

Ten Ways to Get Sued: A Guide for Mediators

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Introduction	81
I. Fail to Disclose a Conflict of Interest	86
II. Breach a Specific Contractual Promise Regarding Structure or Outcome.....	93
III. Engage in the Practice of Law	95
IV. Engage in the Practice of Law Badly.....	102
V. Breach Confidentiality Externally.....	107
VI. Breach Confidentiality Internally	111
VII. Maintain Confidentiality Inappropriately	113
VIII. Advertise Falsely	116
IX. Inflict Emotional Distress on a Disputant.....	120
X. Commit Fraud.....	122
Honorable Mention: Mediate Poorly.....	125

INTRODUCTION

Mediators have practiced for decades without significant exposure to legal actions stemming from their mediation conduct. Despite the thousands, if not millions, of disputants who have received mediation services,¹ instances of legal complaints against mediators are

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1. I am aware of no empirical analysis cataloguing the number of mediations taking place nationally. The decentralized and often unofficial nature of mediation makes precise calculation impossible. A conservative estimate, however, places the number of mediation participants annually in the hundreds of thousands. Based on extrapolations from 1997 data, the National Association for Community Mediation alone claims to receive 97,500 cases per year. See National Association for Community Mediation web site, at <http://www.nafcm.org/pg5.cfm> (last visited September 6, 2002). No centralized reporting mechanism exists for private providers. However, large providers mediate significant numbers of cases each year. Telephone Interview by John Benazzi with Barbara Wittig, Marketing Communications Manager, American Arbitration Association (September 18, 2002) (in 2001, the AAA mediated 3800 separate disputes). With court-mandated and court-annexed mediation exploding across the country, a conservative inference is that thousands of other cases are being

extraordinarily rare.² Several factors likely contribute to the historical lack of litigation against mediators. Many parties are happy with mediators' services, making lawsuits irrelevant.³ In some practice contexts, mediators enjoy qualified or quasi-judicial immunity from lawsuits.⁴ Confidentiality protections and privileges often prevent public and, sometimes, even private examination of mediators' behaviors.⁵ Mediators and former mediation parties may also be

mediated. *See, e.g.*, ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (1997); ELIZABETH S. PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 6, 29-56 (1996). Even if these were the only sources of mediation services, and even if we assume that all mediations involve only two parties and that many mediations involve repeat-players, the number of people participating in mediations annually would still climb into the hundreds of thousands.

2. In a separate article, I detailed exhaustive empirical research regarding lawsuits against mediators, concluding that the numbers of such complaints remain miniscule, despite the exploding use of mediation. *See* Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147 (2003). In total, only one reported case describes a verdict against a mediator for improper mediation conduct, and that verdict was overturned on appeal. *See* *Lange v. Marshall*, 622 S.W.2d 237 (Mo. Ct. App. 1981) (finding insufficient proof of proximate causation and overturning a jury verdict against mediator). A further examination of secondary sources, including journals, newsletters, and on-line resources yielded no other cases. Even malpractice insurers report only a handful of claims against mediators annually. Telephone and E-mail Interviews by Jeffrey Johnson and Tenielle Fordyce-Ruff with Betsy Thomas, Broker, Complete Equity Markets (May 22, May 30, and July 8, 2002). *See also* KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 219 (1993).

3. *See, e.g.*, STATE JUSTICE INSTITUTE, PARTICIPANT SATISFACTION SURVEY OF GEORGIA'S COURT-CONNECTED ADR PROGRAMS 11 (December 2000) (ninety percent of participants reported feeling that their mediation process was fair), at <http://www.state.ga.us/gadr/pdfs/finalsji.pdf>; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *An Evaluation of the Equal Employment Opportunity Commission Mediation Program* (September 20, 2000), <http://www.eeoc.gov/mediate/report/index.html>. While the statistics regarding participant assessment of mediation are extraordinarily favorable, too many mediators do too many different things in too many different contexts for satisfaction to be universal.

4. *See, e.g.*, FLA. STAT. ANN. § 44.107 (2002) (extending to mediators "judicial immunity in the same manner and to the same extent as a judge"); WYO. STAT. ANN. § 11-41-105(d) (2001) ("Mediators . . . are immune from civil liability for any good faith act or omission within the scope of the performance of their . . . duties."); *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994) (extending quasi-judicial immunity to case evaluators and mediators); Cassandra Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629 (1997). For an in-depth analysis of mediator liability in various states, see CENTER FOR DISPUTE SETTLEMENT & INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS § 14.0 (1998), <http://www.caadrs.org/studies/nationstd.htm> (last visited Sept. 20, 2002).

5. Confidentiality shields generally protect mediation participants from disclosures of mediation communication to those who were not a participant in the mediation. *See, e.g.*, UNIFORM MEDIATION ACT §§ 3-6 (1991) (governing mediation

inclined to settle post-mediation disputes out of court. Perhaps most significantly, the legal requirements of likely causes of action present considerable obstacles to any plaintiff seeking to recover from a former mediator.

Despite the historical rarity of suits against mediators, many within the mediation community are demonstrating concern about the prospect of mediators being sued. An increasing number of jurisdictions and programs require mediators to carry liability insurance.⁶ A recent journal article described “a gathering storm” of liability.⁷ My own anecdotal experience indicates that the percentage of training time mediators spend asking about the prospect of liability has increased over the past decade.⁸ While mediators have virtually no case studies of behavior leading to litigation, fear of post-mediation legal actions appears to be growing.

This article outlines specific circumstances that could give rise to legal complaints against mediators for their mediation-related conduct. Specifically, the article describes ten scenarios in which a mediator may be exposed to liability. The ten are not organized as a hierarchical “top ten” list; a scenario’s placement within this list is not intended to signal anything about its likelihood relative to any other scenario on the list. Insufficient empirical experience with post-mediation lawsuits makes definitive probabilistic assessments impossible. Instead, the ten scenarios are organized into a sequence that illustrates several broad categories of mediator behavior that could give rise to liability.

For practicing mediators, the good news stemming from an examination of this list is that most of the actions are quite easily

privileges). One consequence of confidentiality is that outsiders seeking to develop a sense of customary mediation practice are shielded from relevant information. To the extent that this makes it more difficult for a dissatisfied plaintiff to demonstrate a breach of customary practice, professional negligence claims against mediators are more difficult. For more on professional negligence in the context of mediation, see *infra* § 4 and the section entitled *Honorable Mention: Mediate Poorly*.

6. See, e.g., Cuyahoga County, Ohio, Domestic Relations Rule 32(E)(4) (1995), at <http://www.cuyahoga.oh.us/Domestic/courtrules.htm> (requiring mediators to have liability insurance); *Gotcha Covered: Your Professional Liability Insurance Coverage*, AAM NEWSLETTER (The Association of Attorney-Mediators, Dallas, Tex.), Feb. 2001, available at <http://www.attorney-mediators.org/news200102.html> (setting minimum liability insurance policy limits); W. Va. Sup. Ct. Requirements for Court-Approved Family Court Mediators, at <http://www.state.wv.us/wvsca/familyct/cover.htm> (last visited Sept. 19, 2002).

7. David I. Bristow & Jesmond Parke, *The Gathering Storm of Mediator & Arbitrator Liability*, 55 DISP. RESOL. J. 14 (2000).

8. This observation holds true both for introductory mediation trainings and in advanced workshops for experienced mediators.

within the mediator's control. Diligence and precision regarding initial disclosures and contractual undertakings, for example, will prevent many circumstances that might give rise to subsequent litigation. However, a mediator cannot so easily avoid all forms of exposure to post-mediation complaints. In particular, this article highlights cautionary notes related to those aspects of the practice of mediation that intersect with the practice of law. Nevertheless, many mediators will reasonably and accurately review this list of behaviors and derive some confidence that they can well-manage their liability exposure.

Perhaps surprisingly, the initial list of ten behaviors omits almost all mention of the multitude of subjective judgments a mediator makes during a mediation or of the specific services a mediator provides. In many respects, these judgments and services form the heart of mediation. Activities such as setting agendas, facilitating communication, demonstrating empathy, engaging in creative problem-solving, encouraging realistic assessments of various courses of action, and exploring parties' perceptions, emotions, and interests, all form a significant part of most mediators' conceptions of their role. From the narrow perspective of liability-creation,⁹ however, the skill with which a mediator conducts these activities is relatively insignificant in most circumstances. While other professionals and practitioners currently exercise discretion and judgment under the threatening shadow of malpractice or professional negligence, mediators can operate largely without similar concerns. This article concludes with a discussion of the applicability of malpractice or professional negligence standards to mediator conduct. For better or worse, negligence is unlikely to serve as a significant basis for mediator liability.

Mediators confronted with complaints regarding their mediation services face sanctions from four basic sources. First, some mediator misconduct may create personal, civil liability under which the mediator would owe compensation to the complaining party for injuries caused by mediator misconduct. Most of the examples outlined in

9. Many motives beyond the simple avoidance of liability motivate mediators' behaviors. A mediator may adopt or shun a practice because of its impact on the parties, or on the mediator's reputation, or on his or her vision of ethics. A mediator's skill-set and training may demand or preclude certain behaviors. I do not intend to discount the importance, indeed prominence, of these factors in mediators' decision-making processes. This article focuses on the specific question of behaviors carrying the potential for post-mediation legal action by one or more of the parties.

this article create at least a risk of private civil lawsuits alleging either contractual or tort-based liability. Second, certain mediator misconduct may constitute criminal behavior, subjecting the mediator to sanctions ranging from fines to imprisonment. Only a few of the behaviors listed below rise even to the level of criminal misdemeanors.

Third, mediators operating within formal referral programs risk exposure to the complaint mechanisms of the programs in which they serve. Not all mediators operate within the structure of a formal program. However, mediators who operate within referral structures such as court-annexed programs or community programs are almost always subject to a set of standards of conduct. In many circumstances, mediators operating in affiliation with a court-sponsored or court-annexed mediation program do not face civil liability because they will qualify for either quasi-judicial or qualified immunity.¹⁰ A mediator who fails to uphold the standards of most referral programs risks sanctions that could range from reprimands to disqualification from future service in the program to the imposition of the costs of the proceeding in which the misconduct took place.¹¹

Fourth, many mediators maintain membership in voluntary associations, most of which require their members to uphold certain principles or standards of conduct.¹² A party complaining of mediator misconduct can seek sanctions within the voluntary association by demonstrating a violation of those standards. Many voluntary organizations have developed complaint or grievance procedures. A mediator who violates the terms of an organization's standards of conduct risks sanctions ranging from required apologies and additional training to suspension or revocation of membership.¹³ Some voluntary associations may even publish the names of mediators

10. See *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994) (extending quasi-judicial immunity to case evaluators and mediators); FLA. STAT. ch. 44.107 (2001) (extending to mediators "judicial immunity in the same manner and to the same extent as a judge"). See also Joseph, *supra* note 4; Moffitt, *supra* note 2, at 200-206 (criticizing *Wagshal*).

11. See, e.g., Florida Rules for Certified and Court-Appointed Mediators, FLA. STAT. ANN. § 10.830 (2002); California Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases Rule 1622 (2002).

12. See, e.g., ABA/AAA/SPIDR MODEL STANDARDS OF CONDUCT FOR MEDIATORS (American Bar Ass'n et al. 1994) [hereinafter MODEL STANDARDS]; MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (Academy of Family Mediators 1998); STANDARDS OF CONDUCT FOR ADA MEDIATION (Key Bridge Foundation 2000).

13. See, e.g., THE ASSOCIATION OF ATTORNEY-MEDIATORS, GRIEVANCE PROCEDURE, available at <http://www.attorney-mediators.org/grievance.htm>; FAMILY MEDIATION CANADA, PROCESSES FOR DEALING WITH COMPLAINTS AGAINST FMC MEMBERS at F(1) (May 2002), available at <http://www.fmc.ca/complaintprocesshtml.htm> [hereinafter Family Mediation Canada].

found to have engaged in improper behavior.¹⁴ In most circumstances, violations of voluntary association standards of conduct would not directly create the basis for legal action.¹⁵ If, however, the mediator's contract made reference to membership in the voluntary association, then the terms of the association's standards of conduct may be implied into the agreement to mediate, possibly creating a basis for legal action.

Technically, perhaps, the term "getting sued" applies only to sanctions creating personal civil liability through a contract or tort-based claim. Nevertheless, actions within each of these four categories may be significant to a mediator seeking to avoid sanction for misconduct.

I. FAIL TO DISCLOSE A CONFLICT OF INTEREST

Melissa Mediator is a member of a small consulting firm specializing in corporate dispute resolution. One of the firm's clients is a large, multi-national conglomerate. Unlike most of her colleagues, Melissa has never done work for the conglomerate. A dispute arises between one of the subsidiaries of the conglomerate and a local business. Melissa agrees to mediate the dispute and discloses nothing about the relationship between the conglomerate and her firm.

A mediator who holds an interest in opposition to one or more of the parties, and who fails to disclose that interest to the parties, opens the door to the prospect of legal action. Most articulations of mediation norms place great importance on the principle of impartiality or neutrality.¹⁶ Conceptions of impartiality tend to ask two separate questions: "Did the mediator refrain from taking biased

14. See, e.g., Family Mediation Canada, *supra* note 13, at F(1)(g). While potentially disturbing to some mediation practitioners, public mechanisms such as this are fundamental to creating a more functional mediator reputational market.

15. Violations of ethical provisions rarely create independent causes of action, even when the provisions are governmentally endorsed. A private organization's codes, therefore, are likely only to create a cause of action under contract (as implied terms of the contract) or under tort (as evidence of a failure to exercise reasonable care).

16. The principle of impartiality or neutrality holds considerable appeal to many within the mediation community. See, e.g., *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 53-56 (9th Cir. 1980) (upholding exclusion of mediator testimony because "the very appearance of impartiality is essential to the effectiveness of labor mediation"). This principle is not, however, absolute or universally embraced. For an interesting discussion of considerations surrounding impartiality and mediation, see the UNIFORM MEDIATION ACT § 9(g) cmt. (2001). In many contexts, impartiality is important, if not critical, to a mediator's success. Unless one adopts a definition of mediation so narrow as to exclude the work of ombudspersons or diplomats, however, the principle

actions?" and, "Did the mediator hold any biased incentives?" As to the first, many articulations of mediator ethics demand that the mediator refrain from acting in a way that favors one party over the other.¹⁷ These prohibitions recognize that mediators, as human beings, may develop opinions or be persuaded by information they learn during the course of the mediation. Rather than trying to demand that mediators disengage their hearts and minds, these prohibitions demand that the mediator not take actions that openly demonstrate favoritism.¹⁸ Regarding the second aspect of impartiality, many restrictions seek to protect against situations in which a mediator enters the mediation with undisclosed, pre-existing incentives in opposition to one or more of the parties.¹⁹ Conflicts of interest do not

of impartiality cannot be held as absolute. Some within the mediation community draw a distinction between the terms "neutrality," "impartiality," and "evenhandedness." See, e.g., Leda M. Cooks & Claudia L. Hale, *The Construction of Ethics in Mediation*, 12 *MEDIATION Q.* 55, 62-64 (1994). Because I remain unpersuaded that the concepts can be clearly delineated in practice, my largely interchangeable use of the terms conflicts with some popular distinctions. I choose "impartiality" for this section because it is slightly more frequently used in describing mediators.

17. See, e.g., MODEL STANDARDS, *supra* note 12, at II ("A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties."); FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.330(a) (2000) ("A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual."). Certain aspects of mediator ethics on the topic of neutrality or impartiality parallel those constructed for judges. Certain portions of judicial codes of conduct target behaviors demonstrating bias. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(5) (1990) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice.").

18. Prohibitions against mediators taking actions that favor one party over the other raise considerable questions. Virtually any mediator action will affect the dynamic between the parties. Even in cases when both parties are made better off by the change in bargaining dynamic (for example, when communication is improved, perceptions are clarified, or an agenda is developed), only rarely would both parties be *equally* better off because of the change. Surely the prohibitions against taking actions favoring one side do not intend to discourage mediators from making such interventions. Yet, if phrased as absolute restrictions, ethical standards such as these risk encouraging mediators either to deny disingenuously the existence of imperfection or to refrain from otherwise helpful behavior. For more on the unfortunate impacts of ethical restrictions framed in absolute terms, see Jamie Henikoff & Michael Moffitt, *Reframing the Model Standards of Conduct for Mediators*, 2 *HARV. NEGOT. L. REV.* 87 (1997).

19. See, e.g., UNIFORM MEDIATION ACT § 9 (Mediator's Disclosure of Conflicts of Interest); MODEL STANDARDS, *supra* note 12, at III (conflicts of interest). These provisions largely parallel the judiciary's treatment of the question of conflicts of interests. Codes of judicial ethics focus on uncovering any personal relationship or direct, financial stake the judge holds regarding the dispute in question. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (1990).

categorically bar a mediator from serving. Instead, in most cases,²⁰ if a mediator makes a full²¹ disclosure of the conflicts and the parties consent to his or her service despite these conflicts, no problems arise. A mediator who hides the existence of a conflict of interest from the parties, however, risks exposure to subsequent legal action in a variety of ways.²²

Virtually any mediator operating within a court-annexed program, referral program, or voluntary association is subject to ethical codes or standards of conduct that demand the disclosure of conflicts of interest. Some programs adopt wholesale the restrictions applied to federal judges and magistrates regarding disqualification.²³ These

20. In some cases however, a mediator may have no option to remain in a mediation. See MODEL STANDARDS, *supra* note 12, at II and III. Similarly, in some circumstances, judges must recuse themselves, regardless of the preferences of the parties. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (1990).

21. Disclosures for mediators who are not sole practitioners become more complicated. The imputation of conflicts across firms or organizations could significantly broaden the scope of conflict situations. In the hypothetical at the outset of this section, Melissa is a member of a consulting firm. While she holds no direct history with the disputant in question, one might reasonably wonder whether, as a member of a firm that does business with one of the parties, Melissa holds a financial interest of some sort in the outcome of the mediation. If one of her business partners who had previous direct experience with the client were asked to mediate, most would argue that disclosure would be required under all formulations of conflicts of interest. Not all mediation ethics codes speak specifically, however, to the issue of imputation of conflicts of interests across firms. For example, the ABA Model Standards of Practice for Family and Divorce Mediation omits any specific mention of imputation of conflicts of interest, although its catch-all provisions may intend to include such circumstances. See MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION Standard IV (2000) [hereinafter FAMILY MEDIATION]. Even if Melissa were a member of a law firm, rather than a consulting firm, the obligations are uncertain, despite the relatively robust jurisprudence surrounding most aspects of law firm conflict rules. The CPR-Georgetown-proposed Model Rule included provisions that specifically addressed the question of imputation of conflicts of interest across firms in the context of mediation. See PROPOSED MODEL RULE FOR THE LAWYER AS THIRD PARTY NEUTRAL 4.5.4(b) (CPR-Georgetown Comm'n on Standards and Ethics in ADR, Proposed Draft 1999). The 2002 Amendments to the Model Rules adopt, instead, Model Rule 1.12 as the answer to all questions of conflicts of interest in the context of firm practice. See MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. 4 (2002).

22. The analogy to judicial treatment of the question of conflicts of interests extends only so far. A judge who improperly fails to disclose a conflict of interest may create grounds for an appeal, and perhaps even reprimand. However, judicial immunity will almost certainly shield the judge from any personal liability for the misconduct. See, e.g., *Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985) (judicial immunity attaches even when the judge's "motives" are improper); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (judicial immunity attaches "even when the judge is accused of acting maliciously and corruptly").

23. See, e.g., MODEL LOCAL ADR RULE § (e) (Standing Committee on Alternative Dispute Resolution Programs of the Ninth Circuit 1999) (incorporating 28 U.S.C. § 455).

provisions demand recusal in cases in which the neutral holds a “personal bias or prejudice,” a personal history of involvement, a financial stake in the outcome, or a relationship with one or more of the parties.²⁴ Other rosters and referral programs contain independent prohibitions against conflicts of interest.²⁵ Voluntary mediation associations’ statements regarding ethical behavior also generally demand disclosure of conflicts of interest in advance of a mediation. For example, the Model Standards of Mediator Conduct, adopted jointly by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution (now called the Association for Conflict Resolution) require a mediator to disclose “all actual and potential” conflicts of interest.²⁶ A mediator’s failure to uphold referral program standards or voluntary associational standards of behavior regarding conflicts of interest exposes the mediator to potentially serious complaints by the parties.

Beyond the prospect of programmatic or organizational sanctions, a mediator faces the possibility of civil liability if he or she fails to disclose a conflict of interest. In some circumstances, failure to disclose a potential conflict of interest could amount to a breach of an express contractual term. Using a variety of language, many mediation contracts contain provisions assuring the parties of the mediator’s freedom from pre-existing bias with regard to the parties. Mediation contracts commonly contain references to the mediator as “neutral,” “impartial,” “unbiased,” “fair,” or “even-handed.”²⁷ Each of

24. See 28 U.S.C. § 455(a)-(c) (2002).

25. See, e.g., UTAH RULES OF COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION Rule 104, Canon II (2002).

26. MODEL STANDARDS, *supra* note 12, at III:

The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

27. In addition to reviewing standardized contracts available from prominent mediation organizations, I have recently reviewed several dozen mediation contracts drawn from practitioners around the country. The examples cited in this article represent only a sample of the contracts I considered. See, e.g., Superior Court for the District of Columbia, ADR and Settlement Forms 716 (Dec. 2, 1999) (“unbiased, neutral and independent”); JOHN R. VAN WINKLE, *MEDIATION: A PATH BACK FOR THE LOST LAWYER* 126 (Jack C. Hanna & Gina Viola Brown eds., 2001) (“neutral”); BENNETT G. PICKER, *MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES* 134 (Pike & Fischer, Inc. 1998) (describing the need to protect the mediator’s “independence or impartiality”); Dispute Resolution Specialists, Agreement to Mediate (“impartial”); Employment Law Mediation Services, Confidential Agreement to Mediate Employment Related Dispute 2 (“impartial and neutral”); Mark Kantor, Mediator

these terms is subject to considerable variation in interpretation. Nevertheless, a mediator who stands to benefit financially from terms of the agreement that favor one side over the other would be hard-pressed to defend his or her status as unbiased or impartial.

Even in contracts lacking such express promises, impartiality may be implied as a term of the mediation contract. Professor Amanda Esquibel has argued that, "even if it is not an explicit term of any such contract, neutrality and impartiality are such a fundamental aspect of what [mediation] parties seek that they should be considered a part of the contract. It is akin to courts implying terms of good faith and fair dealing in contracts."²⁸ No court has yet implied impartiality into a mediation contract, but the legal foundations of implied impartiality are sufficient to make such a ruling a genuine possibility. Mediators, therefore, may not necessarily avoid all potential legal consequences of conflicting interests merely by remaining contractually silent on the question.

A mediator faces significant liability for failure to disclose a conflict of interest only if the mediator's bias led him or her to take actions that resulted in injury to a mediation party. A mediator who held a conflict of interest but who took no actions demonstrating bias could, at most, be liable to the parties for the transaction expenses—the mediator's fees, for example. A party might be able to claim that he or she would not have retained the biased mediator had the conflict been disclosed. When a mediator's conflict of interest arguably manifested itself in biased actions, however, a party would likely seek to establish causation of a broader injury.²⁹ Depending on the

Agreement 1 ("The mediator shall be neutral and impartial"); Sorensen-Jolink, Trubo, Williams, McIlhenny & Williams LLP, Agreement for Mediation 1 ("neutral"); David E. Hollands, Standard Terms of Engagement as Mediator, ¶ 2 ("even-handed") at <http://homepages.ihug.co.nz/~deh/med-terms.htm> (last visited May 10, 2002); Peter Pollaczek, General Mediation Disclosure and Agreement 1 ("impartial and objective").

28. Amanda K. Esquibel, *The Case of the Conflicted Mediator*, 31 RUTGERS L.J. 131, 168 (1999).

29. The securities law distinction between "transaction causation" and "loss causation" in fraud contexts provides a potentially useful analogy. "Transaction causation," sometimes also called "causation in fact," asks whether the transaction (i.e. stock purchase) would have occurred in the absence of the fraudulent statement. "Loss causation," instead, asks whether the loss would have been sustained if the statement had not been fraudulent. Assume that a corporate officer fraudulently tells a shareholder, "[w]e're in great shape because we have a new partnership with a distributor overseas." The shareholder purchases more shares based on the officer's statement, but the price of the shares plummets the next day when the company's primary production facility burns to the ground. The shareholder would establish transaction causation by demonstrating that he or she would not have purchased additional stock if the officer had not made the fraudulent statement. To establish loss

circumstances, this would involve demonstrating either (1) that the mediator's conflict prevented settlement in a mediation which otherwise would have resulted in an agreement, or (2) that the mediator's conflict caused the mediator to facilitate a settlement whose terms were distributionally less favorable to the complaining party than the terms a conflict-free mediator would have facilitated. In the first circumstance, the party alleging breach of contract would essentially assert, "I would not have chosen this mediator had I known about the conflict of interest. But for the mediator's conflict of interest, this case would have settled in mediation, and because this case did not settle in mediation, I suffered injury." In the second circumstance, the party alleging the breach of contract would assert, "I would not have chosen this mediator had I known about the conflict of interest. Because of the conflict of interest, the mediator caused the case to settle on terms that were less favorable to me than the terms would have been under the facilitation of an unbiased mediator." Proving each of the elements in either of these circumstances poses very considerable challenges to the prospective plaintiff. In many regards, the analyses underlying any such claim would resemble the difficult-but-not-impossible demands of adjudicating the "case within a case" in instances of legal malpractice.³⁰ Therefore, civil liability for failure to disclose conflicts of interest is likely to exist only in particularly egregious or unfortunate circumstances.

causation, however, the shareholder would have to demonstrate that the loss (the reduction in stock price) would not have occurred if the fraudulent statement had been true. In this hypothetical, because the existence of an improved distribution network would be unlikely to prevent the fire (or the adverse market reaction to the fire), the shareholder would be unable to establish loss causation. See *CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS* 396-7 (5th ed. 2000) (describing the distinction between loss causation and transaction causation); *Litton Industries Inc. v. Lehman Brothers Kuhn Loeb Inc.*, 967 F.2d 742 (2d. Cir. 1992). This hypothetical is based in part on a scenario described in Note, *Civil Liability Under Section 10b and Rule 10b-5: A Suggestion for Replacing the Doctrine of Privity*, 74 *Yale L.J.* 658, 658-60 (1965). I am indebted to Professor Judd Sneider for providing me with guidance on this analogy. For more on fraudulent inducement, see *infra* § 8 ("Advertise falsely").

30. The concept of the "case within a case" in the context of legal malpractice speaks to issues of causation and damages. Even assuming that a lawyer has breached his or her duty of care toward the plaintiff, the plaintiff must still demonstrate that the breach caused the injury of which the plaintiff complains. To do so, the plaintiff must essentially litigate the case in which the lawyer allegedly committed malpractice in order to demonstrate that the plaintiff would have prevailed in the underlying action but for the lawyer's malpractice. See, e.g., *St. Paul Fire & Marine Ins. v. Ellis & Ellis*, 262 F.3d 53, 65-66 (1st Cir. 2001); *Dixon Ticonderoga v. Estate of O'Connor*, 248 F.3d 151, 175 n.15 (3rd Cir. 2001); *Brown v. Slenker*, 220 F.3d 411, 422-24 (5th Cir. 2000). For a critique of this aspect of legal malpractice law, see Joseph Koffler, *Legal Malpractice Damages In A Trial Within A Trial—A Critical Analysis Of Unique Concepts: Areas Of Unconscionability*, 73 *MARQ. L. REV.* 40 (1989).

A mediator's obligations regarding conflicts of interest are not extinguished by initial disclosures. A mediator's initial disclosures permit parties to decide for themselves whether to demand the withdrawal of the mediator or to consent to the participation of the mediator despite the existence of a conflict of interest.³¹ The same reasons underlying the requirement of initial disclosures create a running duty for mediators to disclose any conflicts they discover during the mediation.³² This duty also precludes a mediator from acquiring new sources of conflict mid-mediation.³³ For example, a mediator should not purchase stock in the defendant corporation during the mediation, and certainly may not do so without disclosing his or her intentions or actions.

Perhaps even more significantly, a mediator's duty to avoid acquiring interests in conflict with parties may extend beyond the life of the mediation. For example, in *Poly Software International v. Su*,³⁴ a lawyer-mediator conducted a mediation involving a dispute between a corporation and two former employees. Following the mediation, a dispute arose between the former employees, one of whom sought to retain the mediator as legal counsel. Citing Utah's Rules of Professional Conduct, the court disqualified the mediator from representing one former mediation party against another former mediation party in the new lawsuit. The court drew on language in Model Rule 1.9 in concluding that the ban against subsequent adverse representations in a "substantially related matter" applied to this case because of the "confidential relationship" between mediators and mediation parties.³⁵ Many voluntary associational standards of conduct have codified this result with provisions that require mediators to guard against subsequent professional relationships that may give rise to

31. See, e.g., MODEL STANDARDS, *supra* note 12, at III ("If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation.").

32. See, e.g., FAMILY MEDIATION, *supra* note 21, at IV(E) ("All disclosures should be made as soon as practical after the mediator becomes aware of the bias or potential conflict of interest. The duty to disclose is a continuing duty.").

33. See, e.g., FLA. STAT. ANN. § 10.340(d) (2002) ("A mediator shall not create a conflict of interest during the mediation.").

34. 880 F. Supp. 1487 (D. Utah 1995).

35. *Id.* at 1493-94. For a detailed treatment of the decision in *Poly Software International*, see Michael Moffitt, *Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross-Profession Practice*, 1 HARV. NEGOT. L. REV. 203 (1996).

the appearance of partiality.³⁶ No theory bars, in perpetuity, a mediator from acquiring *any* interests in conflict with a former mediation party. Nevertheless, a mediator's obligation to avoid conflicts of interests does not extinguish at the moment when a mediation concludes.

II. BREACH A SPECIFIC CONTRACTUAL PROMISE REGARDING STRUCTURE OR OUTCOME

Marijke Mediator has the disputants sign her standard Agreement to Mediate. The agreement says, "In addition to talking together as a group, each party will have a chance to meet with the mediator privately." Marijke's standard agreement also states, "At the conclusion of the mediation, the mediator will assist the parties in writing up the terms of an agreement." The parties sign the agreement, and Marijke conducts the mediation. After several hours of joint session discussions, Marijke concludes that the mediation is unlikely to produce a useful result and terminates the mediation.

A mediator's obligations to the parties stem from a range of sources, including the mediator's contract with the parties. Most mediator contracts include only vague statements about the mediator's services, making it extraordinarily difficult to maintain a contract-based claim.³⁷ Some mediators, however, make more particular contractual representations about the nature of their services or even about the results the parties will obtain. A mediator making such promises faces the prospect of a contract-based action if he or she fails to uphold the contractual promises.

36. See, e.g., MODEL STANDARDS, *supra* note 12, at III ("A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.").

37. See, e.g., VAN WINKLE, *supra* note 27, at 126 ("assists the parties"); UNITED STATES ARBITRATION & MEDIATION, MEDIATION 1 ("organizing the discussions"); Margaret Shaw, Mediation Agreement 1 ("The mediation process may be conducted by the mediator in whatever manner will most expeditiously permit full discussion and resolution of the issues."); Tennessee Supreme Court, Agreement to Mediate (on file with Gregory Davis) ("helping the parties to communicate effectively, gather and analyze information, define issues, generate alternatives, explore consequences and reach agreements acceptable to both parties"); Employment Law Mediation Services, *supra* note 27, at 2 ("assisting the parties in their efforts toward settlement").

One relatively common set of contractual promises that create exposure to liability involves pre-commitments regarding the mediation structure. Many sophisticated views of mediation shun a lock-step, non-contextual, sequential view of mediation.³⁸ Nevertheless, some contractual descriptions of mediation can be construed as a commitment to undertake each of the described steps, regardless of the dispute circumstances. For example, in the hypothetical contract described at the outset of this section, Marijke promises to meet with each of the parties separately. While a typical mediation contract would also contain a clause stating that continued participation in mediation is voluntary for all participants (including the mediator), a party might complain that Marijke failed to implement a specifically-described step in the process and in so doing breached the mediation contract. Damages in such a claim would be difficult to establish, given the parties' voluntary participation in the mediation and the extraordinary degree of speculation required to determine what would have occurred if the mediator *had* undertaken the step in question. However, a mediator who describes a mediation process with specificity³⁹ and then fails to implement that process risks civil liability for breach of contract.

A second potential risk in the structure of some mediation agreements comes from express, or even implied, promises of particular outcomes. Again in the hypothetical involving Marijke, the mediation agreement strongly implies that the mediation *will* produce an agreement. Not all mediations produce agreements.⁴⁰ In some

38. See, e.g., CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 56-77 (2d ed. 1996) (distinguishing between "noncontingent moves," adopted in virtually all mediation contexts, and "contingent activities," adopted depending on a variety of factors); DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 39-40 (1996) (encouraging mediators both to plan and to be contextually adaptive); JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 107-09 (2001) (describing mediation in terms of stages, but acknowledging "that when mediating a 'real' case, the phases will often meld together"); NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* 7-8 (1987) (describing variations among mediators in different disputes).

39. The discussion above assumes that the contract's specificity is in regard to particular "steps" in the mediation process. An interesting question to consider is the effect of mediators' contractual commitments regarding the adoption or avoidance of particular mediation "approaches" or "models." For example, if Marijke had advertised herself as a "facilitative" mediator, certain otherwise un-actionable mediator behaviors may expose her to liability.

40. Settlement rates in mediation vary considerably, depending on the context. See ALAN SCOTT RAU ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 13-15 (3d ed. 2002) (describing studies with litigation rates ranging from 3% to 25%, depending on the study and the subject matter of the dispute).

circumstances, *not* producing a settlement is the best outcome for all involved. As a general matter, a mediator is at no liability risk merely because he or she presides over a mediation that produces no settlement.⁴¹ If, however, a mediator promises a particular result, he or she risks civil liability if the mediation fails to produce that outcome.⁴² Furthermore, many program and association ethical standards explicitly prohibit mediators from making settlement guarantees.⁴³ A mediator who contractually promises settlement, therefore, risks both civil liability and programmatic sanction.

Similarly, liability may result from contractual guarantees about the *nature* of any settlement. Under most constructions of mediator ethics, a mediator has few or no obligations regarding the substance of a mediated agreement. Instead, most constructions of mediator ethics examine the mediator's obligations to assure the propriety of the process leading to the mediation outcome.⁴⁴ In simplistic terms, a mediator is responsible only to assure that the parties' participation in the mediation is voluntary, and that any outcome is the product of an autonomous and informed decision. However, a mediator who contractually undertakes to assure the equity or efficiency of mediated settlement terms disrupts that baseline assumption in a way that may create subsequent liability. A mediator who promises to help the parties to reach, for example, a "fair outcome," risks a subsequent allegation that he or she failed to assure that a particular outcome was substantively and distributively fair.

III. ENGAGE IN THE PRACTICE OF LAW

After considerable efforts to facilitate an agreement, and at the request of the disputants, Marjorie Mediator examines the evidence each side has compiled and develops her best assessment of a court's likely disposition of the case. The parties then quickly agree to basic settlement terms. Again at the parties' request,

41. Much as a lawyer's agreement to represent a party is not considered a warrant that the party will win or obtain a favorable outcome in the matter, a mediator's agreement to mediate does not imply a warrant of settlement. *Cf.* *Simko v. Blake*, 532 N.W.2d 842, 846 (Mich. 1995) (a "lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect, and for that purpose").

42. Even if the contract includes a warrant, the voluntary nature of mediation participation and mediation settlements makes the relevant causation issues more complicated.

43. *See, e.g.,* MODEL STANDARDS, *supra* note 12, at VII.

44. *See, e.g.,* Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981). *But see* Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981).

Marjorie drafts a formal contract to capture the terms of the parties' agreement.

Intentionally or not, a mediator might engage in conduct specially reserved for members of the legal profession. No state has established an unambiguous, comprehensive definition of what constitutes "the practice of law." Most definitions hinge upon the largely elusive distinction between "providing legal information" and "providing legal advice," with only the latter category requiring a state license.⁴⁵ Other definitions consider whether the service provider exercises legal judgment,⁴⁶ occupies a representational position,⁴⁷ applies the law to specific facts,⁴⁸ or receives compensation for the services in question.⁴⁹ Even if a mediator does not intend to hold

45. See David A. Hoffman and Natasha A. Affolder, *Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution?*, DISP. RESOL. MAG., Winter 2000, at 39 (describing as unworkable standards relying on the distinction between "legal information" and "legal advice"). Interestingly, at least some within the mediation community have embraced this distinction in describing the appropriate boundaries of mediators' behaviors. See, e.g., FAMILY MEDIATION, *supra* note 21, at VI (requiring mediators to assure that "participants make decisions based on sufficient information and knowledge," but prohibiting mediators from providing "legal advice").

46. See, e.g., Or. State Bar v. Smith, 942 P.2d 793, 800 (Or. Ct. App. 1997) ("[T]he 'practice of law' means the exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice or other assistance.").

47. See Maureen E. Laffin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 501-02 (2000).

48. See John W. Cooley, *Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR*, 55 DISP. RESOL. J. 72, 75 (2000).

49. Compare ARK. CODE ANN. § 16-22-501 (1999) (making the practice of law an offense if it is undertaken "with intent to obtain a direct economic benefit") with *Magaha v. Holmes*, 886 S.W.2d 447, 449 n.1 (Tex. App. 1994) (ruling that "the issue of compensation" is not a factor in the determination of what constituted the practice of law). The Arizona State Bar Association provides a somewhat lengthier treatment of the question of what constitutes the practice of law, incorporating many of the criteria listed above.

One who acts in a representative capacity in protecting, enforcing or defending the legal rights and duties of another is engaged in the practice of law. It also includes counseling or advising another in connection with their legal rights and duties. One is deemed to be practicing law whenever he furnishes to another advice or services which require the exercise of legal judgment. The practice of law creates a professional relationship of confidence and trust based upon the giving of legal advice.

STATE BAR OF ARIZ., REPORT OF THE UNAUTHORIZED PRACTICE OF LAW COMMITTEE 4 (1991), quoted in Ryan J. Talamante, *We Can't All Be Lawyers . . . Or Can We? Regulating the Unauthorized Practice of Law in Arizona*, 34 ARIZ. L. REV. 873, 877 n.42 (1992). For a helpful characterization of the various tests applied by states, see Hoffman, *supra* note 45, at 20.

himself or herself out to be a lawyer,⁵⁰ certain conduct may nonetheless constitute the practice of law. The relevant consideration under most state regulations is the mediator's behavior, rather than his or her stated intentions.⁵¹ Many aspects of mediators' practices fall within or near to the boundaries of "the practice of law." In some states, a mediator who predicts the outcome of a disputed legal issue engages in the practice of law.⁵² In others, a mediator who produces successive iterations of a single-text, settlement discussion draft for the parties' consideration is practicing law.⁵³ The practice of law is often defined as including drafting settlement documents whose terms go beyond those specified by the disputants.⁵⁴ A mediator who advances one settlement option as more favorable than another may

50. In seeking to avoid the application of unauthorized practice of law restrictions against mediators, significant portions of the mediation practice community have argued forcefully (and in a somewhat conclusory manner) that "mediation is not the practice of law." See, e.g., SECTION ON DISPUTE RESOLUTION, AMERICAN BAR ASS'N, RESOLUTION ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW (Feb. 2, 2002), available at <http://www.abanet.org/dispute/resolution2002.pdf>. For a thoughtful critique of these efforts at distinguishing mediation from the practice of law, see Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002).

51. See, e.g., *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 214 N.E.2d 771, 774 (1966) ("it is the character of the acts themselves that determines" whether one is engaging in the practice of law).

52. See, e.g., OFFICE OF THE EXECUTIVE SEC'Y, SUPREME COURT OF VA., GUIDELINES OF MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW 13 (1999), available at <http://www.courts.state.va.us/drs/upl> ("apply[ing] legal principles to facts in a manner that . . . in effect predicts a specific resolution of a legal issue" constitutes the practice of law). Professor Nolan-Haley has suggested that mediators' conduct frequently contains evaluative elements, whether explicitly or implicitly. From that observation, she concludes that it is no genuine resolution of the question of the boundaries of the practice of law for a mediator merely to eschew formal evaluation. See Nolan-Haley, *supra* note 50, at 277-80.

53. The practice of preparing a single negotiation text has a long and storied history within mediation practice. See, e.g., HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 205-17, 281-85 (1982) (describing the application of the "single negotiation text" approach); ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 112-16 (Bruce Patton ed., 2d. ed. 1991) (describing the same procedure as the "One-Text Method"). In its draft report, the Association for Conflict Resolution Task Force on the Unauthorized Practice of Law included specific mention of these methods, saying "further work is needed" on the issues they raise. ASSOCIATION FOR CONFLICT RESOLUTION, REPORT OF THE TASK FORCE ON THE UNAUTHORIZED PRACTICE OF LAW, at 29 n.50 (Draft August 2002).

54. See, e.g., ABA SECTION OF DISPUTE RESOLUTION, RESOLUTION ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW (2002) ("The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law.").

also be engaging in the practice of law.⁵⁵ However, as the North Carolina Bar has admitted in their treatment of the topic, “there are no bright lines” in defining the practice of law.⁵⁶

Mediators who engage in the practice of law face a threat of legal action for the unauthorized practice of law (“UPL”) if they are not members of the Bar.⁵⁷ Every state restricts the practice of law to those licensed by the state. A range of service providers have run afoul of UPL charges, including non-attorneys dealing in real estate, estate planning, bankruptcy, and accounting.⁵⁸ Similarly, a non-attorney mediator who engages in behavior reserved for attorneys may face a UPL action. The growth of mediation has generated increased scrutiny of mediators’ behavior both from within the mediation community and from service providers (such as lawyers) whose practices may be impacted by mediation’s growth.⁵⁹ Furthermore, with the growing significance of so-called multidisciplinary service providers

55. See OFFICE OF THE EXECUTIVE SEC’Y, SUPREME COURT OF VA., GUIDELINES OF MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW (1999) (naming it as the practice of law if a mediator “directs, counsels, urges, or recommends a course of action by a disputant or disputants as a means of resolving a legal issue”), available at <http://www.courts.state.va.us/drs/upl>.

56. NORTH CAROLINA BAR ASSOCIATION DISPUTE RESOLUTION TASKFORCE ON MEDIATION AND THE PRACTICE OF LAW: GUIDELINES FOR THE ETHICAL PRACTICE OF MEDIATION AND TO PREVENT THE UNAUTHORIZED PRACTICE OF LAW (1999), available at <http://www.acca.com/advocacy/mjp/NCopinion.pdf>.

57. I recognize that John Cooley and others have suggested that to inquire whether mediators engage in the practice of law is to frame the problem incorrectly. Cooley suggests instead that “we should be framing the problem in terms of the practice of ADR, rather than in terms of the practice of law or the unauthorized practice of law.” Cooley, *supra* note 48, at 72-73. Cooley’s argument is essentially normative—describing a set of questions he would prefer for the ADR and legal communities to be asking. In this article, at least, I restrict myself largely to describing the current set of considerations a state bar association or court is likely to adopt. I do not intend to signal disagreement with Cooley’s argument. Rather, I describe the fact that it has not been universally embraced.

58. See, e.g., *Cleveland Bar Ass’n v. Slavin*, 62 Ohio Misc. 2d 570 (Ohio Board of Comm. on the Unauth. Practice of Law 1993) (real estate); *Mahoning County Bar Ass’n v. The Sr. Servs. Group*, 642 N.E.2d 102 (Ohio Board of Comm. on the Unauth. Practice of Law 1994) (estate planning); *In re Herren*, 138 B.R. 939 (D. Wyo. 1992) (bankruptcy); *Ky. State Bar Ass’n v. Bailey*, 409 S.W.2d 530 (Ky. 1966) (accounting).

59. Cf. Martha W. Barnett, *Keynote Address*, 52 S.C. L. REV. 453, 455 (2001) (“The proliferation of lawyers, not to mention the ever-increasing number of non-lawyers who want to offer legal services, has created intense competition for clients and fees.”). While Barnett, the President of the ABA, was not directly speaking of mediators, her remarks demonstrate the concern the legal community holds with regard to what is perceived as encroachment on traditional legal practices.

in accounting and business consulting,⁶⁰ the legal community's collective radar has become increasingly focused on the question of UPL.⁶¹ The likelihood of UPL actions against mediators, therefore, may be on the rise.⁶²

The two most prominent UPL cases against mediators illustrate the judicial considerations created by the intersection of mediation and the practice of law. In the first case, *Werle v. Rhode Island Bar Association*,⁶³ a non-lawyer psychologist advertised mediation services that specifically included property division, determining child custody and setting child support amounts.⁶⁴ In the second case, *Virginia v. Steinberg*,⁶⁵ a non-lawyer mediator drafted a document outlining the parties' legal issues, provided a legal analysis of the case, and drafted a separation agreement. In both cases, the court determined that the non-lawyer mediator's conduct constituted the unauthorized practice of law.

60. Multidisciplinary service providers ("MDPs") and their intersection with the practice of law have drawn attention too voluminous to catalogue thoroughly here. For useful overview of the issues raised by MDPs, see John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83 (2000); SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, N.Y. STATE BAR ASS'N, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS (2000), available at <http://www.law.cornell.edu/ethics/mdp.htm>. See also COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES (2000), available at http://www.abanet.org/litigation/issues/mdp/aba_finalreport.pdf.

61. Sheryl Stratton, *ABA Rattles Unauthorized Practice of Law Saber While Debating MDPs*, 86 *TAX NOTES* 1057, 1057 (2000) ("Nonetheless, the perception of most state and local bars looking at the MDP issues is that current professional rules need to be enforced rather than relaxed.").

62. Trends in the enforcement of UPL restrictions vary by jurisdiction, with some increasing enforcement while others decrease it. See, e.g., Nancy Rogers & Craig McEwen, *Mediation and the Unauthorized Practice of Law*, 23 *MEDIATION Q.* 23, 23 (1989); Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 *ALTERNATIVES TO HIGH COSTS LITIG.* 57, 61 (1996).

63. 755 F.2d 195 (1st Cir. 1985).

64. The Rhode Island Bar Association sent the psychologist, Werle, a letter ordering him to cease and desist from this behavior, asserting that it constituted the practice of law. Werle subsequently sued the Rhode Island Bar Association alleging that the UPL Committee's actions violated his First and Fourteenth Amendment rights. His suit failed because the court accorded the defendants a form of immunity.

65. Case No. CL-96-504, (Cir. Ct., Henrico County, Va., Sept. 17, 1996). This case is described in detail in Geetha Ravindra, *When Mediation Becomes the Unauthorized Practice of Law*, 15 *ALTERNATIVES TO HIGH COSTS LITIG.* 94 (1997). See also Nolan-Haley, *supra* note 50, at 271.

UPL sanctions are enforced unevenly across jurisdictions. In most states, a UPL violation is a misdemeanor.⁶⁶ Criminal penalties are rare, however, with most UPL actions resulting only in injunctions against further unauthorized practice.⁶⁷ Alternatively, some jurisdictions make the unauthorized practice of law a matter of contempt of court, on the theory that the judiciary has complete jurisdiction over those who practice law in the state.⁶⁸ Enforcement of UPL prohibitions varies by jurisdiction. The UPL committees of some state bar associations are active, while others are inactive or have even been disbanded.⁶⁹ Where enforcement of UPL restrictions has been left to law enforcement agencies, such as the district attorney, limited prosecutorial resources often mean UPL actions take a back seat to what are perceived to be more significant criminal matters.⁷⁰ Nevertheless, non-lawyer mediators risk potentially serious UPL actions if their conduct falls into an area their states consider the practice of law.

Lawyers who practice law while mediating also face difficult cross-profession ethical considerations. Attorney-mediators operate under simultaneous obligations from both legal ethics and mediator ethics, neither of which purports to cede applicability (much less dominance) in the context of an attorney-mediator whose mediation practices constitute the practice of law. An attorney-mediator engaging in the practice of law during a mediation must simultaneously uphold the standards of the legal profession and those imposed upon mediators.⁷¹ Predictably, these simultaneous restrictions occasionally produce inconsistent demands, creating an ethical quandary for

66. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 11 (1981).

67. See, e.g., *Unauthorized Practice Comm. v. Cortez*, 692 S.W.2d 47 (Tex. 1985).

68. For a brief summary of one state's considerations regarding the use of criminal contempt sanctions against those who violate orders to cease engaging in UPL see Robert B. Van Wyck & Lynda C. Shely, *Unauthorized Practice of Law: Should We Just Give Up?*, ARIZ. ATT'Y, Jan. 1999, at 22, available at <http://www.azbar.org/ArizonaAttorney/Jan99/upl.pdf>.

69. See Rhode, *supra* note 66, at 20 n.59.

70. See RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 636-37 (1995) (suggesting that the most likely targets of UPL actions are "those who falsely and overtly hold themselves out to be lawyers, or who continue to practice after disbarment or suspension.")

71. In its recent amendments to the Model Rules of Professional Conduct, the ABA recognized this possibility. See MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. 2 (2002); Fiona Furlan et al., *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound By Ethical Codes for Lawyers When Acting as Mediators?*, 14 J. AM. ACAD. MATRIM. LAW. 267, 307-08 (1997); FLA RULES FOR CERTIFIED & COURT-APPOINTED

the attorney-mediator.⁷² For example, consider a lawyer-mediator who observes misbehavior by another lawyer in the context of mediation. While legal ethics require the *attorney-mediator* to report the misbehavior,⁷³ mediation ethics require the *attorney-mediator* to maintain confidentiality about mediation conduct.⁷⁴ Potential clashes between attorney-mediators' legal ethical codes and mediation ethical restrictions are real.

Moreover, when a mediator's conduct lapses into the practice of law, specific legal threats arise even for attorney-mediators. For example, under the Virginia Rules of Professional Conduct for lawyers, a lawyer-mediator is prohibited from offering any of the parties "legal advice" on the theory that such a service "is a function of the lawyer who is representing the client."⁷⁵ An attorney-mediator, therefore, whose mediation practice includes "offering legal advice"⁷⁶ may run afoul of legal ethical constraints even though he or she is permitted to render the same services to clients when serving in a representational capacity. While UPL restrictions typically aim to prevent the incompetent rendering of legal services, the Virginia legal ethics restriction demands a different explanation because an attorney-mediator would presumptively be competent to render the legal services in question. Instead, the Virginia prohibitions stem from a concern regarding loyalty, rather than competence. Loyalty is central to both mediation and lawyering. Most visions of mediator ethics hold that a mediator owes a duty of loyalty either to *all* of the parties (even

MEDIATORS R. 10.650 ("Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound.").

72. For examples of the ethical dilemmas posed by the practices of attorney-mediators, see SARAH COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 11:3 (1994); Michael Moffitt, *Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross-Professional Practice*, 1 HARV. NEGOT. L. REV. 203 (1996).

73. See MODEL RULES OF PROF'L CONDUCT R. 8.3 (2002).

74. Many articulations of mediation ethics provide confidentiality exceptions for occurrences such as learning of abuse or the planned commission of a crime. Others provide a blanket exception for disclosures "required by law." See, e.g., ALTERNATIVE DISPUTE RESOLUTION SECTION, TEXAS BAR ASSOCIATION, *ETHICAL GUIDELINES FOR MEDIATORS* Guideline 8 (2001), available at <http://www.texasadr.org/ethicalguidelines.cfm> (last updated Dec. 26, 2001). Lawyers' ethical obligations may or may not constitute legal obligations demanding that the mediation ethical constraint yield. *But see* UNIF. MEDIATION ACT § 6(a)(6) (2001) (providing explicit exception to confidentiality for reporting professional misconduct).

75. VA. R. OF PROF'L CONDUCT § 2.11 cmt. 7 (2000). For an interesting critique of Virginia's restrictions, see Laflin *supra* note 47, at 516-24.

76. Recall the ambiguity regarding the contours of this concept, described *supra* in notes 45-56 and in the accompanying text.

though their interests are likely to be in conflict) or to *none* of the parties individually (owing loyalty instead to a broad conception of “the mediation process”).⁷⁷ An attorney holds a duty of loyalty to an individual client and is forbidden from owing this duty of loyalty simultaneously to others who hold interests in conflict with the first client.⁷⁸ Under the conventional conception of loyal representation within an adversarial framework, a lawyer cannot provide advice to one client to the detriment of another and, therefore, cannot provide legal advice to two parties on opposite sides of a dispute.⁷⁹ In this regard, loyalty concerns, rather than competence concerns, may restrict attorneys from engaging in behaviors that would otherwise meet legal ethical standards. Therefore, while an attorney-mediator does not risk UPL sanctions, engaging in the practice of law may nonetheless run afoul of ethical constraints.

Whether a mediator is licensed to practice law, the intersection of the practices of law and mediation may expose him or her to legal action.⁸⁰ For mediators who are not licensed to practice law, the threat of UPL actions may be growing. Even attorneys—for whom UPL poses no threat—confront the prospect of ethical complaints if they engage in the traditional practice of law while acting as a mediator. In short, any mediator who engages in the practice of law during a mediation risks legal action.

IV. ENGAGE IN THE PRACTICE OF LAW BADLY

Mortimer Mediator facilitates an agreement between disputing former business partners. The agreement includes a voluntary

77. Professor Nolan-Haley treats these two as consistent, arguing that “the mediator is said to represent the integrity of the mediation process and it is in this sense then that the mediator has a special fiduciary relationship with both parties to a dispute.” Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 826 (1999).

78. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

79. For an interesting critique of conventional conceptions of lawyers' roles, see Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & M. L. REV. 5 (1996).

80. Engaging in the practice of law violates the ethical restrictions established by many mediation organizations and referral programs. See, e.g., MODEL STANDARDS, *supra* note 12, at VI; FAMILY MEDIATION, *supra* note 21, at VIII; UTAH RULES OF COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION Rule 104, Canon VIII(b) (2002). Therefore, in addition to the prospect of UPL actions or legal ethical complaints, a mediator who practices law faces whatever disciplinary actions attach to mediators' ethical standards. In most cases, these are not technically legal actions, and I have thus omitted them from this section. They are, nevertheless, significant to many mediators, and their prospect merits at least mention in this context.

dismissal of certain pieces of litigation, a new licensing agreement on the partnership's intellectual property, and a division of the partnership's assets. Based on Mortimer's advice about a "tax smart" way to craft the deal, the parties agree to a novel agreement structure proposed and drafted by Mortimer. Later, a dispute arises over the interpretation of a poorly drafted clause in the agreement, and both parties find themselves stuck with substantial tax burdens that could have been avoided with a more standard agreement.

A mediator who negligently engages in the practice of law faces not only the kinds of complaints described in the section immediately above, but also the prospect of a professional negligence or legal malpractice suit.⁸¹ A legal malpractice action against a mediator has fundamental requirements no different from those of any other negligence case.⁸² A plaintiff in a legal malpractice case must demonstrate that the attorney owed a duty of care, that the attorney breached the duty of care, and that the plaintiff suffered injury proximately caused by the attorney's breach of duty.⁸³ The threat of legal malpractice applies equally to attorney-mediators and non-attorney-mediators whose behavior constitutes the practice of law.⁸⁴ Attorney-mediators and non-attorney-mediators will be judged against the same standards of behavior when assessing an allegation of legal malpractice. Non-attorneys cannot shield themselves from accusations of professional negligence in the rendering of legal services merely by pointing to their lack of licensure to practice law. Instead, all mediators who engage in the practice of law in a sub-standard fashion face the risk of a legal malpractice claim.⁸⁵

81. I use the terms "professional negligence" and "malpractice" interchangeably. Some prefer one term or the other, but their elements are identical. See Michael J. Poelle, *Who's on First, and What's a Professional?* 33 U.S.F. L. REV. 205, 205 (1999) (Malpractice is "more accurately called professional negligence"); Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1193 (1992) ("A medical malpractice action is identical in all vital respects to any and every suit sounding in negligence.").

82. See RONALD MALLIN & JEFFREY SMITH, *LEGAL MALPRACTICE* § 8.5 at 802 (5th ed. 2000) ("The principles and proof of causation in a legal malpractice action do not differ from those governing an ordinary negligence case.").

83. See *Nielson v. Eisenhower & Carlson*, 999 P.2d 42, 45-6 (Wash. Ct. App. 2000).

84. Cf. *Buscemi v. Intachai*, 730 So.2d 329 (Fla. Dist. Ct. App. 1999) (financial planner who assisted in preparing divorce documents committed legal malpractice despite holding no license to practice law and despite a contractual disclaimer indicating that the financial planner would not provide legal advice).

85. Cf. *Hecomovich v. Nielsen*, 518 P.2d 1081, 1087 (Wash. Ct. App. 1974) (noting that an escrow company and its manager would be held to a legal malpractice standard, even without expert testimony establishing a "standard of care to which one

Any legal malpractice claim requires a demonstration that the attorney owed a duty to the plaintiff and caused injury to the plaintiff by breaching that duty.⁸⁶ Establishing a duty in most legal malpractice claims is generally straightforward because the existence of an attorney-client relationship is sufficient to show a duty.⁸⁷ In the context of attorney-mediators, however, no traditional lawyer-client relationship exists. Ethical restrictions prohibit an attorney from forming a representational relationship with two parties holding conflicting interests.⁸⁸ Almost by definition, within an adversarial conception of representation, opposing parties in a mediation hold interests in sufficient conflict to prohibit simultaneous representation by a single lawyer.⁸⁹ No agreement among observers exists regarding the exact nature of a mediator's duties toward clients. Some have suggested that a mediator owes essentially a fiduciary duty to the client.⁹⁰ Others have suggested that the mediator owes no direct duties to the clients, instead owing a duty "to the mediation process."⁹¹ Regardless of the precise scope of a mediator's duties to clients, however, if a mediator undertakes to perform services (including legal services), the mediator at least owes a duty of ordinary care with respect to those services.⁹² Without answering, therefore, the question of whether a mediator owes a duty of loyalty to a particular client, the mediator owes at least a duty not to provide

lawfully practicing in this state would be held in the selection and preparation of documents," because judicial notice sufficed to establish the standard of care); COLE, *supra* note 72, at § 11:3.

86. See MALLEEN & SMITH, *supra* note 82, § 8.1 at 769.

87. See, e.g., Meyer v. Mulligan, 889 P.2d 509, 513 (Wyo. 1995) (describing establishing a lawyer-client relationship in a legal malpractice claim as important because it establishes a duty).

88. See generally MODEL RULES OF PROFESSIONAL CONDUCT 1.7 (2002); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105 (1995).

89. Compare MODEL RULE OF PROFESSIONAL CONDUCT 2.2 (1983) (permitting lawyers to serve as an "intermediary" between clients, so long as the attorney believes a resolution satisfying the clients' interests is possible) with MODEL RULE OF PROFESSIONAL CONDUCT 2.4 (2002) (establishing rules governing lawyers serving as "third-party neutrals," requiring that the disputants not be "clients of the lawyer").

90. See Arthur Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731 (1984) (proposing to use fiduciary obligations as a means of constraining mediators' behavior). But see Joseph Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85 (1986) (criticizing Chaykin's proposal); *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876 (1986) (same).

91. See Nolan-Haley, *supra* note 77, at 826.

92. Some courts may impose an additional test requiring the plaintiff to demonstrate that he or she reasonably relied on the attorney-mediator's legal services. See MALLEEN & SMITH, *supra* note 82, § 8.2, at 772.

negligent legal services to the parties.⁹³ A mediator who refuses to render legal services to a mediation party may be at no risk of subsequent legal action, but if he or she chooses to render legal services, the services must be at least minimally competent.⁹⁴

Failure to have and exercise ordinary skill, competence, knowledge, or care in rendering legal services will subject a mediator who provides legal services to the prospect of a professional negligence claim.⁹⁵ Professional competence, as measured by an absence of malpractice, requires an attorney to “exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances.”⁹⁶ Mediators engaged in the practice of law, like any practicing attorneys, will not be held liable for simple errors in judgment regarding uncertain or unsettled areas of the law.⁹⁷ On the other hand, mediators exercising legal judgment are responsible to know “well established,” “settled” or “clearly defined” aspects of the law.⁹⁸ Furthermore, mediators who choose to pursue activities constituting the practice of law will be held responsible for conducting legal research to supplement their legal understanding.⁹⁹ A mediator’s lawyerly conduct need not be perfect.¹⁰⁰ A mediator dispensing legal advice

93. At least one court has suggested that where an attorney-client relationship does not exist, an attorney who nonetheless provides legal advice should be held to a gross negligence standard. See *Simmerson v. Blanks*, 254 S.E.2d 716 (Ga. Ct. App. 1979). See also *MALLEN & SMITH*, *supra* note 82, § 8.2, at 772.

94. See *MALLEN & SMITH*, *supra* note 82, § 8.2, at 775 (“Although there may be no duty to undertake a specific task, if an attorney does so voluntarily for a client, the task must be done with reasonable care.”).

95. See *COLE ET AL.*, *supra* note 72, at § 11:3.

96. *MALLEN & SMITH*, *supra* note 82, § 19.2, at 67.

97. See *MALLEN & SMITH*, *supra* note 82, § 18.1; *Hodges v. Carter*, 80 S.E.2d 144, 146 (N.C. 1954) (“An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled . . .”).

98. See *Hill v. Mynatt*, 59 S.W. 163, 167 (Tenn. Ct. App. 1900) (lawyer responsible to know “well established” law); *Davis v. Damrell*, 119 Cal. App. 3d 883, 889 (Cal. Ct. App. 1981) (lawyer not responsible for “unsettled” areas of the law); *Gimbel v. Waldman*, 84 N.Y.S.2d 888, 891 (N.Y. Sup. Ct. 1943) (an attorney will be deemed negligent for disregarding “well and clearly defined” law).

99. See *Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975) (“ . . . even with respect to an unsettled area of the law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.”).

100. See *National Savings Bank v. Ward*, 100 U.S. 195, 198 (1879) (“ . . . it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client’s cause. Instead of that, the rule is that if he acts with a proper

may even demonstrate “below average” skill without running afoul of legal malpractice. A mediator whose legal services are “ordinary,” “reasonable,” and demonstrate “minimum” skill will not face legal malpractice liability.¹⁰¹

Next, a mediation party whose mediator provides negligent legal services could suffer two possible types of injury: unfavorable settlement terms or injurious subsequent litigation. To illustrate the first possibility, consider a mediator who provides an evaluation of the likely trial outcome on a particular issue in dispute. For example, the mediator says, “It is clear that the plaintiff will prevail at trial, and I would judge that damages will fall between \$500,000 and \$700,000.” As a result of this evaluation, the unrepresented parties agree to a settlement of several hundred thousand dollars.¹⁰² Assume now that it turns out that the mediator negligently ignored the fact that the statute of limitations had run on the claim, making it impossible for the plaintiff to recover anything at trial.¹⁰³ The defendant may allege that he or she reasonably relied on the mediator’s negligent legal advice, causing settlement terms less favorable than they otherwise would have been.¹⁰⁴

degree of skill, and with reasonable care and to the best of his knowledge, he will not be held responsible.”)

101. *First Bancorp v. Giddens*, 555 S.E.2d 53, 58 (Ga. App. 2001) (In a legal malpractice action, “plaintiff must establish the failure of the attorney to exercise ordinary care, skill, and diligence . . .”); *Gambill v. Stroud*, 531 S.W.2d 945, 950 (Ark. 1976) (“The question is . . . of the minimum common skill.”); *Clark v. Rowe*, 701 N.E.2d 624, 626 (Mass. 1998) (“The standard of care normally applied is whether the lawyer failed to exercise reasonable care and skill in handling the client’s matter . . .”).

102. The attorney-mediator would surely argue in his or her defense that the parties’ reliance on the negligent legal advice was unreasonable. Depending on the circumstance, this contention may be persuasive. Nevertheless, as a general guide, if an attorney-mediator undertakes to provide a service such as a legal evaluation, it is difficult for the attorney-mediator subsequently to assert that the parties should not put any credence in the service the mediator is providing.

103. Because statutes of limitation are well-established areas of the law, attorneys are generally held responsible to know them and to apply their provisions without error. See *Allyn v. McDonald*, 910 P.2d 263, 266 (Nev. 1996) (“The situation whereby an attorney has allowed the statute of limitations to run against his or her client’s cause of action is an example of the sort of negligence so apparent as to make expert evidence as to the standard of care and deviation therefrom unnecessary”); *Little v. Matthewson*, 442 S.E.2d 567, 571 (N.C. Ct. App. 1994) (“It does not require expert testimony to establish the negligence of an attorney who is ignorant of the applicable statute of limitations or who sits idly by and causes the client to lose the value of his claim for relief.”).

104. Even with this mediator’s clearly negligent behavior, establishing “but for” causation remains an obstacle for the defendant seeking compensation from the mediator. In the case underlying *Nielson v. Eisenhower & Carlson*, 999 P.2d 42, 47 (Wash.

To illustrate the second possible kind of injury resulting from a mediator's negligence, consider the hypothetical at the outset of this section. The parties may contend that their subsequent disputes over the poorly drafted contract terms resulted directly from Mortimer's negligence in providing legal services.¹⁰⁵ The parties could assert that the costs incurred in subsequent litigation would never have accrued but for Mortimer's negligent conduct in crafting the terms of the settlement. Furthermore, if the parties can demonstrate that the tax issues on which Mortimer provided incompetent advice were settled areas of the law, the parties may be able to assert a professional negligence claim against Mortimer for the additional tax burdens stemming from the agreement.

A mediation party seeking to establish a legal malpractice claim against a mediator in either of the contexts described above faces the prospect of litigation regarding what is sometimes called the "case within a case."¹⁰⁶ Litigation over what would have happened but for the conduct in question demands considerable speculation—more than some courts will tolerate. Nevertheless, a party who can demonstrate one of these two types of injuries has a solid foundation from which to mount a professional negligence claim against a mediator.

V. BREACH CONFIDENTIALITY EXTERNALLY

To the surprise of the disputants, Marcus Mediator calls a press conference during a break in the mediation. At the press conference, Marcus reveals that the plaintiffs have indicated an intention not to pursue at least certain parts of their original lawsuit against the City. Marcus further says to the press, "Now, with a little flexibility from the City, we should be able to get the whole thing settled."

Ct. App. 2000), plaintiffs settled a medical malpractice claim for 85% of the jury verdict out of fear that their attorney's error regarding the statute of limitations might create grounds for an appeal. In a subsequent legal malpractice claim against the attorney, the plaintiffs sought recovery of the difference between the settlement and the jury verdict. The court treated the issue as one of proximate causation for the judge, rather than for a jury. See also MALLEN & SMITH, *supra* note 82, § 8.5, at 808.

105. See *Sizemore v. Swift*, 719 P.2d 500, 504 (Or. Ct. App. 1985) (holding that a party to a contested will may recover litigation expense from the drafters if negligence was shown and the resulting litigation was foreseeable); *Sindell v. Gibson*, 63 Cal. Rptr. 2d 594, 602 (Cal. Ct. App. 1997) (holding that attorneys fees are recoverable as damages in a legal malpractice claim).

106. For a description of the "case within a case" requirement, see *supra* note 30.

Many consider “external” confidentiality¹⁰⁷ to be the cornerstone of mediation, arguing that confidentiality protections present a superior bargaining opportunity for mediation participants who would otherwise refrain from potentially productive behaviors.¹⁰⁸ The codes of ethics and standards of conduct of virtually every voluntary mediation association and referral source reflect this view, requiring mediators generally to prevent those outside of a mediation from learning the specifics of what occurs during a mediation.¹⁰⁹ A mediator who breaches confidentiality externally, therefore, risks sanctions from referral or voluntary organizations in all but the most narrow set of circumstances.

A mediator who breaches confidentiality externally also faces the prospect of civil liability for damages resulting from that breach. Contractual obligations form the most likely basis for a civil complaint alleging breach of confidentiality. Virtually all agreements to mediate include reference to the mediator’s undertakings with respect to confidentiality. Typical provisions range from broad assertions that the mediation process is confidential to lengthy treatments of the scope and exceptions relating to the baseline assumption of confidentiality.¹¹⁰ A mediator who shares mediation information

107. I distinguish for purposes of the following two sections between “external” confidentiality and “internal” confidentiality. External confidentiality refers to the process of keeping those outside of the mediation process from knowing what transpired during the mediation process. Internal confidentiality is relevant to mediation processes in which the mediator does not share with one party any information obtained from another party *ex parte* in confidence.

108. See, e.g., UNIFORM MEDIATION ACT PREFATORY NOTE 1 (2001); Michael Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988) (naming confidentiality as “vital” to mediation, arguing that it promotes effectiveness, fairness, neutrality, increased participation in mediation, and protection against unnecessary mediator and mediation program distractions).

109. See, e.g., MODEL STANDARDS, *supra* note 12, at V; FAMILY MEDIATION, *supra* note 21, at VI; FLA. R. CIV. P. 10.360 (Matthew Bender 2002); URCADR RULE 104 CANON IV (2002).

110. Many of the contracts I reviewed resembled substantially the detailed confidentiality clause appearing in James J. Alfini & Eric Galton, *ADR Personalities and Practice Tips* 236 (1998), reprinted in ALFINI ET AL., *supra* note 38, at 199-200. See also U.S. Equal Employment Opportunity Commission, Houston District Office, Mediation Resources, Agreement to Mediate (providing another typical set of confidentiality descriptions and exceptions). Other contracts adopt language parallel to, or even citing directly, Federal Rule of Evidence 408. See, e.g., PICKER *supra* note 27, at 134-35; Superior Court for the District of Columbia, *supra* note 27, at 718. For examples of less detailed contractual provisions regarding confidentiality, see Employment Law Mediation Services, *supra* note 27 (“The parties and the Mediator agree to maintain the confidentiality of the Mediation with regard to all communications made or used in connection with the dispute resolution process.”); Out-of-Court Solutions, Mediation Rules & Procedures and Agreement to Mediate (standardized contract by which

with non-participants in violation of those terms will be liable to a mediation party who can demonstrate an injury stemming from that breach of confidentiality.

Even in the absence of a specific contractual undertaking regarding confidentiality, some states have crafted privileges or evidentiary exclusions safeguarding against the disclosure of certain information.¹¹¹ The recently adopted Uniform Mediation Act provides a prominent example of a statute granting each mediation participant a privilege, permitting each participant to prevent the disclosure of "mediation communications" in all but a narrow set of circumstances.¹¹² A mediator who, without authorization, discloses a party's confidential information risks civil liability for an injury caused by that breach.¹¹³

Under certain circumstances, a mediator could even be liable for breaches of confidentiality under the tort theory of privacy. Several different forms of privacy actions have emerged in common law torts over the past century.¹¹⁴ Public disclosure of private information

parties agree to "uphold the confidentiality of the mediation process, agreeing that [the mediator] need not retain any notes or other records of the mediation; not to subpoena any records or representatives of [the mediator in any pending or future legal action or proceeding.]"

111. See e.g., OKLA. STAT. ANN. tit. 12, § 1805 (West 2002) ("Any information received by a mediator or a person employed to assist a mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential."); OR. REV. STAT. § 36.220 (2001) ("Mediation communications are confidential and may not be disclosed to any other person."); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon 2002) ("... a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding."); WYO. STAT. ANN. § 1-43-103 (Michie 2002) ("A party to the mediation has a privilege to refuse to disclose and to prevent all mediation participants from disclosing confidential communications The privilege under this section may be claimed by a representative of the party . . . , or the successor, trustee or similar representative of a corporation, association, or other organization, whether or not in existence . . . the mediator may claim the privilege but only on behalf of the party."). For a brief summary of the distinction between privileges and evidentiary exclusions, see STEPHEN B. GOLDBERG, FRANK E.A. SANDER & NANCY H. ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 421 (3d ed. 1999).

112. See UNIFORM MEDIATION ACT §§ 5-8.

113. Cf. *Harley v. Druzba*, 565 N.Y.S.2d 278 (App. Div. 3d. Dept. 1991) (social worker who reveals confidential information about a client faces tort liability); *Horne v. Patton*, 291 Ala. 701 (Ala. Sup. Ct. 1973) (doctor who discloses confidential information risks contract-based liability); Alan B. Vickery, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426 (1982).

114. See 2 DAN B. DOBBS, *THE LAW OF TORTS* § 424 (2001); William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

may create tort-based liability if a person of ordinary sensibilities would find the information disclosed to be “highly offensive” and “objectionable.”¹¹⁵ In most mediation circumstances, nothing a mediator learns during the course of the mediation would be sufficiently offensive or objectionable to satisfy this requirement.¹¹⁶ However, in mediations involving highly private information, for example those involving contested divorces, a mediator risks tort liability if he or she breaches external confidentiality.

A mediator’s duties regarding confidentiality do not extinguish at the termination of a mediation. In the hypothetical above, Marcus discloses information during a break in an ongoing mediation. The same set of confidentiality constraints attach to mediators even after the mediation is terminated.¹¹⁷ Mediators who file post-mediation reports must guard carefully against breaches of external confidentiality. Most programs requiring such reports now strictly limit the information to be included in those reports.¹¹⁸ A mediator who

115. Restatement (Second) of Torts § 652D at 383 (1972).

116. A mediator who lawfully acquired a trade secret through communications during a confidential mediation, yet unlawfully disclosed the trade secret, may be held civilly liable in a manner similar to an ex-employee who lawfully acquired a trade secret through employment, yet unlawfully disclosed the trade secret outside of her employment. A typical statute protecting trade secrets is described in *Union National Life Insurance Co. v. Tillman*, 143 F. Supp. 2d 638 (N.D. Miss. 2000). To establish a violation of trade secrets protections, a plaintiff must demonstrate “(1) that a trade secret existed; (2) that the trade secret was acquired through a breach of a confidential relationship or discovered by improper means; and (3) that the use of the trade secret was without the plaintiff’s authorization.” *Id.* at 643.

117. A possible exception stems from the use of interim gag orders or confidentiality agreements. Some mediators seek at least temporary bars against disclosure of mediation conduct, even in contexts in which external confidentiality cannot be permanently guaranteed. For a discussion of the impacts of public visibility into ongoing mediations, see MOORE *supra* note 38, at 147-48.

118. See, e.g., ME. REV. STAT. ANN. tit. 5, § 3341 (West 2002) (providing the content parameters of a requisite mediator’s report under Maine’s Land Use Mediation Program as follows:

[T]he mediator shall file a report with the Superior Court clerk. . . the report must contain: A. The names of the mediation participants, including the landowner, the governmental entity and any other persons; B. The nature of any agreements reached during the course of mediation, which mediation participants were parties to the agreements and what further action is required of any person; C. The nature of any issues remaining unresolved and the mediation participants involved in those unresolved issues; and D. A copy of any written agreement under subsection 11;

LA. REV. STAT. ANN. § 9:4112 (West 2002) (“Reports made by the mediator to a court, pursuant to that court’s order, only as to whether the parties appeared as ordered, whether the mediation took place, and whether a settlement resulted therein.”). In the absence of an express settlement, the content of the mediator’s report is even more limited. See IND. CODE ANN. § 4-21.5-3.5-21 (West 2002):

supplements these reports with other information stands at risk of program sanction and civil liability.¹¹⁹

VI. BREACH CONFIDENTIALITY INTERNALLY

Plaintiffs brought suit seeking injunctive relief to force a change in a particular policy at the defendant corporation and seeking modest monetary damages. During a private caucus, Marsha Mediator learns that the defendant has already decided to change the policies in question, in a way the plaintiffs will embrace. When Marsha asks defense counsel why they have not told the plaintiffs about the corporation's plans, they indicate that they hope to use the change in policies as a "trade-off concession" in order to minimize or eliminate any financial payment. In a subsequent private meeting with the plaintiffs, without the consent of the defendant, Marsha says, "Look, the defendants have already told me that they're going to make the policy change. The only issue is money."

Most treatments of confidentiality in the context of mediation focus on the question of "external" confidentiality—the conditions in which those outside of the mediation can learn about what happened in a mediation—rather than on "internal" confidentiality. Internal confidentiality considers the extent to which one participant in the mediation may learn information about another participant. Some models of mediation contemplate no *ex parte* communication with the mediator, making the issue of internal confidentiality moot.¹²⁰ Most approaches to mediation at least provide for the possibility that a mediator will obtain information from a party who does not intend to

If the parties do not reach an agreement on any matter as a result of mediation, the mediator shall report the lack of an agreement without comment or recommendation to the administrative law judge assigned to the proceeding. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party that, if resolved or completed, would facilitate the possibility of a settlement.

119. The circumstances underlying the eventual lawsuit in *Wagshal v. Foster*, 28 F.3d 1249, 1251 (D.C. Cir. 1994), cert. denied 115 S. Ct. 1314 (1995), arise principally because the mediator included extraneous information in his report to the judge regarding the results of the mediation. Specifically, Foster wrote a letter to the judge overseeing the case in which Wagshal was a party and intimated that the case could have been settled if Wagshal had acted "reasonably."

120. See, e.g., GOLANN *supra* note 38, at 68 (explaining that domestic relations mediators sometimes shun caucusing in favor of work entirely in joint session).

share that information with the other party.¹²¹ A mediator who receives private information faces considerable strategic and ethical decisions about how to handle the information. In some circumstances, a mediator who takes information privately shared by one party and improperly discloses it to other parties may face the prospect of sanction or civil liability.

Mediators face a risk of sanction from referral programs and voluntary associations if they improperly breach internal confidentiality. Most codes of ethics or standards of conduct address the question of internal confidentiality. Some codes declare affirmatively that mediators may not disclose information they learn in confidence,¹²² while others simply require the mediator to be clear about what will happen with information he or she learns. For example, The Model Standards of Practice for Family and Divorce Mediation provides, "If the mediator holds private sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon prior to the sessions."¹²³ Even in the context of codes without specific internal confidentiality provisions, general provisions demanding that mediators "maintain parties' reasonable expectations regarding confidentiality" may also serve as a basis for sanction against a mediator who violates internal confidentiality.¹²⁴

Additionally, contractual obligations may expose mediators to the prospect of civil liability if they breach internal confidentiality. Many mediation contracts contain no specific reference to the issue of internal confidentiality.¹²⁵ Those contracts that mention the issue,

121. See, e.g., RAU ET AL, *supra* note 40, at 348 (describing baseline assumption that information learned in caucus is confidential, absent contrary provisions from the mediator); ALFINI ET AL. *supra* note 38, at 131-37; GOLANN, *supra* note 39, at 30 ("The receipt of confidential information from each side is another key source of mediative power."); MOORE *supra* note 38, at 319-326.

122. See, e.g., FLA. STA. ANN. § 10.360 (West 2002) ("Information obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party."); N.H. SUP. CT. R. 170 (1995) ("To insure that parties openly, freely, and candidly discuss the strengths and weaknesses of their positions with the mediator, information provided to the mediator in private discussion shall be confidential and shall not be divulged to the opposing side unless specifically authorized.").

123. FAMILY MEDIATION, *supra* note 21, at VII(D).

124. MODEL STANDARDS, *supra* note 12, at V ("The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that the party expects to be confidential unless given permission by all parties or unless required by law or other public policy.").

125. See, e.g., VAN WINKLE, *supra* note 27, at 127-28. *But see* J.A.M.S./Endispute Mediation Agreement cited in PICKER, *supra* note 27, at app. H (1998).

however, typically include explicit promises to maintain internal confidentiality. For example, one standard mediation confidentiality agreement provides, "During the course of the mediation proceedings, disclosures made by or for any party privately in caucus to the mediator shall not be disclosed by the mediator to any other party without the consent of the disclosing party."¹²⁶ Furthermore, depending on their conduct, mediators may face the prospect of a breach of contract action even in circumstances in which an agreement to mediate makes no reference to internal confidentiality. For example, a mediator who makes explicit oral statements regarding confidentiality at the outset of a private caucus with a party creates at least the possibility of contract-based obligations regarding internal confidentiality.¹²⁷

Mediators violating internal confidentiality also face the possibility of tort liability under the theory of interference with prospective advantage. Common law tort principles protect against one person interfering with existing contractual relations. These principles have been extended in some jurisdictions to include the protection of economic opportunities or contractual prospects.¹²⁸ A party whose information was leaked may reasonably believe that he or she is placed at a comparative disadvantage because of the breach of internal confidentiality. Assuming the injured party can establish the speculative damages involved to the satisfaction of a court, a mediator faces the prospect of tort liability for breaching internal confidentiality. In the hypothetical above, the defendant may have a tort-based action against Marsha, alleging that her breach of internal confidentiality improperly worsened the defendant's bargaining position with respect to the plaintiffs.

VII. MAINTAIN CONFIDENTIALITY INAPPROPRIATELY

Maurice Mediator learns during a conversation with a divorcing couple that the children are regularly subjected to living arrangements tantamount to abuse or neglect. Maurice mentions

126. BETTE J. ROTH ET AL, THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE Part III app. 5, at 2 (1993). See also USA&M Mediation Procedures (United States Arbitration and Mediation 2001), available at http://www.usam.com/services/med_procedures.html ("Any information disclosed to the mediator in a private caucus shall remain confidential unless the party agrees that it may be disclosed.")

127. For an interesting contractual approach to this issue, see Sorensen-Jolink, Trubo, Williams, McIlhenny & Williams LLP, Agreement for Mediation ("Unless otherwise agreed, the mediator will not hold information from one party in confidence from the other.")

128. See DOBBS, *supra* note 114, at §§ 445-46.

his concern, but both of the parents swear that the circumstances will change once they can finalize the divorce. Maurice says nothing to anyone outside of the mediation and proceeds to assist the parties in finalizing the terms of the divorce.

The principle of confidentiality in mediation is not absolute. While mediators often hold an obligation not to discuss information learned during a mediation, certain contexts demand that the mediator breach this baseline assumption of confidentiality in favor of protecting others' interests. Protecting the physical wellbeing of vulnerable persons presents the most important consideration potentially requiring a breach of confidentiality. In certain jurisdictions, under unusual circumstances, a mediator who maintains confidentiality risks criminal, civil, and ethics sanctions.

The most obvious illustrations of conditions in which a mediator risks sanction for improperly maintaining confidentiality arise with so-called "mandatory reporting." Mandatory reporter laws hold certain individuals responsible for informing state authorities of incidences of misconduct such as child abuse, elder abuse, and abandonment.¹²⁹ State laws vary both in defining what conditions require reporting and in defining who constitutes a "mandatory reporter." Some states, for example, have created a generalized duty, theoretically applicable to all members of the public.¹³⁰ Other states enumerate a list of the occupations and offices of those with a duty to report instances of abuse or abandonment.¹³¹ In some jurisdictions, the statutory list of mandatory reporters explicitly includes mediators.¹³²

Mediators who fail to uphold the requirements of mandatory reporting face a range of sanctions. Most commonly, if the mediators are mandatory reporters, criminal penalties attach to mediators who fail to report conditions of abuse or neglect. States vary in their penalties for failure to uphold mandatory reporting laws. Most treat it as a misdemeanor.¹³³ Given the scarcity of prosecutorial resources¹³⁴

129. See, e.g., CAL. PENAL CODE § 11166 (West 2002); KAN. STAT. ANN. § 38-1522 (2001) (amended and renamed the Juvenile Justice Reform Act of 1996, effective July 1, 1997); MINN. STAT. § 626.556 (2001); OHIO REV. CODE ANN. § 2151.421 (West 2002); TEX. FAM. CODE ANN. § 261.101 (Vernon 2001); WYO. STAT. ANN. § 14-3-205 (Michie 2002).

130. See, e.g., UTAH CODE ANN. § 62A-4a-403 (1997).

131. See, e.g., OR. REV. STAT. § 419B.005(3) (2001) (listing twenty-seven separate occupations covered by the requirement to report child abuse).

132. See, e.g., VA. CODE ANN. § 63.2-1509(10) (Michie 2002).

133. See, e.g., OR. REV. STAT. § 419B.010(1) (2001); UTAH CODE ANN. § 62A-4a-411 (2002); CAL. PENAL CODE § 11166(B) (WEST 2002).

and the rarity of mandatory reporting incidents, few states have extensive records of prosecuting violations of mandatory reporting laws. Nevertheless, a mediator who inappropriately maintains confidentiality risks criminal sanction.

Failure to report in a mandatory reporting situation can also create grounds for civil liability. A mediator affiliated with the government, for example, in a court-annexed mediation program, faces a theoretical risk of a civil lawsuit under 42 U.S.C. §1983, which provides for the liability of government actors when they act under color of state law and deprive a person of rights. A plaintiff may assert that the mediator violated his or her rights by not reporting the abuse, while pointing to the mediator's governmental affiliation as evidence that the action or failure to act was under color of state law. Most courts, however, have declined to extend § 1983 to include such actions.¹³⁵ Even beyond the possibility of a § 1983 action, depending on the construction of the state statute involved, failing to report abuse may subject a mediator to private civil liability.¹³⁶ As with criminal prosecutions, actions in tort against persons who improperly fail to report abuse are rare. Nevertheless, mediators stand some risk of civil liability for failing to report instances of abuse.

Referral sources and voluntary associations typically provide standards of conduct either permitting or demanding a breach of confidentiality in conditions such as those under consideration here. Many standards, for example, incorporate legal requirements to establish the parameters of the exceptions to confidentiality.¹³⁷ Some ethical provisions demand that the mediator report, rather than merely permit reporting. For example, one prominent set of mediator

134. See James T. R. Jones, *Kentucky Tort Liability for Failure to Report Family Violence*, 26 N. KY. L. REV. 43, 46 (1999).

135. See, e.g., *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1417 (5th Cir. 1995) (finding no state action, and therefore no § 1983 liability, for failure to report). *But see Zappala v. Albicelli*, 980 F. Supp. 635, 638 (N.D.N.Y. 1997) (suggesting that a failure to report could result in § 1983 liability).

136. Compare *Jane Doe "A" v. Special Sch. Dist. of St. Louis County*, 637 F. Supp. 1138, 1148 (E.D. Mo. 1986), and *Perry v. S.N.*, 973 S.W.2d 301, 309 (Tex. 1998) (finding no private cause of action exists for failure to report), with *Landeros v. Flood*, 551 P.2d. 389, 410 n. 8 (Cal. 1976) (finding a private cause of action exists for failing to report), and *Ham v. Hosp. of Morristown*, 917 F. Supp. 531, 537 (E.D. Tenn. 1995) (same).

137. See, e.g., Fla. R. Civ. P. 10.360(a) ("A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law."); MODEL STANDARDS, *supra* note 13, at V ("The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.").

standards provides, “[a]s permitted by law, the mediator *shall* disclose a participant’s threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon.”¹³⁸ Mediators who belong to rosters or organizations with such requirements risk a range of sanctions for failing to report abuse.

Beyond the circumstance of mandatory reporting requirements, so-called *Tarasoff*¹³⁹ conditions may also create an obligation for mediators to breach confidentiality. The *Tarasoff* case involved a psychologist who learned that one of his patients intended to kill a woman in whom the patient had an unrequited romantic interest. The psychologist maintained confidentiality, and his patient murdered the woman. The woman’s family brought a wrongful death action against the psychologist. The California Supreme Court ultimately ruled that the psychiatrist had a duty to prevent harm to the victim, even if that meant breaching patient confidentiality.¹⁴⁰ States vary broadly regarding the existence or scope of *Tarasoff* disclosure obligations, with most retreating from any duty to warn.¹⁴¹ Mediator standards of conduct also vary in their treatment of the *Tarasoff* question.¹⁴² Fortunately, *Tarasoff* conditions are extremely rare, but they create a second set of circumstances¹⁴³ in which a mediator may be exposed to complaints for upholding confidentiality inappropriately.

VIII. ADVERTISE FALSELY

Mitchell Mediator’s website touts his mediation services as “expert.” In part, it says, “Over 1,000 cases of experience. Certified

138. FAMILY MEDIATION, *supra* note 22, at VII(C) (italics added).

139. See *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 340 (Cal. 1976).

140. See *id.*

141. See Timothy E. Gammon & John K. Hulston, *The Duty of Mental Health Care Providers to Restrain their Patients or Warn Third Parties*, 60 MO. L. REV. 749, 751 (1995); Noreen M. Grant, Notes & Comment, *Psychiatrists Have No Duty to Warn Third Parties of Patients’ Threats: Tarasoff is Kicked Out of Texas . . . Finally!*, 7 TEX. WESLEYAN L. REV. 157, 158 (2001); Peter Lake, Essay, *Virginia is Not Safe for “Lovers”*: *The Virginia Supreme Court Rejects Tarasoff in Nassar v. Parker*, 61 BROOK. L. REV. 1285, 1286 (1995).

142. Compare Uniform Mediation Act § 6(a)(3), with FAMILY MEDIATION, *supra* note 21, at VII(C).

143. A third possible condition, outside of the realm of injury to third parties, is the prospect of cross-professional obligations to report misconduct. See Pamela Kenetra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. REV. 715 (1997).

and sanctioned by the State and by prominent national mediation organizations.” Mitchell is a former judge who presided over more than a thousand civil cases during his years on the bench. He has formally mediated, however, only a few dozen cases. Furthermore, neither the state nor the national mediation organizations to which Mitchell belongs certifies or sanctions mediators. Mitchell is simply a member of the mediation rosters each body maintains.

As with any service provider, a mediator who holds him or herself out to the public in a false manner risks sanction from a number of sources. The mediator may be civilly liable to any party induced to mediate based on the mediator’s false assertions. Furthermore, consumer protection statutes may create a risk of increased damage awards against mediators. False advertising carries criminal penalties in some jurisdictions, and many referral programs and voluntary associations restrict the information their members may include in advertisements. For decades, many professions discouraged or even prohibited professionals from advertising their services out of a fear of deception.¹⁴⁴ While professionals are now generally permitted to engage in advertising, professional associations and state governments continue to impose restrictions on the content of professionals’ public statements.¹⁴⁵ Without engaging in the debate regarding mediation’s status as a profession or as a practice, it suffices to note that while many mediators engage in robust advertising, a number of sources restrict or govern those advertising practices.

144. See Ruth B. Kraft, *Attitudinal and Legal Factors in Professional Advertising*, 1 J.L. & HEALTH 61, 62 (1985-86) (“The fear of misleading and fraudulent inducements was a primary justification for the prohibition of advertising.”). See also William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49, 55 (2002); Laura Champion & William Champion, *Television Advertising: Professionalism’s Dilemma*, 23 ST. MARY’S L.J. 331, 334 (1991).

145. See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY EC 2-10 (1981); AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS E-5.00 (2002). For a general review of the legal evolution of professional advertising, see Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 SUP. CT. ECON. REV. 265 (2000). See also Robert R. Gasaway, *The Problem of Tort Reform: Federalism and the Regulation of Lawyers*, 25 HARV. J.L. & PUB. POL’Y 953, 960-61 (2002); *Miller v. Stuart*, 117 F.3d 1376 (11th Cir. 1997) (restrictions on accountants’ advertisements); *Talsky v. Dep’t of Registration & Educ.*, 370 N.E.2d 173 (Ill. 1977) (describing advertisement restrictions on chiropractors in context of advertisement proclaiming, “Free Chicken. Free Refreshments. Free Spinal X-Rays.”); *Parker v. Ky. Bd. of Dentistry*, 818 F.2d 504 (6th Cir. 1987) (upholding dentists’ right to advertise).

The risk of civil liability for advertising falsely stems principally from a theory of fraudulent inducement. In order to prevail in a complaint against a mediator on this theory, a plaintiff needs to demonstrate that the mediator knowingly made a false representation about a material issue, that the plaintiff reasonably relied upon the representation, and that the plaintiff's reliance produced injury.¹⁴⁶ In the hypothetical described above, Mitchell's statements about his experience or credentials as a mediator would certainly be considered material for purposes of a fraudulent inducement claim. The plaintiff's reliance on those claims would be reasonable. However, the plaintiff would still need to demonstrate that reliance on the misrepresentation causes injury, a significant hurdle. A plaintiff might reasonably prove that he or she would not have hired a mediator with so little experience. As a result, the plaintiff might easily prove that the misrepresentation caused losses directly tied to the transaction, such as the mediator's fees.

More significant, however, is the prospect of a plaintiff claiming that the fraudulent inducement caused more extensive injuries. In order to prevail on a broader fraud-based claim in this context, the plaintiff would have to demonstrate "loss causation," showing that if the statements advertised had been true, the plaintiff's injuries would not have occurred.¹⁴⁷ What would a mediator with the advertised credentials and experience have done differently from Mitchell? What impacts would a different mediator's actions have had on the outcome of the mediation? If a mediator with the advertised experience and credentials would have produced a result measurably more favorable to the plaintiff, an action may stand. In many circumstances, the tremendous speculation involved will preclude recovery by the plaintiff. Nevertheless, if a plaintiff can plainly demonstrate injury resulting from reliance on the misrepresentations, mediators' false advertisements will produce civil liability.

In addition to facing private civil lawsuits for compensatory damages, a mediator who improperly advertises his or her credentials or services may also face the prospect of private actions under consumer protection laws. Some state consumer protection laws provide an injured party with treble damages, if he or she can show that a service

146. See, e.g., *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 480 (5th Cir. 2000). Some jurisdictions construct the elements of fraudulent inducement differently. See, e.g., *Western Contracting Corp. v. Dow Chem. Co.*, 664 F.2d 1097, 1100 (8th Cir. 1981) (describing eleven-part fraudulent inducement test).

147. For a discussion of the concepts of "loss causation" and "transaction causation" in the context of securities fraud, see *supra* note 30.

provider willfully or knowingly engaged in deceptive practices.¹⁴⁸ Even if the consumer suffered no monetary injury, he or she may still obtain an injunction against the mediator from continuing to advertise falsely.¹⁴⁹ Consumer protection laws, therefore, may expand a mediator's exposure to civil liability beyond that stemming from simple fraudulent inducement.

A mediator making false public statements about his or her credentials may also be subject to criminal charges. Some jurisdictions protect against false advertising through their general consumer protection statutes, while others have adopted specific false advertising statutes. Even if a mediator's false advertising produces no discernable economic injury, a risk of criminal sanction exists.¹⁵⁰ In most circumstances, violations amount only to criminal misdemeanors,¹⁵¹ carrying a theoretical possibility of imprisonment,¹⁵² but more likely exposing the mediator to the possibility of a fine¹⁵³ or an injunction against further use of the false advertising.¹⁵⁴

Finally, referral sources and voluntary mediator associations often impose independent restrictions on member mediators' advertising.¹⁵⁵ Some programs include only general statements demanding that any advertisements be accurate. Others provide more specific guidance on the nature of certain disclosures. For example,

148. See, e.g., MASS. GEN. LAWS ANN., Ch. 93A, § 11 (2002); TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (2002).

149. See, e.g., MASS. GEN. LAWS ANN., Ch. 93A, § 11 (2002).

150. See, e.g., MINN. STAT. § 325F.67 (2001) (a person committing false advertising is guilty of a misdemeanor "whether or not pecuniary or other specific damage to any person occurs as a direct result thereof . . .").

151. See, e.g., MINN. STAT. § 325F.67 (2001) (making false statement in advertising a criminal misdemeanor); ALA. CODE § 13A-9-42(c) (2002) (Class B misdemeanor); KY. REV. STAT. ANN. § 517.030(2) (2001) (Class A misdemeanor); N.Y. PENAL LAW § 190.20 (2002) (Class A misdemeanor).

152. See, e.g., ALA. CODE § 13A-5-7 (2002) (Class B misdemeanor punishable by up to six months imprisonment); KY. REV. STAT. ANN. § 532.090 (Banks-Baldwin 2001) (Class A misdemeanor punishable by up to one year imprisonment); N.Y. PENAL LAW § 70.15 (2002) (Class A misdemeanor punishable by up to one year imprisonment).

153. See, e.g., ALA. CODE § 13A-5-12 (2002) (Class B misdemeanor punishable by up to one thousand dollar fine); KY. REV. STAT. ANN. § 534.040 (Banks-Baldwin 2001) (Class A misdemeanor punishable by up to five hundred dollar fine); N.Y. PENAL LAW § 80.05 (2002) (Class A misdemeanor punishable by up to one thousand dollar fine).

154. See, e.g., N.D. CENT. CODE § 51-12-14 (2001) (providing for injunctive relief against false advertisements).

155. For a parallel discussion of the approaches of various state Bar associations on the question of credentialing or certification, see William Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-based Ethics and Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49, 68 (2002).

the Model Standards of Conduct for Mediators provide that a mediator may “make reference to meeting state, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.”¹⁵⁶ Some programs go even further, prohibiting mediators from identifying themselves as “certified.”¹⁵⁷ Whether a mediator’s advertisement creates grounds for a civil or criminal complaint, a mediator may nonetheless face the prospect of sanctions for failing to uphold a program’s advertising standards.

IX. INFLICT EMOTIONAL DISTRESS ON A DISPUTANT

During the mediation, Muriel Mediator adopts an aggressive approach to creating settlement. As always, she had told the parties, a divorcing couple, “Bring your toothbrushes when you show up to my mediation.” The divorcing wife, unrepresented by counsel, is visibly worn down by Muriel’s relentless efforts at “persuasion.” When the wife protests and indicates a desire to leave, Muriel threatens to report to the judge that the wife did not participate in the mediation in good faith. Muriel further indicates that such a report would “all but guarantee that you’ll lose your claim for custody of the children.”

While mediators have no obligation to guarantee the comfort and happiness of mediation parties, mediators do not operate with *carte blanche* regarding their treatment of parties. Mediation can be a stressful, painful, and even disturbing experience for some parties, even when the mediator conducts the mediation skillfully. Some dispute conditions are inherently sensitive or difficult. Also, to the extent that a mediator helps parties to see aspects of their circumstances they had not before seen, or to see them from the perspective of another, the experience can be disturbing. Mediator conduct that produces an emotional reaction in parties, therefore, does not necessarily signal inappropriate mediator behavior. Indeed, discomfort can be an important aspect of the mediation process. Nevertheless, if a mediator’s conduct rises to the level of tortious infliction of emotional distress, the mediator is exposed to a threat of civil liability.

156. MODEL STANDARDS, *supra* note 12, at VII. See also RULES FOR CERTIFIED AND COURT APPOINTED MEDIATORS § 10.610 (Fla. Sup. Ct. Dispute Resolution Ctr. 2000), available at http://www.tfapm.org/Drc/drc_rules.shtml. Not all programs include such restrictions. See, e.g., UTAH RULES OF COURT-ANNEXED DISPUTE RESOLUTION (1999).

157. See, e.g., MINNESOTA GENERAL RULE OF PRACTICE 114 (Appendix Rule VI) (2002).

All jurisdictions provide for common law, tort-based claims against people who inflict emotional distress on others under certain circumstances.¹⁵⁸ The most common construction of the tort of intentional infliction of emotional distress requires a plaintiff to demonstrate that the mediator intentionally or recklessly engaged in extreme or outrageous conduct, causing emotional distress in the plaintiff.¹⁵⁹ Jurisdictions vary in the evidence required to demonstrate emotional distress.¹⁶⁰ Some jurisdictions also recognize claims sounding in negligence rather than intentional tort.¹⁶¹ In most circumstances, however, a plaintiff must demonstrate that the mediator intentionally or recklessly inflicted the distress. Fortunately, few imaginable mediator behaviors are sufficiently outrageous to satisfy the elements of the tort of infliction of emotional distress.

One case, drawn from a setting with considerable analogies to mediation, illustrates the prospect of outrageous conduct by a service provider. The dispute underlying the *Howard v. Drapkin*¹⁶² case involved a custody and visitation dispute between Vickie Howard (“Vickie”) and Robert Howard (“Robert”), regarding their nine year-old son. Because their son alleged physical and sexual abuse by Robert, Vickie sought to terminate Robert’s custody and visitation rights. Vickie and Robert agreed to hire an independent psychologist, Robin Drapkin, to evaluate the circumstances and produce a non-binding set of recommendations. Drapkin’s services included multiple sessions with the Howards, extending over several months. The final session took place on the eve of their court hearing. In her complaint, Vickie alleged that Drapkin told her the final session “would only last an hour and a half. It lasted over six hours—from 5:30 p.m. to 11:50 p.m. For five of those six hours, [Drapkin] personally attacked [Vickie], screamed at her, ridiculed her, accused her of lying and fabricating evidence, threatened she would lose custody of her son if she persisted in believing his allegations about his father, and misrepresented that the child’s doctors and other experts involved did not believe the child had been abused.”¹⁶³ Based on this conduct, Vickie filed a complaint alleging intentional and negligent infliction of emotional distress. While the legal sufficiency of Vickie’s tort

158. See DOBBS, *supra* note 114, at §§ 302-3.

159. See 86 C.J.S. Torts § 69 (1997); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12 (5th ed. 1984).

160. See DOBBS, *supra* note 114, at § 306.

161. See *id.* at § 308.

162. *Howard v. Drapkin*, 222 Cal. App. 3d 843 (1990).

163. *Id.* at 849, 895.

claim is uncertain,¹⁶⁴ Drapkin's alleged conduct provides a chilling illustration of behavior that potentially exposes a service provider to tort liability.

Like Drapkin, mediators operate without the explicit authority to impose outcomes on the participants. Nevertheless, mediators' actions can have significant impacts on the parties. Disputants can enter mediations in fragile emotional states. Mediators' practices often encourage the parties to develop trust in the mediator, and some practices even encourage a degree of deference. In such a context, a mediator who recklessly disregards the psychological impacts of his or her mediation conduct risks creating actionable emotional distress.

X. COMMIT FRAUD

In a private caucus, the plaintiffs tell Manuel Mediator that they would be able to break this case wide open if only they could get some cooperation from a few important executives in the defendant corporation. They admit, however, that they have had no luck so far in their efforts. Manuel then sits down privately with the general counsel for the defendant and says, "Look, I spoke with the plaintiffs. They have just lined up some key insider witnesses, including a couple members of your management team. It's time for you to end this." The general counsel looks surprised but increases the defendant's offer considerably. The mediator takes the new offer to the plaintiffs, who quickly agree to it.

In narrow circumstances, a mediator's statements to one or more of the parties may expose the mediator to civil liability under a common law fraud claim. A mediator commits fraud if the mediator knowingly misrepresents a material fact and a mediation party reasonably relies on that misrepresentation to his or her detriment.¹⁶⁵ Most mediators' communications with parties raise no concern of

164. Ultimately, the court in *Howard v. Drapkin* never reached the issue of intentional infliction of emotional distress. Instead, it dismissed the action on summary judgment after extending quasi-judicial immunity to Drapkin. The Howards initially hired Drapkin privately. However, the court later endorsed the Howard's stipulated order for "Child Custody Evaluation." This endorsement may explain, at least partially, the California appellate court's decision to extend quasi-judicial immunity to Drapkin.

165. DOBBS, *supra* note 114, at § 470 ("courts . . . agree in substance that the plaintiff must prove (1) an intentional misrepresentation (2) of fact or opinion . . . (3) that is material and (4) intended to induce and (5) does induce reasonable reliance by the plaintiff, (6) proximately causing pecuniary harm to the plaintiff").

fraud. Most mediators would not knowingly¹⁶⁶ misrepresent information to the disputants. Furthermore, most of the topics mediators discuss, while potentially important to creating a productive negotiation dynamic, are not “material” in the sense demanded to constitute fraud. Still, certain mediator conduct may create the potential for liability under common law fraud.

A mediator’s misrepresentation creates a risk of fraud only if the subject of the misrepresentation is material to the topic of the mediation. A mediator who knowingly, falsely compliments a participant’s new outfit, therefore, faces no risk of a subsequent fraud action, even if the outfit is later proven to have been objectively unworthy of the compliment. The statement is immaterial for purposes of fraud, both because a dispute is unlikely to turn on the quality of a disputant’s attire and because the statement represents only the mediator’s opinion. In all but the most extraordinary cases, statements of opinion cannot constitute fraud. Facts alleged to underlie statements of opinion, however, can easily be material to a dispute.¹⁶⁷ For example, a mediator who merely tells one party, “I think this is a fair settlement offer,” runs little risk of a subsequent complaint in which the party later accuses the mediator of fraud for having shared the opinion. On the other hand, a mediator who knowingly misrepresents the existence of witnesses and says, “I know that they have just secured cooperation from members of your management team and have uncovered a smoking gun memo,” and then adds, “so I think this is a fair settlement offer,” exposes himself or herself to a fraud claim. The existence of witnesses or evidence related to the underlying dispute would surely be material to the settlement of the dispute.¹⁶⁸ A bright line does not always exist between what constitutes an opinion (not material) as opposed to a statement of fact (potentially material),

166. The prospect of liability for negligent misrepresentation exists in a context involving fiduciary duties. If one adopts Chaykin’s suggestion that fiduciary duties should attach to mediators with respect to parties, a mediator would also face the prospect of liability for negligent misrepresentation. *See id.* at § 472; Chaykin, *supra* note 90.

167. DOBBS, *supra* note 114, at § 478 (noting that a speaker who holds an opinion and offers facts to support her opinion is providing an opinion as “an assessment of or conclusion from facts,” which “carry provably false implications” and, therefore, would be actionable). For a useful summary of the law of fraud in the context of bargaining, see G. Richard Shell, *When Is It Legal to Lie in Negotiations?*, 32 SLOAN MGT. REV. 93 (1991).

168. Although the materiality of the misrepresentation could be proved, the plaintiff must still establish the requisite elements of reasonable reliance and injury. *See DOBBS, supra* note 114, at § 470. In a case with sophisticated parties, such a demonstration could be hard on the issue of reasonableness of reliance because the reliance, in some jurisdictions, must be justified as well as reasonable, and some courts also

leaving mediators who employ misrepresentations as part of their mediation practice exposed to liability.

Some mediators may instinctively view misrepresentation as anathema to the ideals of mediation. However, a careful examination of mediation ethical guidelines reveals that principles of veracity or candor hold no prominent places in the collectively articulated norms of the mediation community.¹⁶⁹ To some extent, the widely embraced notion of informed consent may subsume those aspects of mediator misrepresentation that impair parties' judgment and autonomy. This principle speaks to the parties' experience, however, rather than to the mediators' conduct. No categorical prohibitions against misrepresentation stand out in mediators' codes of ethics. In fact, some have even suggested that misrepresentation may serve a fundamentally useful purpose in the context of mediation. Using formal economic models, Jennifer Brown and Ian Ayres have suggested that mediators' ability to create value in a mediation between two rational actors depends on the mediator's access to and control over private information.¹⁷⁰ Employing the euphemism "noise introduction," they argue that by occasionally misrepresenting information from one side to the other, mediators under certain conditions may improve the net expected utility of mediated outcomes.¹⁷¹ Even beyond such formal and conspicuous misrepresentation, I would be surprised if careful

allow a comparative fault defense. *See id.* at § 474. But with less sophisticated parties, the reasonableness of reliance might easily be justified and, thus, present a more significant risk.

169. For example, the only treatment of the question of truthfulness in the Model Standards of Conduct for Mediators arises in the narrow context of advertising. *See* MODEL STANDARDS *supra* note 12, at VII. Interestingly, some contracts go to lengths to describe the *parties'* obligations to be truthful in statements without making any mention of a parallel duty for the mediator. *See, e.g.,* MARK D. BENNETT & MICHELE S.G. HERMANN, *THE ART OF MEDIATION* 223 (1996).

170. *See* Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323 (1994).

171. *Id.* at 357 ("... the commitment to noisy translations can reduce the ability of the stronger bargainer to exploit the newly disclosed information. For example, a seller with take-it-or-leave-it market power will respond to precise information about the buyer's valuation by extracting all the gains from trade, but cannot so effectively exploit a less precise report of the buyer's valuation. Without the mediator's precommitment to add noise, the privately informed parties may find it in their self-interest to disclose less information . . . without the commitment to make imprecise translations, the disputant with private information may refuse to make disclosure to the other side.").

observation and reflection did not reveal at least some mediators engaging in some degree of misrepresentation over the course of a mediation.¹⁷² Many such misrepresentations currently create no grounds for complaint, but the common law of fraud protects against some of the most egregious forms of mediator deceit.

HONORABLE MENTION: MEDIATE POORLY

Michael Mediator misses an opportunity to improve the parties' understanding of each other and of the relevant issues. Michael creates an unhelpful agenda and refuses to adapt his approach. Michael misreads the parties' primary concerns. He makes inappropriate suggestions. Michael is unprepared. He listens horribly. Michael oversees a lengthy process that produces no agreement and worsens the parties' relationship.

The threat of malpractice lawsuits hangs over most service providers, theoretically encouraging the careful dispensation of the services in question. A doctor, for example, who fails to provide reasonable or customary levels of care may be subject to a medical malpractice claim.¹⁷³ Similarly, a lawyer who fails to exercise due care in representing a client may face a professional negligence claim.¹⁷⁴ While mediators face a theoretical risk of a malpractice or negligence-based suit,¹⁷⁵ the nature of mediation practice makes negligence an unlikely source of liability exposure.

172. While I do not necessarily endorse the practices, I have little doubt, for example, that some mediators make questionable assertions about their own beliefs regarding the existence or scope of a Zone of Possible Agreement ("ZOPA"). For a lengthier discussion of the potential impact(s) of a mediator's statements regarding ZOPAs, see Michael Moffitt, *Will This Case Settle? An Exploration of Mediators' Predictions*, 16 OHIO ST. J. ON DISP. RESOL. 39 (2000). One might reasonably wonder, for example, how the statements of mediators James Alfini characterized as "hashers" and "bashers" would fare under a microscope focused on candor. Cf. James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is This the End of 'Good Mediation'?*, 19 FLA. ST. U. L. REV. 47 (1991).

173. See 1 DAN B. DOBBS, *THE LAW OF TORTS* § 242 (2001).

174. See MALLEN & SMITH, *supra* note 82, § 8.12 (1996).

175. States vary in the terminology they use to describe actions against service providers in occupations like mediation. Some states restrict the term "malpractice" to recognized professions. See, e.g., *Michigan Microtech, Inc. v. Federated Publications, Inc.*, 466 N.W.2d. 717 (Mich. 1991). Others have adopted the term "professional negligence," signaling that the underlying action is based fundamentally in negligence. Still others treat all claims as simple negligence claims. The terminology differences do not produce significant distinctions in the elements necessary for a successful claim. See, e.g., *Alexander v. Culp*, 705 N.E.2d. 378, 382 (Ohio App. 8th Dist. 1997) (professional negligence case possible against minister, even though religious officials are not treated statutorily as professionals).

A former mediation party would have difficulty satisfying each element of a professional negligence claim against a mediator. To establish negligence, a plaintiff must demonstrate that the mediator breached his or her duty of care toward the plaintiff.¹⁷⁶ A successful negligence-based claim would also require a demonstration of causation and injury.¹⁷⁷ The fundamental elements of a professional negligence claim are no different in an action against a mediator than in one against other service providers. However, a variety of aspects of modern mediation practice make each element difficult to satisfy.

The difficulty of defining a standard or customary set of practices against which to measure a mediator's performance creates a significant challenge to any plaintiff pursuing a negligence-based action against a mediator. Mediation practice is gloriously diverse. Mediators as a community include members of many different cultures, socio-economic backgrounds, education, and political leanings. The diversity of their approaches to the basic undertaking of facilitating negotiations or conversations is similarly rich. While some have argued strongly for a more unified, restrictive understanding of what constitutes "mediation," the practice continues to elude restriction.¹⁷⁸ Even efforts at defining sub-categories of mediators, often framed in terms of "style," "model," "approach," or "orientation," have been similarly less than exact.¹⁷⁹ Experienced, educated, well-intending practitioners engage in a wide variety of activities under the rubric of mediating, and no indication exists of an emerging consensus on practice decisions. Who should be in the room?¹⁸⁰ How should the

176. See DOBBS, *supra* note 173, at § 114; 57a AM. JUR. 2D *Negligence* § 6 (2002). In typical cases, establishing such a breach would require the plaintiff to demonstrate that a customary level of care exists and that the mediator's conduct failed to meet the minimum standards of that customary care.

177. See DOBBS, *supra* note 173, at § 114; 57a AM. JUR. 2D *Negligence* § 6 (2002).

178. Compare, e.g., Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 32 (1996) with John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 328-30 (2000). See also Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145 (2001).

179. See, e.g., Joseph Stulberg, *Facilitative Versus Evaluative Mediation: Piercing the Grid Lock*, 24 FLA. ST. U. L. REV. 985 (1997); Jeffrey Stempel, *Beyond Formalism and False Dichotomies*, 24 FLA. ST. U. L. REV. 949 (1997).

180. See, e.g., Christopher Moore, *The Mediation Process: Practical Strategies For Resolving Conflict* 143-8 (1996). An additional distinction exists regarding who should decide who should be in the room. Compare, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 206 (1994) (parties should discuss and decide) with GOLANN, *supra* note 40, at 136 (mediator should decide).

agenda be established?¹⁸¹ How should possible settlement options be discussed?¹⁸² How should non-settlement alternatives be considered?¹⁸³ What role should the law or other external standards play?¹⁸⁴ How transparent should the mediator be about the actions he or she takes?¹⁸⁵ How and by whom should the problems be defined?¹⁸⁶ For better or worse (and I largely think it is for the better), the diversity of mediation renders the articulation of an identifiable customary practice difficult.

The nearly ubiquitous principle of mediation confidentiality further complicates the issue of identifying customary mediation practice. Many tout confidentiality as foundational to mediation. Among the purposes of confidentiality protections is to shield the statements and conduct of those within the mediation from inspection by those outside of the mediation.¹⁸⁷ Such a purpose is perhaps laudable from the perspective of the individual disputants and the mediator in any single iteration of mediation. However, the cumulative effect of confidentiality prevents outsiders from generating a clear picture of what

181. Compare ALFINI ET AL., *supra* note 38, at 107-121 (describing structured process); MOORE, *supra* note 39, at 141 (same) with BUSH & FOLGER, *supra* note 180, at 103-4 (describing loose cycles of facilitated conversation).

182. See GOLANN, *supra* note 38, at 407 ("In general, the question is when, if ever, the mediator can and should abandon a nonjudgmental posture and be more directive. It is noteworthy that this type of dilemma was reported, in our study, more often than any other.").

183. The collective attention of mediation practitioners and scholars in recent years has been dominated largely by discussions of confidentiality and of this issue. The most prominent version of this debate takes on the label of "facilitative versus evaluative." No brief citation list would do justice to the scholarly ink spilled on this issue. For a sample of the divergent viewpoints, see Marjorie Corman Aaron, *Evaluation in Mediation*, in GOLANN, *supra* note 38, at 267-305 (considering evaluation as a strategic mediation choice); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 948 (1997) (arguing against all evaluations under the title "mediation"); Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

184. See GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 173-75 (Aspen Law & Business 1999) (surveying different views of the role of law and external standards in the context of mediation).

185. See Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J ON DISP. RESOL. 1 (1997).

186. Compare Riskin, *supra* note 183 (describing differences between mediators with broad and narrow problem definition orientations) with Bush & Folger, *supra* note 180 (criticizing the "problem-solving orientation" generally).

187. Confidentiality also protects against one mediation party subsequently using information gained in a mediation against another mediation party in an adjudicative forum. See, e.g., UNIFORM MEDIATION ACT § 4-6 (2001).

actually takes place in an “ordinary” mediation.¹⁸⁸ This generalized secrecy presents an extraordinary barrier for a plaintiff trying to demonstrate a customary mediation practice.

The difficulty of demonstrating the existence of customary practice within mediation makes establishing a *breach* of customary practice virtually impossible. Some have suggested that plaintiffs suing mediators might alternatively assert a breach of fiduciary duty, thereby avoiding problems related to the establishment of customary practices.¹⁸⁹ No courts, however, have accepted the underlying proposition that mediators somehow owe fiduciary duties simultaneously to two or more mediation parties. In extraordinary cases, a mediator’s conduct may be so outrageous that no reference to customary practice will be necessary to establish a breach of due care.¹⁹⁰ Such occurrences are mercifully difficult to imagine, however, and the rich history of mediation practice does not currently include examples of such behavior. Instead, a plaintiff seeking to establish a negligence-based claim against a mediator faces the considerable burden of establishing that the conduct in question constitutes a breach of the mediator’s duty.

Even if a plaintiff successfully establishes a breach of duty by the mediator, causation and damages pose additional hurdles. A plaintiff may allege negligence in one of two possible injury circumstances: either the mediation produced a settlement with terms the plaintiff believes are injurious, or the mediation produced no settlement, creating an injury because the plaintiff believes the case should have settled.¹⁹¹ In the first circumstance, a plaintiff will have difficulty establishing a sufficient causal link between a mediator’s negligent actions and the specific terms of an eventual agreement. In many mediations, the parties themselves are the source of all settlement

188. My anecdotal observation of mediation practitioners at conferences and continuing education sessions is that they are extraordinarily eager to learn about the practices of their colleagues. Perhaps this is a function of their personalities. I suspect, however, that the lack of easy access to information from the outside makes mediation practitioners hungry for opportunities to exchange stories and experiences.

189. See Chaykin, *supra* note 90. But see Stulberg, *supra* note 90.

190. Cf. Dobbs, *supra* note 173, at § 248 (describing certain medical malpractice cases as containing such “gross and obvious negligence” that no independent assessment of negligence standards is required).

191. Two other types of injury may theoretically stem from mediator misconduct, though I do not address them in this section of the article. First, mediator misconduct may injure one of the parties in a way that does not affect the substantive outcome of the mediation. One manifestation of this type of injury is treated *supra* in the section regarding infliction of emotional distress. A second category of injuries is those inflicted upon non-parties. In cases of failure to warn, for example, the injury from mediator misconduct does not fall on the parties.

terms, with the mediator's role restricted to facilitating discussions regarding those options. Even when the mediator plays an active role in suggesting appropriate settlement terms, the parties retain the authority—indeed the unique responsibility—for making the final decision about the acceptability of any settlement options. Unless a party can demonstrate that his or her capacity to exercise autonomy was impaired in some way, it would be difficult to lay blame for the terms of the agreement at the feet of the mediator.

The complex question of establishing damages further clouds a negligence-based claim. A plaintiff may claim that the terms of the settlement are injurious, demanding a response to the question “injurious compared to what?” Proving what would have happened in settlement discussions but for the interventions of a mediator or any other party demands extraordinary speculation. A plaintiff may try to demonstrate injury by highlighting the disparity between the outcome of the mediated settlement and the outcome litigation would have produced. However, even if a “case within a case”¹⁹² adjudication were possible to establish what would have happened in the event of non-settlement, the results of mediations are notoriously difficult to compare with the results of adjudicated proceedings. Mediation agreements can, and often do, include terms that courts are incapable of awarding. As a result, comparing court outcomes against mediated outcomes is easy only when the mediated agreement is largely distributive. Only extraordinary circumstances would allow a plaintiff to demonstrate to a legal sufficiency that a mediator's negligence caused settlement terms that in turn caused compensable, measurable injury.

In the second circumstance, involving allegedly improper non-settlement, a plaintiff will have similar difficulty proving that the disputants would have reached a settlement but for the mediator's negligence. Many mediation cases fail to settle for reasons entirely separate from the mediator's competence.¹⁹³ Non-settlement, by itself, creates no basis for an assertion of mediator negligence. As with the scenario described above, extraordinary challenges exist in determining the effects of the mediators' conduct on the dynamics between the parties. Bargaining systems are tremendously complex in even the simplest two-party dispute. Thus, even in hindsight, one rarely

192. For more on the concept of a “case within a case” or “trial within a trial,” see *supra* note 30.

193. For a detailed exploration of some of the causes of non-settlement, see BARRIERS TO CONFLICT RESOLUTION (KENNETH J. AAROW ET AL., EDS., 1995); GOLANN, *supra* note 38, at 153-241.

could say with any certainty what difference a change in the mediator's behavior would have had on the parties.

Establishing damages further complicates the claim in a non-settlement circumstance. Mediation parties have no general obligation to remain in a mediation, even in so-called mandatory mediation contexts.¹⁹⁴ Similarly, mediation parties are free to settle disputes outside the auspices of a mediator. As a result, even if a plaintiff could prove that a possible mediated settlement was thwarted because of the mediator's negligent conduct, full recovery would also demand a demonstration of why the parties could not subsequently, independently agree to the terms allegedly available. The fact that parties can vote with their feet makes negligence claims in non-settlement circumstances even more difficult to sustain. Only in truly extraordinary circumstances could a mediation party successfully link specific injuries in a non-settlement outcome to a mediator's negligence.

Mediators have many reasons to pay careful attention when conducting mediations. Respect for the mediation parties demands that mediators provide their services with care and skill. A mediator's reputation, and sometimes livelihood, will depend on the parties' assessments of the mediator's diligence and effectiveness, causing the mediator to strive for professional quality in delivering mediation services. Respect for the mediation process, and a desire to see a broad dissemination of its underlying philosophies, principles, and potential will drive many mediators to conscientiously consider the practices they adopt. For these, and many other reasons, mediators reasonably and appropriately seek to provide continually improving mediation services. For the reasons I describe above, however, mediators have little reason to modify their good faith, discretionary mediation conduct out of a fear of malpractice suits. Mediators may get sued in the future, but successful negligence-based claims are unlikely.

While mediators' historical exposure to liability has been extraordinarily limited, at least some within the mediation community demonstrate genuine concern about the prospect of parties filing legal complaints. To the extent this fear of liability is generalized, it is unproductive. Generalized fears—for example, a fear of dying in a natural disaster—suggest no course of action one can take to avoid the small chance of the unfortunate outcome in question. Complaints against mediators are unlike natural disasters in that they are

194. See COLE ET AL., *supra* note 72, at § 6.4.

neither random nor entirely beyond mediators' control. An understanding of the possible foundations of liability, coupled with some care in describing and dispensing mediation services will help a mediator avoid getting sued.

