *id.* at 18-19. "It is not possible to assert as a matter of definition that mediators are always neutral. However, whatever their lack of neutrality, they are required to act impartially, that is, fairly and without bias." *Id.* at 19.

64. See discussion *infra* Part IV.E.

65. See discussion *infra* Part IV .E.

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involved. The prosecutor and the defendant are the primary interested parties; that is, they have a direct interest in the plea bargain. The prosecutor seeks to promote the public interest as much as possible, which generally means issuing serious charges and insisting on draconian sentences, but the defendant's interest is in being charged with a minor offense and receiving only a light sentence if this can be achieved.⁶⁶ By way of contrast, the interest of the defense attorney in the plea bargain is of a secondary nature; the defense attorney does not necessarily have a direct interest in the specific details of the bargain or its consequences but, rather, in other concerns.

The secondary concern of the defense attorney in the plea bargain is to strike the deal between the prosecution and the defendant and to stick to the plea bargain agreed upon in court in the face of possible judicial criticism. In order to do so, the defense attorney must strike a balance between two pivotal factors during the negotiations leading to the formation of the agreement. The first factor is the primary interest of the defendant, who is the client. The defense attorney seeks to conclude the best possible deal from the client's point-of-view. On many occasions, the efficiency, credibility, and professionalism of the defense attorney will be measured by the client according to what the client, with the tools at the client's disposal, perceives to be the nature of the plea bargain. The second factor is the relevant legal position. In this context, the defense attorney must deal with both the relevant law regarding the type of incidents in question and the relevant public interest. The defense attorney should be aware that the incomplete inclusion of the second factor might well prevent a plea bargain from being reached or from being approved by the court. The primary method for realizing the secondary interest in the formation of a plea bargain is to proximate the wishes of the parties until there is a "meeting of the minds," while bearing in mind the public interest and the law in order to make obtaining the court's approval a formality.⁶⁷

66. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968).

67. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1308-09 (1975) (describing how the defense attorney should let the client make the ultimate decision whether to plea but should advise the client whether the plea is likely to be accepted by the court); Martin Marcus, *Above the Fray or Into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice*, 57 BROOK. L. REV. 1193, 1209 (1992) (stating that the ultimate factor in determining whether a plea is successful is whether the judge will be convinced that it serves the interests of justice and, therefore, approve the plea).

This manner of reaching a plea bargain requires that the defense attorney in essence fulfills a mediation function based on the relationship he enjoys with the defendant and with the prosecution. Within the framework of negotiations leading up to a plea bargain the defense attorney can act, for all intents and purposes, as a mediator. These negotiations are conducted ostensibly between the defendant and the prosecutor, with the defense attorney serving as the defendant's formal spokesman. In reality, however, two different dialogues take place: one between the defense attorney and the defendant and the other between the defense attorney and the prosecutor. When the defendant is represented by an advocate, it is unreasonable to expect the defendant to conduct an independent dialogue with the prosecutor.

From a mediation perspective, there are three main stages to reaching a plea bargain. The first stage is the feasibility stage, during which the defense attorney will try and convince the defendant that reaching a plea bargain in light of the legal and factual situation in which the defendant has been caught up in, is a necessity. At the same time, the defense attorney will try and convince the prosecution of the need for a plea bargain. It may be that there will be no need for both dialogues and one will suffice. The nature of this stage will be determined by the identity of the party who takes the initiative in bringing about the plea bargain. If it is the prosecutor who initiates the process, it is reasonable to expect that the defense attorney's efforts at persuasion will be confined only to the defendant

The second stage is the stage of negotiations designed to bring about a contractual "meeting of the minds." At this stage, two types of dialogue will actually be needed: one between the defense attorney and the defendant and the other between the defense attorney and the prosecution. Within this framework, the defense attorney will most likely use all of his or her powers of persuasion and ability to exert force as part of the mediation effort to bring the parties to an agreed solution. These methods include: pressuring the parties, proposing and fashioning a solution, determining the subjects for discussion, holding separate meetings, withholding relevant information, presenting information in a manipulative way, altering the relative bargaining strengths of the parties, persuading, exchanging interests, and even offering gratuities by the mediator.⁶⁸ Use of these tactics shall be discussed hereinafter in light of the fact that the defense attorney's approach embodies the central characteristics of mediation.⁶⁹ The goal of this stage is

68. See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator*, 2 CLINICAL L. REV. 73, 101-19 (1995).

69. See Rebecca Hollander-Blumoff, *Note: Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 119 (1997).

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to bring about a contractual agreement between the parties regarding the details of the plea bargain.⁷⁰

The third and final stage is the stage of drafting and validating the agreement. By this time, the parties will be aware of and will have consented to the details of the bargain. The formal arrangements necessary in order to bring the deal to fruition are likely to include a detailed written agreement and changes to or the withdrawal of the original indictment.⁷¹ What needs to be done in order to validate the plea bargain depends upon the specific stage in the criminal proceedings during which it was concluded. If an indictment had already been filed in court, validation will generally take the form of a court hearing, during which the judge will grant the plea bargain the status of a court judgment. It is not, however, entirely unusual for a deal to be struck out of court during the initial stages of the process. Validation by the court is unnecessary, for example, in those instances in which the obligation that the prosecution takes upon itself is not to file an indictment at all.

Even when the plea bargain is not the result of protracted and exhaustive negotiations but is arrived at within the court itself and in the shortest possible time (perhaps even due to pressure exerted on the parties by the judge), each of the aforementioned stages exist from a conceptual point-of-view. A judge who pressures the parties to reach a plea bargain assists in completing the first stage. The negotiations during the second stage take place during the court hearing, when the details of legal agreement are determined. Finally, the plea bargain will be drafted, even if this takes the form of declarations made by the parties that are entered into the court record and approved by the judge. This description of the formation of a plea bargain raises questions regarding the defense attorney's role as mediator. The role as mediator in this context, and especially during the first and second stages of forming the plea bargain, must be evaluated in the light of the four essential characteristics of the mediation process discussed

70. See Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1406 n.10 (2003) (describing the form of plea bargaining as a weighing of interests similar to what happens in contractual negotiations); Hollander-Blumoff, *supra* note 69, at 119 (stating that, to get to agreement, the parties undertake some form of contractual negotiations); Uphoff, *supra* note 68, at 131-32 (describing how the defense attorney should make suggestions to the client in these negotiations but should ultimately leave the plea decision up to the client).

71. Uphoff, *supra* note 68, at 132 n.241.

above: the autonomy of the parties and their right to self-determination, informed consent, fairness, and neutrality.

B. The Autonomy of the Parties and Their Right to Self-Determination in Plea Bargains

The question that needs to be asked in this context is whether the role of the defense attorney as mediator within the framework of a plea bargain between the prosecutor and the defendant has a detrimental effect on the autonomy of the parties and their right to self-determination, which are characteristics that typify the mediation process. While, as indicated above, the existence of this characteristic of mediation does not necessarily rule out the possibility of the mediator adopting a more interventionist role,⁷² the mediator must refrain from any activity which would have the effect of limiting the aforementioned autonomy, including from providing professional counsel or exerting pressure. The defense attorney is liable to use tactics such as: pressuring the parties (including by threatening to set forth ultimatums having the potential to damage any party who refuses to acquiesce in the formation of a plea bargain), creating artificial time constraints by stipulating a final date for making decisions, and expressing an opinion regarding the state of the case in order to channel the listener towards a particular solution.

The application of pressure by the mediator is not necessarily in itself an illegitimate act from the standpoint of the autonomy of the parties; it only becomes so if it is designed to limit the choices available to the parties.⁷³ There is, therefore, nothing untoward in the mediator applying pressure that is designed to increase the parties' capacity for self-determination. For example, it would be legitimate for defense counsel to pressure either the prosecutor or the defense attorney's own client to obtain all the information necessary in order to form a plea bargain. Similarly, if the mediator suggests a tailored solution to the parties, this would not be considered detrimental to the parties' autonomy because they are the ones with the power to resolve the dispute and such a proposal only widens the range of options before them. Therefore, if defense counsel offers both parties a compromise proposal on the basis of which a plea bargain may be formed, this does not adversely affect the parties' autonomy and their right to self-determination. Deciding which subjects are to be debated within the framework of plea bargain negotiations and which are to be left out of the discussions does not

72. See Weckstein, *supra* note 38, at 502-03.

73. See Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 278 (1989).

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necessarily damage the parties' autonomy—the reason being that there is no obligation to include within a plea bargain all matters over which the parties disagree. A partial plea bargain may also be legitimate. Thus, a plea bargain in which the prosecution agrees to reduce the charge from robbery to theft, the defendant admits to the lesser charge, and the parties are free to plead regarding severity of sentence would be legitimate in this context. This bargain reflects the full agreement reached by the parties because consensus would have reached regarding the type of offense but not the punishment to be imposed.

The holding of separate meetings within the framework of the negotiations (between defense counsel and the defendant and between defense counsel and the prosecution) is often necessary in order to arrive at a plea bargain, and this becomes a vital tool if the parties take up entrenched positions and, as a result, become deadlocked. Nevertheless, the separate meeting is a fertile ground for manipulation and deceit by both the mediator and the parties, who may expose the mediator to incorrect information without fear of the reproach that would follow if the meeting were to be held simultaneously with both parties, each acting as watchdog with regard to the information presented by the other side. As a rule, to the extent that holding separate meetings with the parties enhances the level of communication between them, whether due to the fact that the gulf between their respective positions is too wide or whether the atmosphere in a joint meeting would most likely be too charged, it is welcomed as a way of advancing the mediation process. Thus, if defense counsel holds separate meetings with the prosecution and the defendant at the first and second stages of forming the plea bargain with the aim of softening their positions and eroding the differences between them in order to lead to a “meeting of the minds,” this contributes to, rather than detracts from, the parties' autonomy and right to self-determination. On the other hand, if the mediator exploits the separate meeting in order to transfer information to one of the parties in an unfair manner or in order to pressure that party unfairly, this would be injurious to the parties' autonomy.

The transfer of misleading information or the refusal to transfer relevant information damages the autonomy of the parties because their ability to reach a suitable result within the framework of the proper process of decision-making has been prejudiced. The provision of relevant information within the framework of plea bargains is dictated not only by the needs created during formation of the plea bargain, which reflect the interests of the parties, but also by legal requirements. The relevant information

regarding the manner in which the courts deal with the type of criminal case in question, for example, is information that the parties require in order to reach a settlement because, once in possession of it, they can adopt positions based on a correct appraisal of the opportunities and risks facing them. Defense counsel has no authority to transfer information if to do so would constitute a breach of the client's right to client-lawyer privilege. However, this in no way prejudices the prosecution's right to request factual details from the investigating authorities in accordance with the procedural law applied at the specific stage reached in the criminal proceeding in question. In fact, the said privilege in this context only acts to prevent the transfer of information from the weak party (the defendant) to the strong party (the State), but does not restrict the prosecution's right to use all the available means at its disposal within the framework of the criminal process to expose the truth (by questioning witnesses, arresting suspects, and carrying out searches). The transfer of false information to the prosecution is also forbidden by law and, in many countries, constitutes a criminal offense. The transfer of incorrect information to a client is prohibited by the rules of professional etiquette; it may, in addition, constitute grounds for an action in tort and, in many countries, for a criminal offense.

In evaluating the bargaining strengths of the parties to a plea bargain from a mediation point-of-view, it would appear that both parties have the opportunity of continuing their negotiations or beginning the full criminal process with all the possibilities and risks that entails. The presumption is that, because the parties have moved from the first stage (the feasibility stage) to the second stage (the negotiations phase), they have a mutual need to reach some sort of plea bargain—the details of which will be hammered out during negotiations. This need may highlight deficiencies in the evidence required in order to prove the allegations—the fact that those allegations have already been disproved by the other side, technical problems engendered by the burden of overwork, and the absence of the mental resilience necessary on the part of the defendant to go through a full trial. Nevertheless, it ought to be pointed out that, while the prosecutor has the professional expertise necessary to arrive at a plea bargain because of operating as an experienced and professional advocate, the defendant has to rely on a defense attorney. The defendant does not, as a rule, have the tools necessary to handle the information to which he or she is exposed and to know whether that information is all the information he or she needs to know. In such cases, the defendant will probably partially or fully relinquish personal autonomy and right to self-determination, either openly or confidentially.

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An informed waiver of personal autonomy and the right to self-determination is also possible.⁷⁴ This concession is likely to express itself during mediation proceedings when one of the parties asks the mediator to make decisions on that party's behalf, to suggest to the party a solution which seems fair and reasonable in the circumstances of the case, or to counsel the party as to which of the possible alternatives would be wise to take.⁷⁵ Sometimes, in pressurized situations, this type of concession may be made because a party wishes to rely on the expertise of a professional and to be freed from the burden of decision-making.⁷⁶ This situation is not uncommon in the context of plea bargains. The defendant is likely to rely on the discretion of an attorney in order to be freed from the burden of making a decision, and there can be no doubt that being the subject of a criminal investigation and then being indicted are pressurized situations for the ordinary person. Having said this, because the process is one of mediation, a party to the mediation cannot relinquish the existence of a right to make the decision regarding the solution to the dispute.⁷⁷ In a plea bargain situation, defense counsel presents the deal that has taken shape with the prosecution to the client for final approval, and, thus, the mediation-style character of the plea bargain is not prejudiced. Defense counsel's mediation role allows the parties to formulate the fine print of their agreement through negotiations to boost their autonomy and right to self-determination. To this end, defense counsel uses pressure as a tactic to preserve the parties' autonomy and right of self-appreciation. Other types of tactics are prohibited by law in a substantial number of instances and are, therefore, irrelevant. The upshot of all this is that defense counsel is likely to be regarded as a mediator to the extent that the defense counsel's plea bargaining activities affect the autonomy of the parties and their right to self-determination.

74. See DWORKIN, *supra* note 33, at 118.

75. Strauss, *supra* note 34, at 346. Compare DAVID KIPNIS, TECHNOLOGY AND POWER 43 (1990) (criticizing those that waive autonomy by accepting a court-appointed arbitrator's decision rather than attempting to resolve the conflict independently of that decision), and CARL E. SCHNEIDER, THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS AND MEDICAL DECISIONS 186 (1998) (stating that the complexity of medical decisions often makes the costs of achieving autonomy outweigh its benefits).

76. Strauss, *supra* note 34, at 346.

77. See generally JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 43 (1975) (describing a study concerning the existence of external bias and its effects).

C. *Informed Consent in Plea Bargains*

The characteristic of informed consent as an aspect of the mediation process requires that the mediator provide the parties with free access to relevant information, relating to all matters with which the mediator is personally connected as a mediator and to the mediation process itself and to personally transfer it to the parties.⁷⁸ In so far as plea bargains are concerned, it may be presumed that the prosecutor knows and is familiar with the rules, procedure and relevant laws involved, and, therefore, there is no need for a formal transfer of information between the prosecutor and the defense attorney. The need arises most acutely within the framework of the dialogue between the defense attorney and client. The defense attorney who acts as a mediator in plea bargain negotiations must explain to the defendant the relevant information relating to the roles of the parties in formulating the bargain: the part the defendant is to play, the defense attorney's lack of authority to impose a settlement on the parties, the requirement that the defendant must give his personal consent in order for a deal to be worked out, the legal status of the bargain and its enforcement, the possibility of returning to court at any time if the plea bargain negotiations appear to be failing, and even matters which relate to the defense attorney's fees. In fact, every mediator is under an obligation to reveal details that are relevant to both parties in cases where private litigation has been referred to mediation,⁷⁹ and, therefore, a plea bargain is no different in this respect. Some commentators take the view that when one of the parties to mediation is not represented by an advocate the mediator's obligations towards that party are enhanced.⁸⁰ In the same way, the transfer of this information is far more relevant within the framework of the dialogue between the defense attorney and the defendant than it is in the dialogue between the defense attorney and the prosecutor.

Regarding the transfer of material information in any criminal case within the framework of negotiations leading to a plea bargain, a distinction must be made between the different levels of awareness in relation to the different amounts and quality of knowledge the parties have in their possession. As a rule, situations in which one or both parties have all the information necessary to make a decision are rare; therefore, the search for

78. Nolan-Haley, *supra* note 36, at 784-87.

79. *See id.* at 810-11 (discussing that mediators are generally under a duty of disclosure).

80. *Id.* at 833.

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information is relentless.⁸¹ The result is that, in all probability, virtually all decisions are taken on the basis of incomplete information.⁸²

Accordingly, in so far as informed consent is concerned, the mediation process in general, and not only in the specific context of plea bargains, requires a minimal level of awareness, which expresses itself in the representation of the parties by advocates and the receipt of legal advice from them during the course of the mediation.⁸³ Similarly, in a plea bargain in which the defense attorney serves as mediator, there exists a basis of informed consent. The State is represented by attorneys as is the defendant. The defense attorney, as mediator, has possession of the relevant information relating to the defendant, who, as a rule, does not have professional legal training, and has information held by the prosecution from the attorneys representing the State. Where transfer of information is prohibited by specific legal provisions relating to privilege, as we shall discuss below, it may be supposed that these do not concern the prejudicial effect on the rights of a party who lacks a defense because the existence of the attorney-client privilege is between the defense attorney and the defendant, not between the prosecution and its attorneys.

Moreover, the existence of attorney-client privilege between the defense attorney and the defendant in the context of a plea bargain is likely to be a temporary mechanism needed to maintain the defense attorney's objectivity and to keep the defense attorney's status on par with that of the mediator.⁸⁴ Where the mediator arranges to meet with the parties separately, each of them must reveal to the mediator information intended for the mediator's eyes only and not to be passed on to the opposing side. This is for all intents and purposes a form of privilege, the obligatory element of which falls on the mediator. The attorney-client privilege operates in the same way, the obligation being owed by the attorney to the client. The defense attorney who meets with the defendant with the aim of formulating a plea bargain has the same status as the mediator who holds a separate meeting with one of the parties. The defense attorney and the mediator are both prohibited from transferring information to the opposing side.

81. Stulberg, *supra* note 46, at 942.

82. *See id.*

83. *Id.* at 942-43.

84. *See generally* Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 271 (2002) (discussing the need for confidentiality and objectivity in the role of a mediator).

In some respects, the mediator's disclosure obligations and the requirement of informed consent constitute two sides of the same coin because without disclosure of information there can be no informed consent.⁸⁵ Similar is the defense counsel's role as mediator in the plea bargain. The minimal disclosure obligations required in mediation proceedings in practice exist in the context of the plea bargain. The flow of information relates to two types of dialogue—that which is carried on between the defense attorney and the defendant and that which exists between the defense attorney and the prosecutor. The result of plea bargain negotiations depends upon the existence of informed consent, just as the parties' informed consent is required in mediation proceedings. The defense attorney, who has put together the details of the bargain with the prosecution, still needs the informed consent of the client in order for the deal to be approved. To reach this point, the defense attorney must transfer to the client such relevant information as is necessary, including any details of which the client demands to know, because, as part and parcel of this transaction, the defense attorney may be incriminated with all the implications that would entail.

D. Fairness and the Half-A-Loaf Theory in Plea Bargains

The characteristic of fairness in the context of mediation proceedings obligates the mediator to enable the parties and, as previously stated, certain third parties to realize their freedom of choice within the framework of their autonomy and right to self-determination.⁸⁶ In order for the mediator to act fairly towards the parties to the dispute, the mediator must fulfill four conditions: protect the right of the parties to dignity and respect, achieve a balance between the respective strengths of the parties, ensure the absence of bias, and allow decisions to be made based on knowledge.⁸⁷ The degree of dignity and respect achieved can be measured primarily by examining the extent to which the parties are treated as equals throughout the process.⁸⁸ Defense counsel in a plea bargain conducts negotiations with the prosecutor and the defense counsel's client, while emphasizing the terms and prerogative each party has to decide to end the negotiations in the same way

85. Nolan-Haley, *supra* note 36, at 778.

86. See COLE, ROGERS & MCEWEN, *supra* note 46, at 2-3; Stulberg, *supra* note 46, at 910-914, 944-45.

87. BOULLE & NESIC, *supra* note 29, at 454.

88. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-74 (1977); See Michelle R. Evans, *Women and Mediation: Toward a Formulation of an Interdisciplinary Empirical Model to Determine Equity in Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 145, 170 (2001).

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they would be demanded from a mediator.⁸⁹ The defense attorney in a plea bargain balances in a meaningful way the relative strengths of the prosecution and the defendant. The defense attorney makes up for the defendant's lack of legal knowledge when confronting the prosecuting authorities; however, because the defense attorney has no power to determine the matter, the defense attorney cannot impose his or her will but can only air in a fair manner the stance adopted by the defendant. Expressed through the defense attorney, the strength of the defendant's position is balanced by the prosecution, thus creating a fair process.⁹⁰

Ensuring the absence of bias is also a feature of the plea bargain, despite the fact that, in the proceedings in question, the defense attorney represents the defendant in confrontation with the prosecuting authorities—an issue that will be addressed hereinafter when discussing the neutrality of the defense attorney as a mediator. As a rule, if the defense attorney were to function in a passive way, then strong preference would be given in the plea bargain to the stronger party (i.e., the prosecuting authorities).⁹¹ Providing for the possibility of informed decision-making as a way to fairly balance the power of the parties has been discussed above in relation to the attribute of informed consent, which characterizes the defense attorney's role when acting as mediator. The fairness of the result of the mediation process is part and parcel of the fairness of the mediation proceedings themselves. In a plea bargain, in which no gaps in information exist between the two sides and in which the strengths of the parties are evenly balanced, the presumption is that the result of the negotiations is a situation that reflects the best deal that each of the parties could have obtained for themselves.⁹² In fairness of this sort, which looks to the outcome, defense counsel plays a supporting role by providing information and balancing the forces, thereby contributing in the capacity of mediator within the framework of the plea bargain to the fairness of the entire agreement reached.

89. MODEL STANDARDS, MEDIATORS, *supra* note 37, at § 6.

90. See generally Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1 (2000) (exploring the concept of power disparities in negotiation).

91. See Madeleine B. Simborg & Joan B. Kelly, *Beware of Stereotypes in Mediation*, 17 FAM. ADVOC. 69, 70 (1994).

92. See MILLER, McDONALD & CRAMER, *supra* note 55.

E. Neutrality in Plea Bargains

As already mentioned, the commentators make a distinction between neutrality and impartiality and, within this framework, suggest that impartiality should be regarded as an essential and indispensable feature of mediation proceedings, whereas neutrality may be regarded as a less than absolute concept and may be realized or diminished without detrimentally affecting the essential character of the proceedings.⁹³ Impartiality in this context implies that equality, objectivity, and fairness must characterize the manner in which the parties to mediation proceedings are treated, which includes the amount of time they are given and the absence of any appearance of favoritism. It would seem at face value that, because the defendant is paying the defense attorney's fees in order that the attorney should obtain the best possible legal result, defense counsel's ability to act impartially is seriously flawed within the framework of a plea bargain or otherwise. In spite of this assumption, however, legal research in the field paints a very different picture and has clearly shown that the plea bargain system, by its very nature, contradicts the normal attorney-client relationship.⁹⁴ Some commentators have even gone as far as to argue that plea bargains constitute a strong incentive for defense counsel to abandon the fiduciary duty to his client when fulfilling this role.⁹⁵ It seems, therefore, that the system of relations within the framework of the plea bargain is more complicated than it appears to be at first glance. Prosecutors and defense attorneys often have good relations with one another, personally and professionally. If defense counsel shows "flexibility" in one set of negotiations, the defense counsel may merit preferential treatment in other cases. The defense counsel's contacts with the client are usually only short-term in contrast to the relationship with counterparts at the prosecution service, which are long-term and which will continue even after a specific defendant's matter has been dealt with. In those states having a public defender service, the relationship between the defense attorney and the defendant will be substantially weaker.⁹⁶ In such states, the majority of

93. BOULLE & NESIC, *supra* note 29, at 18-19.

94. See generally Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1176 (1998) (focusing on the ethical role of prosecutors who find, in particular cases, that plea bargaining is not operating in its expected fashion).

95. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975).

96. See generally Debra S. Emmelman, *Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures of Court-Appointed Defense Attorneys*, 22 LAW & SOC. INQUIRY 927, 930 (1997) (finding that defense attorneys gauge the strength of evidence through a tacit, taken-for-granted process that emerges in three stages).

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defendants who are represented are represented by public defenders, and it is only the minority who are represented by private attorneys. Where close ties exist between the defense attorney and the specific prosecutor assigned to the case, a tendency exists to bypass the prosecutor's authority and turn to a higher authority within the framework of the plea bargain.⁹⁷ It should be pointed out that even though similar sets of relations also exist between judges, prosecuting attorneys, and defense attorneys, judges are still perceived as being a neutral factor in criminal proceedings.

The initial proximity of the mediator to a specific party does not necessarily cancel neutrality. In his article, Dean Pruitt recalls the success of Henry Kissinger in mediation between Israel and Egypt before a peace agreement was concluded between them.⁹⁸ According to Pruitt, the initial proximity of Kissinger to Israel at the start of the proceedings, the sympathetic stance adopted by the United States towards Israel, and the desire of the United States to end the conflict and have access to Arab oil actually brought about larger concessions on Israel's part because the United States was a friend from its point-of-view and was conveniently situated to extract concessions. This scenario has repeated itself many times in international mediation.⁹⁹ If the role of defense counsel is to assist the client to arrive at a decision with regard to the plea bargain in question while taking into account the prosecutor's concerns and, in so far as possible, the broad picture of relevant data, then the defense counsel's function is no different from that of any other mediator operating in the field of private litigation.¹⁰⁰ If defense counsel assists the prosecutor during negotiations to make a decision for a specific plea bargain, while enabling the prosecutor to take into account the opposing side's concerns, then here too the defense counsel's function is no different from that of any other mediator in private litigation. There are some who argue that the mediator ought to interfere if it appears that the stronger side is exploiting the weaker one, if there is a lack

97. See ELIAHU HARNON & KENNETH MANN, *PLEA BARGAINING IN ISRAEL* (1981).

98. See Dean G. Pruitt, *Kissinger as a Traditional Mediator with Power*, in *DYNAMICS OF THIRD PARTY INTERVENTION: KISSINGER IN THE MIDDLE EAST* 136, 141, 144 (Jeffrey Z. Rubin ed., 1981).

99. See generally Saadia Touval & Ira W. Zartman, *Introduction: Mediation in Theory*, in *INTERNATIONAL MEDIATION IN THEORY AND PRACTICE* 7, 7-17 (Saadia Touval & Ira W. Zartman eds., 1985).

100. See Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 *VT. L. REV.* 85, 96, 116 (1981); MOORE, *supra* note 59, at 52, 197; Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 *BAYLOR L. REV.* 963, 963 (1998); Uphoff, *supra* note 68, at 87.

of information, or if a third party may be adversely affected and that the nature and extent of this interference should reflect the mediator's personal values.¹⁰¹ According to this approach, even when the defense attorney exercises powers of persuasion on the prosecutor in the interests of the client, who may be exploited because of a lack of information in the client's possession or may have family, economic, or social interests at risk, the defense attorney does not derogate from neutrality as a mediator in the plea bargain negotiations.

There are those who argue that mediators involved in the resolution of private legal quarrels are not neutral with regard to the practical outcome of the proceedings before them and that their neutrality is more formal than real; others go further still, suggesting that such mediators are also not neutral with regard to the formal proceedings.¹⁰² Mediators are generally incapable of maintaining emotional detachment from the litigants¹⁰³ and may on occasion be either consciously or unconsciously influenced by their personal leanings and preconceptions.¹⁰⁴ Nevertheless, the mediator in private disputes is still regarded as a neutral figure because the mediator is only human. It seems that the role of the defense counsel in plea bargain negotiations is also no different from that of a mediator in mediation proceedings when it comes to the issue of neutrality. This is also true in relation to the duties of good faith and trust owed by the mediator to the parties, which is comparable with those duties that an attorney owes to a client. An advocate is also obliged to behave as an "officer of the court" at the same time as representing a client. Thus, counsel for the defendant when appearing in court or engaging in plea bargaining also owes duties to the proceedings in general and to the opposing side. Similarly, the mediator simultaneously owes a duty of trust to both parties, while addressing what is

101. JOHN M. HAYNES, *DIVORCE MEDIATION* 62-63, 129-31 (1981).

102. Compare David Greatbatch and Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 L. & SOC'Y REV. 613, 639 (1989) ("Mediator only becomes a problem when formal and substantive neutrality are confused so that the pressure becomes invisible or when the choice of goals remains a purely personal matter rather than one for which the practitioner may be socially accountable."), with Robert Dingwall, *Empowerment or Enforcement? Some Questions about Power and Control in Divorce Mediation*, in *DIVORCE MEDIATION AND THE LEGAL PROCESS* 166 (Robert Dingwall & John Eekelaar eds., 1988) (describing how a mediator's gender and what type of formalities, particularly what type of party behavior, will be acceptable during the mediation).

103. See Cohen, Dattner & Luxenburg, *supra* note 58, at 342.

104. Paul V. Olczak, *Resistance to Mediation: A Social-Clinical Analysis*, in *COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS* 153, 158 (Karen Grover Duffy et al. eds., 1991).

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required to run the mediation proceedings, including the need to balance the parties' relative strengths.¹⁰⁵

V. CONCLUSIONS

A modern examination of plea bargains in accordance with the characteristics of mediation proceedings reveals that a substantial similarity exists between plea bargain procedures and those proceedings to the extent that it is not difficult to see that plea bargains involve a specific type of mediation. The legal dispute in the case of the plea bargain according to the adversarial model, which is based on a legal tug of war (lis) between two sides, is the dispute between the prosecutor and the defendant with the defense counsel serving as mediator.¹⁰⁶ An examination of the role of the defense counsel in the formulation of a plea bargain based on the characteristics of the mediation process also shows that substantial similarity exists between the function of the defense attorney in plea bargain negotiations and that of the mediator. This similarity does not exist by chance. Both the plea bargain and mediation are forms of ADR, and both give the parties the certainty and the ability to control the proceedings. However, while in a civil case the mediator fulfills a formal position disconnected from the parties, in plea bargain negotiations there is no such detachment—the role of mediator is fulfilled by the defense counsel despite ostensible identification with one of the parties.

In view of the substantial similarities between plea bargains and mediation proceedings and the possibility of treating the plea bargain as a form of ADR in criminal cases, it has been suggested that reference be made to the wealth of experience that has accumulated as a result of using mediation as an alternative to private litigation, to learn from it, and to seek ways to implement it within the framework of the plea bargain.¹⁰⁷ This implementation is likely to relate to both the plea bargain itself, as a proceeding, and the special function of the defense attorney within the

105. See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 857-66, 881-86 (1997).

106. See generally Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 933 (1983) (discussing how plea bargaining turns lawyers into judges and judges into figureheads).

107. See Sherry R. Wetsch, *Alternative Dispute Resolution—An Introduction for Legal Assistance Attorneys*, 2000 ARMY LAW 8, 8 (2000); Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 277-313 (1996).

framework of the plea bargain.¹⁰⁸ Putting the accumulated experience acquired during private mediation proceedings into practice in the context of plea bargaining is likely to express itself in values elicited from the rules of professional ethics, the conduct of negotiations, the use of pressure tactics, the creation of multi-party duties of good faith, the opportunity for the defendant to understand the damage that the defendant caused to the community, and the defendant's integration into the decision-making process.¹⁰⁹ Within this framework, it will also be possible for discussions to take place between the defendant and the victim of the crime, something that is essentially lacking in current plea bargain procedure.¹¹⁰ To ignore the

108. See generally Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 741 (1997) (stating that parties to a mediation are more likely to be satisfied when they know what to expect, which is more likely to occur if the mediator understands different styles of mediation and the relationship of model practice standards and those styles); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 81-95 (1994) (describing the transformative view of mediation and how implementation of that model assists parties in taking responsibility for their actions); John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 322 (discussing how the practice of mediators has benefited by coming to a greater understanding of the difference between evaluative and facilitative mediations and when each model should be used); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers, and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 238-39 (2002) (describing the benefit of attorneys using the tools of mediation in adversarial settings); Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 9-12 (1996) (outlining how strategic and cognitive biases distort views and make it difficult to reach optimal negotiation agreements); Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267, 277-78 (1996) (discussing the advantage of learning and using the various flexible methods of mediation in litigation).

109. See generally Adam Lamparello, Note, *Reaching Across Legal Boundaries: How Mediation Can Help the Criminal Law in Adjudicating "Crimes of Addiction,"* 16 OHIO ST. J. ON DISP. RESOL. 335, 336 (2001) ("Mediation can serve as an effective means of resurrecting rehabilitative ends that address an individual's addiction, thereby leading offenders on the path to recovery."); Gary D. Williams, Note, *Weighing the Costs and Benefits of Mediating Estate Planning Issues Before Disputes Between Family Members Arise: The Scale Tips in Favor of Mediation*, 16 OHIO ST. J. ON DISP. RESOL. 819, 829-34 (2001) (listing a number of benefits of using mediation instead of traditional litigation including educating clients about how their actions brought about the legal conflict); Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 353 (2003) (noting that a healthy court system ensures that mediation can realize its goals without devolving into something dysfunctional).

110. See Alana Dunnigan, Comment, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. REV. 1031, 1032-33 (2003) (noting that California has imposed mandatory mediation in domestic abuse crimes requiring the victim to mediate with the abuser); Adina Levine, *A Dark State of Criminal Affairs: ADR Can Restore Justice to the Criminal "Justice" System*, 24 HAMLIN J. PUB. L. & POL'Y 369, 375 n.29 (2003) ("The most significant impact ADR has had on the criminal process is victim-offender mediation, part of restorative justice.").

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vast experience accumulated in this field of dispute resolution and the manner in which it can be applied to a substantially similar proceeding—albeit one that has its own special characteristics—would create an enormous rift between ADR methods in civil and criminal cases. It is difficult to see how such a rift could be justified in any modern legal system.

