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# Non-Silences of Professor Hazard on "The Silences of the *Restatement*": A Response to Professor Menkel-Meadow

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# Non-silences of Professor Hazard on "The Silences of the *Restatement*": A Response to Professor Menkel-Meadow

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This comment addresses the dangers involved in drafting legal rules and how improperly drafted ones result in ambiguities. Professor Menkel-Meadow proposes legal standards to regulate Alternative Dispute Resolution (ADR) neutral lawyers.[1] While that is an entirely worthwhile enterprise, her text is not a workable set of legal rules. It would make better sense to adapt the *Model Code of Judicial Conduct* (*Model Code*)[2] to cover ADR neutral lawyers.

There is some awkwardness in preparing this comment because, as Professor Menkel-Meadow acknowledges, her finished paper came long after the occasion for my comment. Also, I generally agree with Professor Moore's remarks.[3] Professor Moore says, in essence, that the *Restatement*[4] is not silent concerning the matters discussed by Professor Menkel-Meadow, but simply speaks in more general terms. In my view that is the correct approach. Surely the responsibilities of a lawyer as a school board trustee, member of a zoning commission, executor or administrator, and other "non-advocacy" functions commonly performed by lawyers, are of equal social importance as service in ADR. In the aggregate they probably are undertaken far more often by practicing lawyers.

The enterprise of the *Restatement* could have been viewed as something else than the law governing lawyers. For example, it could be viewed as the law governing lawyers serving as neutrals in dispute resolution. Indeed, Professor Menkel-Meadow and I presently are participating in that very enterprise. Using that enterprise as an example, I have some observations about the drafting task using the proposals set forth in Professor Menkel-Meadow's draft as a point of reference. My general thesis is that drafting legal rules requires a different orientation than is involved in advocacy or professional counseling, which is what I understand Professor Menkel-Meadow's undertaking to be.

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1. Carrie Menkel-Meadow, *The Silences of the* Restatement of the Law Governing Lawyers, 10 GEO. J. LEGAL ETHICS 631, 660-68 (1997).

2. Model Code of Judicial Conduct (1990) [hereinafter MODEL JUDICIAL CODE].

3. Nancy J. Moore, *Restating the Law of Lawyer Conflicts,* 10 GEO. J. LEGAL ETHICS 541 (1997).

4. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Am. Law Inst. Proposed Final Draft No. 1, 1996) [hereinafter RESTATEMENT].

I address only certain portions of her introductory note and section one by way of example:

1. The categories set forth in the introductory note are not mutually exclusive. Categorical terms should have as clear and distinct boundaries as language permits. The discussion of the categories also indicates that a lawyer has responsibilities which are outside the categories, such as using the "best means possible" to achieve a "client's lawful objectives."[5] A formulation such as "best means possible" should be avoided in drafting legal rules. If taken literally, it subjects the actor to a higher standard of conduct than is required by the general standard of reasonable care. Beyond being itself a standard of "high care," the term also could be read into other rules in the *Restatement* referring to the standard of care a lawyer must observe. In any event, it should not be implied that a lawyer should use the "best means possible" when advising about ADR but some other standard when addressing these types of client problems.

2. If the rule of impartiality stated in section one[6] is to apply to a "third party neutral,"[7] then that term should be the basis of the rule. The various subcategories subsumed in the category should be referenced either in subsections or in an explanatory comment, not in the Introductory Note.

3. The term "assure" used in section one[8] implies guaranty, which in turn implies strict liability. This interpretation also is implied in subsection (1)[9] because the duty of disclosure that is prescribed there is not qualified by such terms as "reasons known to" the lawyer or of which the lawyer "reasonably should have been aware . . . ."

4. The formulation in section one (1)(A)[10] requires disclosure of any "indirect financial or personal interest."[11] There is very little that is excluded from this term. John Donne, for example, told us that no man is an island.[12] This implies that we are all connected, at least indirectly. Another point is that the standard of "appearance of partiality"[13] introduces a concept similar to the notoriously subjective and limitless concept of "appearance of impropriety."[14] The appearance of impropriety concept has been rejected in the *Model Rules of Professional Conduct*.[15] If appearance of impropriety is linked to "indirect finanical or personal interest,"[16] as it is

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5. Menkel-Meadow, *supra* note 1, at 660.
6. *Id.* at 663.
7. *Id.* at 633.
8. *Id.* at 663.
9. *Id.*
10. *Id.*
11. *Id.*
12. John Donne, *Devotions upon Emergent Occasions, No. 17* (*quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 254 (Emily Morison Beck ed., 15th ed. 1980)).
13. Menkel-Meadow, *supra* note 1, at 663.
14. MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 9 (1969) [hereinafter MODEL CODE].
15. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).
16. Menkel-Meadow, *supra* note 1, at 663.

in Professor Menkel-Meadow's draft,[17] especially careful assessment of the meaning of the section is required in an era when gender, race, and lifestyle have become critical standards on the basis of which to impugn impartiality.

5. Section one (1)(D)[18] extends the disclosure requirements — strict liability exists to disclose all indirect personal interests that entail an appearance of impropriety — to the members of the lawyer's firm and family. How is a lawyer to know whether a member of the family of a lawyer in her firm has an "indirect financial or personal interest"[19] as regards a party in which the lawyer is a neutral?

I am not in any way trying to be unkind or sarcastic. I mean only to illustrate the problems of language and concept that must be confronted in drafting legal rules. This is particularly true when these rules are designed to govern resolution of legal controversies, such as rules of procedure and, even more particularly, rules defining standards for recusal of judges and other neutral parties. By definition, the latter rules concerning recusal operate in contentious matters and, as we have learned, there exists maximum pressure to abuse them.

The rules defining "impartiality"[20] of a third party neutral are likely to be the basis for direct legal attacks on the initiation of a mediation or arbitration and the basis of collateral attack in various circumstances. The language of these rules therefore must take account of the mentality referred to by Justice Holmes when he said that a legal document need "not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert."[21] The minds of legal disputants often were inflamed by a desire to pervert in Justice Holmes' time and there certainly exists that tendency today.

It is for these reasons that I have suggested the wisdom, in defining the rules governing third party neutrals other than judges, of tracking the rules prescribed for judges. An accepted version of these rules is contained in the *Model Code of Judicial Conduct*.[22] The original version of the judicial code was promulgated by the American Bar Association (ABA) over twenty years ago and since then has been adopted by practically all of the states[23] as well as by the federal government.[24] It subsequently has been amended by the ABA only in immaterial ways. Its definition of impartiality, set forth in *Canon* 3,[25] is more constrained than the terms proposed by Professor Menkel-Meadow. I acknowledge having been draftsman of the *Model Judicial Code* and therefore being beset by a bias, or

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 663-64.
21. Paraiso v. United States, 207 U.S. 368, 378 (1907).
22. See generally MODEL JUDICIAL CODE for these rules.
23. Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 3 (1988).
24. 28 U.S.C. § 455 (1988).
25. MODEL CODE Canon 3.

at least perhaps an "appearance of partiality."[26] However, practice over the last twenty years has shown that the *Model Code* works fairly well.

It should be noted that the *Model Code* has provisions governing part-time judges.[27] Topic A of these application provisions defines a judge as "[a]nyone, whether or not a lawyer . . . who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee . . . ."[28] This definition refers to persons who are part of "a judicial system,"[29] but that limiting term can simply be omitted if the *Model Code* is adapted to ADR neutrals. This definition of judge is effectively another definition of a lawyer serving as a neutral. The application provisions go on to specify the rules from which a part-time judge (third party neutral) is exempt.[30] Other provisions also specify special rules that take account of the fact that these persons have some other vocation besides being a judge.[31]

What, exactly, is wrong with adopting the provisions of the *Model Code* to govern third-party neutrals, or at least taking those provisions as a starting place? As a work of draftsmanship of legal rules, the *Model Code*, with all deference to Professor Menkel-Meadow, is superior to the text she tenders. This superiority is not the result of brilliance on the part of the draftsman, but of the brilliance, diligence, and painstaking effort of the committee that drafted the *Model Code*. For the record, the members of that committee included Justice Potter Stewart of the United States Supreme Court, attorney Whitney North Seymour (senior partner of a major New York law firm and former ABA President), and, certainly not least, California Chief Justice Roger Traynor as chair. The measure of their success was the immediate adoption and continued retention, now going into its third decade, of the rules they formulated.

If one compares the text of the *Model Code* with the proposals tendered by Professor Menkel-Meadow, a particular kind of difference recurs. The *Model Code* speaks as a regulatory measure, not an exhortation addressed to the ethical sensibilities of a person undertaking the office of third party neutral. Of course, a third party neutral should try to "assure"[32] complete impartiality. Of course, a third party neutral should seek to avoid even the "appearance of partiality."[33] Of course, a third party neutral should not make use of information acquired in that office in any way that could hint or suggest exploitation. But standards cast in these terms are addressed to subjective mental states of the third party neutral and to those of persons observing the neutral. Subjective mental states have their

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26. Menkel-Meadow, *supra* note 1, at 663.
27. MODEL JUDICIAL CODE Canon 5 app. a.
28. *Id.*
29. *Id.*
30. *Id.* app. c-e.
31. *Id.* app. f.
32. Menkel-Meadow, *supra* note 1, at 663.
33. *Id.*.

place in law, particularly in criminal law and the law of fraud and misrepresentation. But they also have special attraction to legislators trying to differentiate "good" guys from "bad" guys. Employed for this latter purpose, subjective terms are uncontainably volatile, especially when used in procedural rules.

The work on the *Restatement of the Law Governing Lawyers* proceeded with cognizance of the *Model Code*. That cognizance extended to the fact that the *Model Code* included provisions addressing part-time judges. That is at least part of the explanation, beyond that given by Professor Moore,[34] for the silence of the *Restatement of the Law Governing Lawyers* on the matter of lawyers serving as third party neutrals.

34. Moore, *supra* note 3, at 565 n.160.