

# Ethical Guidelines for Attorney Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?

by Fiona  
Furlan<sup>†</sup>  
Edward Blumstein<sup>††</sup> David  
N. Hofstein<sup>‡</sup>

## I. Introduction

Mediation in the United States now plays an integral role in resolving disputes as an alternative to litigation. Mediations are conducted in areas of law as varied as family law, medical malpractice, landlord-tenant, civil suits and minor criminal charges.<sup>1</sup> Many jurisdictions now require attorneys as part of their codes of professional conduct to advise their clients of the availability of alternative dispute resolution options.<sup>2</sup> In the area of family law,<sup>3</sup> private mediations currently provide an alternative to litigation for approximately ten percent of the divorces in the United

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<sup>†</sup> Fiona Furlan is a third year student of law at Temple University School of Law in Philadelphia, PA. This article was written under the direction of Edward Blumstein, David Hofstein and Eleanor Myers.

<sup>††</sup> Edward Blumstein is a partner in the firm of Blumstein, Block and Pease, of Philadelphia, and an adjunct lecturer in law at Temple University School of Law.

<sup>‡</sup> David Hofstein is a shareholder in the firm of Hofstein & Widman, P.C., also of Philadelphia, and also an adjunct lecturer in law at Temple University School of Law. Special thanks to Associate Professor of law Eleanor Myers of Temple University School of Law, under whose authority this project was undertaken.

<sup>1</sup> Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation* 26 RUTGERS L.J. 155, 160 (1994).

<sup>2</sup> See e.g., Kan. Bar Ass'n. Op. No. 94-1, *Laws. Man on Prof. Conduct* (ABA/BNA) 1001:3801 (Apr. 15, 1994).

<sup>3</sup> Family Law covers legal assistance relating to the structure of the family, particularly divorce, and the associated area of support and child custody.

States and this number is increasing by perhaps as much as 25 percent per year.<sup>1</sup> Court mandated programs, in areas such as child custody disputes, account for many more.

Yet as professional mediation develops, mediators are finding themselves in situations where their ethical obligations are unclear. For mediators who have come to mediation from another profession, such as law, there is often a dilemma. Do they need to follow the ethical guidelines of their first profession, or does another set of mediation guidelines replace those guidelines? As mediators, they find themselves in a new area, in which a comparable set of obligatory rules of conduct has yet to be established. Indeed, mediation contemplates actions that may be construed to violate the applicable rules of professional conduct.

This article considers some of the questions surrounding the ethical issues that exist for attorneys who also engage in mediation. First, the threshold question is whether mediation is the practice of law. If so, we will examine whether attorney mediators are always bound to all of the applicable rules of professional conduct, even though some of them arguably directly contradict the goals and practice of mediation, and whether the ethical rules concerning integrity and personal behavior nevertheless apply. Even if the rules for professional conduct do not apply, there are ethical guidelines specifically addressing mediation and there are legal obligations and liabilities arising out of particular statutes concerning mediation, or principles such as agency.

Having examined these questions generally, this article explores how these considerations impact the practice of mediation, highlighting specific areas where ethical dilemmas may surface, including confidentiality, drafting the mediated settlement, the business associations of the attorney-mediator, conflict of interest, developing neutrality and self-determination of the parties to mediation, and finally the question of establishing mediation as a profession, with attendant regulation. Others have addressed related issues, and it is reasonable to assume that as mediation becomes more widely used, new issues will arise.<sup>2</sup>

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<sup>1</sup> Linda R. Singer, *SETTLING DISPUTES* 36 (2nd ed. 1994).

<sup>2</sup> See, e.g., Loretta W. Moore, *Lawyer Mediators: Meeting the Ethical Challenges* 30 *FAM. L.Q.*, 679, 715 (1996).

## II. The Process of Mediation

“Mediation is facilitated negotiation. It is a process by which a neutral third party, the mediator, assists disputing parties in reaching a mutually satisfactory resolution.”<sup>3</sup> The mediator guides the parties’ negotiations through a structured process whereby the parties are helped to identify issues and explore possible solutions.<sup>4</sup> The mediator encourages each party to examine his or her own interests and needs<sup>5</sup> and attempts to move the parties toward a reconciliation of their positions by appreciating and accommodating the other party’s concerns.<sup>6</sup> The mediator facilitates the development of the information the parties need to arrive at a meaningful settlement.<sup>10</sup>

In contrast to the adversarial process for resolving disputes, the goal of mediation is that both parties should leave the mediation with a solution to which they have contributed and by which they can abide. Neither should prevail over the other. The underlying tenets of the process are that the parties themselves know best how to make the decisions that affect their lives, and they have and should rely on their own notions of fair play and justice.<sup>7</sup> The forum of mediation allows the parties to suggest and discuss options that may have very little to do with traditional notions of appropriate settlements, but which “work” for the parties. By exploring options mediation can bring the parties to the point where both of them can “win”.<sup>8</sup>

To successfully lead a mediation, “the mediator must remain neutral and be aware of her potential influence on the parties . . . successful mediation depends as much upon the appearance of neutrality as actual neutrality.”<sup>9</sup> However, while remaining neutral, a mediator must be in control of the process and able to use different

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<sup>3</sup> Kimberley K. Kovach, *MEDIATION: PRINCIPLES AND PRACTICE* 16 (1994).

<sup>4</sup> Irvine, *supra* n.1 at 158.

<sup>5</sup> Scott H. Hughes, *Elizabeth’s Story: Exploring Power Imbalances in Divorce Mediation* 8 (1995) *GEO. J. LEGAL ETHICS* 553, 567 (1995).

<sup>6</sup> *Id.*<sup>10</sup>

*Id.*

<sup>7</sup> Glen Sato, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance - A Proposal for Some Ethical Considerations*, 34 *UCLA L. REV.* 507, 509 (1986).

<sup>8</sup> That is, achieve a settlement that satisfies the needs and interests of both parties.

<sup>9</sup> Sato, *supra* n.11.

techniques to accomplish the goal. As the opener of communications or the initiator of negotiations the mediator is the catalyst that moves the process along. Sometimes the mediator may be the legitimizer, helping the parties to see the other party's rights. Sometimes becoming the agent of reality, the mediator challenges extreme or unrealistic positions. Sometimes as a scapegoat, the mediator takes responsibility for unpopular events.<sup>10</sup> Thus a mediator may be in the role of supervisor, teacher, clarifier, advocate (for the process) and even devil's advocate.<sup>11</sup> There can be a conflict in remaining neutral and orchestrating the mediation at the same time. Professor Kovach resolves this conflict by pointing out that it is the process that leads the parties to a successful resolution, not the mediator. At no time is the mediator responsible for the content matter of the dispute, because that is the responsibility of the parties. The process remains the same regardless of the subject matter. The mediator is responsible for the process.<sup>12</sup>

Mediation frequently has considerable advantages over litigation. The parties have more control of the process in mediation, avoiding the uncertainty of a litigated result and the frustration of an imposed solution.<sup>17</sup> Costs are often less than the cost of a litigated solution.<sup>13</sup> Moreover, mediation can reduce the hostility surrounding an adversarial approach to a settlement.<sup>14</sup> Thus it should not be a surprise that research indicates that satisfaction with the mediation process is generally higher than with litigation.<sup>15</sup>

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<sup>10</sup> Hughes, *supra* n.8 at 567.

<sup>11</sup> Kovach, *supra* n.6 at 28.

<sup>12</sup> *Id.* at 29. The process itself can be broken down into several stages. A traditional model includes the mediator's introduction; opening statements by the parties (including an opportunity for venting emotions) often described as an orientation; information gathering; issue identification and the opportunity for the mediator to set the agenda for the mediation; caucusing if appropriate (meeting with each party individually); encouraging the parties to perceive options and reality testing; bargaining and negotiation; and agreement. *Id.* at 24. <sup>17</sup> Hughes, *supra* n.8, at 568.

<sup>13</sup> One study shows that a successful privately mediated divorce settlement cost an average of 134 percent less than a litigated solution. Singer, *supra* n.4, at 43-4 (citing Joan B. Kelly, *Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs*, 8 *Mediation Q.* 15 (1990)).

<sup>14</sup> Hughes, *supra* n.8 at 569.

<sup>15</sup> In a study of court sponsored child custody mediation it was found that of the cases that had been successfully mediated, the non-custodial parent expressed satisfaction with the result in 75 percent of the cases. This compares to 30 percent of

Mediation is used in many contexts as an alternative to litigation. However, it is not universally applicable. For example, it is generally not recommended where there has been a history of abuse between the parties.<sup>21</sup> This is especially true when the situation indicates a significant imbalance of power between the disputants that would render an honest communication of needs and desires impossible to achieve.<sup>16</sup>

Mediation is, however, especially well suited to resolving divorce and custody disputes, where there is no history of abuse. A family coming to court often experiences a significant amount of emotional turmoil. Unlike litigation, mediation provides a forum for the expression of emotion, and validates the needs and concerns of the individuals as important in the decision making process.<sup>23</sup> It would be an overstatement to claim that mediation could take away the pain of a divorce, but it seems to go some way towards alleviating the additional burden of a contested settlement.

#### *The Current Status of Mediation*

According to 1992 statistics, there were about twice as many marriages as divorces in the United States. These statistics are in contrast to thirty years ago when there were four times as many marriages as divorces. The most pessimistic commentators predict that three out of five marriages which originate in the 1990s will end in divorce.<sup>17</sup> More than a decade ago it was estimated that more than half of the civil cases pending in this country were divorce cases.<sup>18</sup> Many courts are backlogged, and long waits for a trial date are common.

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the non-custodial parents as a result of litigated cases. Three months after the experience, the divorced couples were polled as to whether they felt the experience had a detrimental effect on their relationship. Forty percent of those who went to court reported that it had, compared to less than 15 percent of the participants in mediation. Singer, *supra* n.4, at 43 (citing Jessica Pearson and Nancy Thoenes, *A PRELIMINARY PORTRAIT OF CLIENT REACTIONS TO THREE COURT MEDIATED PROGRAMS* (1982)).<sup>21</sup> Many statutes limit or prohibit mediation in cases of domestic violence. See, Loretta W. Moore, *Lawyer Mediators: Meeting the Ethical Challenge*, 30 *FAM. L.Q.* 679, 715 (1996) (providing a comprehensive list of statutes).

<sup>16</sup> See e.g., Hughes, *supra* n.8 at 563.<sup>23</sup>

Hughes, *supra* n.8 at 569.

<sup>17</sup> Singer, *supra* n.8 at 569.

<sup>18</sup> Andrew S. Morrison, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 *CAL. L. REV.* 1093, 1093 (1987) (citing Loeb, *Introduction to the Standards of Practice for Family Mediators*, 17 *FAM. L.Q.* 451 (1984)).

Therefore, it is not surprising that many clients and courts, concerned about costs and delays, are turning to mediation as a means of avoiding the traditional court system. Many states now have mediation programs in family courts, at least for the area of child custody.<sup>19</sup> These programs take many forms. In some, couples must be informed of, and encouraged, but not mandated, to participate in mediation whenever available (Michigan, Washington). In another, mediation is mandatory at a judge's discretion (North Dakota). Many states run mandatory programs required before a couple can come into court (California, Alaska, Arizona, Delaware, Florida, Kansas, Louisiana, Nevada, New Mexico, North Carolina, Oregon, South Dakota and Wisconsin). Two states require mediation of all contested issues of separation, annulment and divorce if the couple has minor children (Maine and Ohio).<sup>20</sup>

### III. Is Mediation the Practice of Law?

#### A. *The Practice of Law Defined*

It is often difficult to reconcile the goals and values of mediation with those of traditional lawyers, articulated in the Rules of Professional Conduct adopted by each state for the regulation of its lawyers. Most are based on the A.B.A.'s Model Rules of Professional Conduct (1992), and others on the earlier Code of Professional Conduct (1980). For the purposes of this article, comparison will be made to the A.B.A. Model Rules of Professional Conduct.<sup>21</sup>

The question arises is an attorney-mediator involved in mediation therefore practicing law? This is a threshold question in determining the applicability of the Model Rules of Professional Conduct to the mediation process. Despite much discussion on the subject, there is still some controversy within the legal community over whether the practice of mediation constitutes the practice of law.<sup>22</sup> The problem is reflected

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<sup>19</sup> Singer, *supra* n.4 at 41.

<sup>20</sup> *Id.*

<sup>21</sup> The Model Rules of Professional Conduct and the earlier Code of Professional Conduct are not binding in any state. However, each states has its own binding rules of conduct applicable to that state and enforced by the courts of that state. Most are variations of the Model Rules.

<sup>22</sup> See Sandra E. Purnell, *The Attorney as Mediator - Inherent Conflict of Interest?* 32 UCLA L. REV. 986 (1985); Sato, *supra* n.11; Morrison, *supra* n.26. <sup>30</sup> Ind. State Bar Ass'n, Op. No. 5 of 1992, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:3304

in the informal opinions of different state bars. Some of the opinions specifically state that they do not believe mediation is the practice of law.<sup>30</sup> Another specifically takes the opposing opinion.<sup>23</sup> The subject is complicated by the fact that while many mediators are attorneys, others are from other professions, such as therapists or social workers. But all mediators provide essentially the same service to mediation clients.

There are some statutes that directly address the question of what constitutes the “practice of law”. Virginia<sup>24</sup> and West Virginia<sup>25</sup> focus on the attorney-client relationship generally as the basis of the definition. Some states concentrate not on the attorney client relationship, but solely on the functions of a lawyer, such as representing, drawing of legal papers in connection with a court,<sup>26</sup> conveyancing, or giving legal advice.<sup>27</sup> These statutes give ample room for judicial interpretation. Some statutes are non specific, referring to case law in order to define the “practice of law”.<sup>28</sup>

The practice of law at its core involves a relationship between the attorney and client. The ABA Model Rules of Professional Conduct state that this relationship is determined by “substantive law external to these rules,” by judicial decree or by statute.<sup>29</sup> The Rules go on to state that most of the duties deriving from the relationship only exist “after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.”<sup>30</sup> This is a legal relationship between two parties constituting the practice of law and it exists based on two preconditions, first the belief of the client that he is getting legal service and second, the acts of the attorney in providing the same. Case law follows a similar approach, looking at the question of legal services first

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(1992); Ky. Bar Ass’n, Op. E-377, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:3905 (June 6, 1995); N.H. Bar Ass’n, Op. 1993-9414, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:5706 (Dec. 16, 1993).

<sup>23</sup> N.J. Op. No. 676, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:5806 (Apr. 15, 1994).

<sup>24</sup> VA. CODE ANN. Sup. Ct. R. 6.

<sup>25</sup> See generally, W. Va. Code R. Prof. Conduct.

<sup>26</sup> GA. CODE ANN. § 15-19-50 (1996).

<sup>27</sup> Mo. REV. STAT. § 484.010 (1995).

<sup>28</sup> See e.g., N.D. CENT. CODE § 27-11-01 (1995); UTAH CODE ANN. § 7851-25 (1996); ARIZ. REV. STAT. ANN. Sup. Ct. R. 42, R. Prof. Conduct ER 5.5 (1996).

<sup>29</sup> Model Rules of Professional Conduct, Scope cmt. 3.

<sup>30</sup> *Id.*

from the point of client reliance, and then, having established that a client has relied on the advice given or acts rendered, courts have gone on to then examine the second question, the specific acts of the service provider.<sup>3132</sup>

A full understanding of the “practice of law” must be obtained on a case by case basis. As the court in *State Bar of Michigan v. Cramer*<sup>40</sup> declared, “[n]o essential definition of the practice of law has been articulated and the descriptive definitions which have been agreed upon from time to time have only permitted dispositions of specific questions.”<sup>33</sup> Expressing its frustration at the inconclusiveness that has reigned, the Supreme Court of Michigan then stated: “[t]he result of this inability to fashion a definition of ‘practice of law’ to fit every situation ‘has been a line of decisions consistent only in their inconsistency.’”<sup>42</sup> In attempting to apply the case law to the practice of mediation, attorneys often have had the same reaction.

However, the policy behind these different approaches seems clear. The courts are not so much interested in concretely defining the practice of law as in protecting the public from potential abuses in an attorney-client relationship, be they from within the system in the form of attorneys or without in the form of untrained and unlicensed practitioners. Judicial balancing allows the courts to review the equities in each case, balancing the reputation and public confidence in the legal system with justice to the parties as individuals. Any discussion of mediation as the practice of law must be cognizant of this underlying policy.

Recent case law specifically concerning whether mediation constitutes the practice of law is limited at best.<sup>34</sup> However, the framework for the examination of the practice of law has been set forth in other settings, such as evaluating the attorney-client privilege, an attorney client conflict of interest, attorney malpractice and whether a

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<sup>31</sup> See *infra* notes 41 through 78 and accompanying text.

<sup>32</sup> N.W.2d 1 (Mich. 1976).

<sup>33</sup> *State Bar of Michigan v. Cramer*, 249 N.W.2d 1, 7 (Mich. 1976). <sup>42</sup> *Id.* at 7. (citation omitted.)

<sup>34</sup> One case has come to light that appears to denote mediation as legal services. However, the term was used as part of a petition for disciplinary action against a Minnesota lawyer who was accused of practicing law in contravention of probation. The attorney stipulated to the allegations, and they were not therefore adjudicated on the merits. *In re* Petition for Disciplinary Action Against Stephen J. Poindexter, 493 N.W.2d 539 (Minn. 1992).



non-attorney has engaged in the unauthorized practice of law.<sup>35</sup> In cases involving the evidentiary privilege, courts are likely to construe the practice of law narrowly so as to allow as much evidence in as possible.<sup>36</sup> By contrast, in cases of attorney's potential conflict of interest, courts generally focus on protecting the client in analyzing whether to disqualify an opposing counsel.<sup>37</sup> When looking at a non-attorney engaged in the unauthorized practice of law, a court is likely to take a broad view of the subject with the aim of as much protection of the public as possible.<sup>38</sup> Similarly, in an attorney malpractice case, "client reliance" may cause a court to look beyond the specific acts of an attorney to take a broader view of the practice of law.<sup>39</sup>

An examination of the seminal cases in each of these areas defining what constitutes the practice of law provides some critical insight into whether the attorney acting as a mediator is practicing law.

*The Unauthorized Practice of Law*

In a case determining whether the actions of a land title and trust company constituted the unauthorized practice of law, Supreme Court of Arizona chose to look primarily at the conduct of the company. However, it also found "[r]eliance by the client on advice or services rendered, rather than the fact that compensation is received, is more pertinent in determining whether certain conduct is the purported or actual practice of law."<sup>40</sup> Having determined that there was reliance by the clients, the court then specifically examined the acts of the trust company. Applying the standard that "those acts, whether performed in court or in the law office, which lawyers customarily have carried on

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<sup>35</sup> Purnell, *supra* n.29 at 993.

<sup>36</sup> *Id.* (citing *United States v. United Shoe Mach. Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950)); *see infra* notes 55 through 59 and accompanying text.

<sup>37</sup> *Id.* (citing *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 448 F.Supp. 1284, 1304 (N.D. Ill.), *rev'd* on other grounds *sub nom.* *Westinghouse v. KerrMcGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978), *see infra* notes 60 through 63 and accompanying text.

<sup>38</sup> *Id.* at 994 (citing *Oregon State Bar v. John H. Miller & Co.*, 385 P.2d 181 (Or. 1963); Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 41-42 (1981)).

<sup>39</sup> *Id.* at 993-94 (citing *Kane, Kane & Kritzger, Inc. v. Altagen*, 107 Cal. App. 3d 36, 40, 165 Cal. Rptr. 534, 536 (1980)).

<sup>40</sup> *State Bar of Arizona v. Arizona Land Title and Trust Co.*, 366 P.2d 1, 9 (Ariz. 1961).

from day to day through the centuries must constitute the ‘practice of law,’” the court concluded that the actions of the land title and trust company did constitute the practice of law.<sup>41</sup>

Other cases concerning the unauthorized practice of law seem to follow a similar pattern. It seems that the court assumes that since the defendant is in court charged with the unauthorized practice of law, he has had clients rely upon him for legal advice or services. The focus in these cases therefore shifts away from reliance, which is presumed, and onto the acts of the provider. How to define the acts themselves as the practice of law is treated differently by different courts. A frequently used test is whether a defendant “performed acts, in or out of court, ‘commonly understood to be the practice of law.’”<sup>42</sup> This is not a very satisfying definition of what constitutes the practice of law, since it remains vague, ultimately only to be defined in relation to the specific activity at issue. However, having determined that an activity does fall into this category, it necessarily follows that the practice “must be and is confined to those who have been duly licensed as lawyers.”<sup>43</sup>

There is an incidental exception to this rule whereby courts will allow a certain amount of legal content in one’s work, provided that those services are incidental to the main business of the provider. For example, in the area of industrial relations and personnel management, a certain level of legal knowledge is essential, but not the primary focus of the profession.<sup>44</sup> “If so, the primary service is nonlegal, the purely incidental use of legal knowledge does not characterize the transaction as the wrongful practice of law.”<sup>45</sup> The policy reasons for this are found by balancing the need for protecting the public against the disinclination to create an unnecessary professional monopoly. It has been noted that “the licensing of law practitioners is not designed to give rise to a professional monopoly, but rather to serve the public right to

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<sup>41</sup> *Id.*

<sup>42</sup> *State Bar Ass’n of Connecticut v. Connecticut Bank and Trust Co.*, 140 A.2d 863 (Conn. 1941) (discussing estate planning services offered by bank. The Court held the bank could not draw up instruments, appear or represent clients at probate court hearings because this constituted the unauthorized practice of law.) *See Stern v. State Bd. of Law Examiners*, 199 N.E.2d 850, 853 (Ind. 1964).

<sup>43</sup> *Arizona*, 366 P.2d at 14.

<sup>44</sup> *Auerbacher v. Wood*, 59 A.2d 863, 863 (N.J. 1948).

<sup>45</sup> *Id.* at 864.

protection.”<sup>46</sup> This exception is not universally agreed upon, however. Some courts see the danger to the public as too great to allow even an incidental exception to the rule: “[a]ny rule which holds that a layman who prepares legal papers or furnishes other services of a legal nature is not practicing law when such services are incidental to another business or profession completely ignores the public welfare.”<sup>47,48</sup>

Many cases define the practice of law as unauthorized only when the provider applies the law to the specific facts of a case, as presented by a client. There is a long line of cases dealing with “Do-it-yourself” divorce or will kits that take this approach. One of the earliest was *New York County Lawyers’ Association v. Dacey*<sup>49</sup> which held that a book HOW TO AVOID PROBATE did not constitute the unlawful practice of law because it did not apply the law to the facts of any particular situation. It simply provided general advice as to what the law was. While this approach was not initially generally accepted,<sup>49</sup> many states have now adopted it.<sup>50,51</sup>

#### *Attorney-Client Privilege*

A principle federal case that defines the practice of law for the purposes of defining an evidentiary privilege is *United States v. United Shoe Machinery Corporation*,<sup>60</sup> in that case the court approached the problem from a dual angle, regarding both client-reliance and the acts of the attorneys as integral to any definition. The question before the court was whether communications between the defendant company and its patent department were privileged and therefore inadmissible. Judge Wyzanski specifically

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<sup>46</sup> *Id.* See *infra* notes 165 through 176 and accompanying text (discussing that this is the same rationale behind the Pennsylvania rule 5.7, published in 1996).

<sup>47</sup> *Gardner v. Conway*, 48 N.W.2d 788, 795 (Minn. 1951).

<sup>48</sup> A.D.2d 161 (N.Y. App. Div.), rev’d, 234 N.E.2d 459 (N.Y. 1967) (adopting dissenting opinion).

<sup>49</sup> See *e.g.*, *The Florida Bar v. Stupica*, 300 S.E.2d 683 (Fla. 1974).

<sup>50</sup> See *e.g.*, *State Bar of Michigan v. Cramer*, 249 N.W.2d 1 (Mich. 1975); *In re Thompson*, 574 S.W.2d 365 (Mo. 1978) *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978) (overruling *Stupica* concerning adherence to the principles in *Dacey*); *(New Jersey State Bar Ass’n v. Divorce Car. of Atlantic County)*, 477 A.2d 415 (N.J. Super. Ct. Ch. Div. 1984), *Oregon State Bar v. Gilchrist*, 538 P.2d 913 (Or. 1975).

<sup>51</sup> F. Supp. 357 (D. Mass. 1950).

focused on confidentiality, but as a threshold question, he determined in part whether: “(1) the asserted holder of the privilege is or sought to become a client and [whether] (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer.”<sup>52</sup> Parts (3) and (4) of the test related to the nature and intent of the specific communication. The court determined that the communications between the company and the patent department were generally on questions of business. The patent department employees have “not been shown to spend most of their time on the application of rules of law to facts which are known only to United’s employees.”<sup>53</sup> Based on the apparent attitude of the company to the patent department and on the nature of their specific work, the court determined that communications between the patent department and the corporation were not privileged, and therefore not the practice of law. This rationale has been applied in later cases with the same result.<sup>63</sup>

#### *Attorney Malpractice*

In an attorney malpractice suit, the question of whether an action is legal practice or non-legal services is sometimes raised by the attorney’s insurance company, seeking to avoid a claim. In the case of *H.M. Smith v. The Travelers Indemnity Company*,<sup>64</sup> the plaintiff had already received a judgment in his favor against an attorney, Wood, to recover a sum of money that the attorney had invested on plaintiff’s behalf. Plaintiff Smith commenced this suit in an attempt to recover against the Insurance Company, with whom Wood had a valid policy at the time of the wrongful act. The defendant raised the defense that investment was not the practice of law, and therefore not covered by the policy. In reaching its decision, the court, using reasoning similar to that in other cases, emphasized that the primary inquiry is “whether the attorney was engaged for his legal services or for work which is not inherently the practice of law.”<sup>65</sup> First the court examined the relationship between the plaintiff and the attorney, and held that since the attorney had approached the plaintiff with an offer of investment, Smith could not be said to have sought legal services. Second, the testimony of the attorney and Smith revealed that neither thought an

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<sup>52</sup> *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-9 (D. Mass. 1950).

<sup>53</sup> *Id.* at 361.

attorney-client relationship existed. Having established the lack of attorney-client relationship, the court looked to the actual acts performed and deemed the investment of funds to be non-legal in nature.<sup>66</sup>

### *Conflict of Interest*

The area of attorney conflict of interest is much more controversial. In *Westinghouse Electric Corporation v. Kerr-McGee Corporation*,<sup>67</sup> the issue concerned anti-trust representation of

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<sup>63</sup> *Id. See e.g., Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954).

<sup>64</sup> 343 F. Supp. 605 (M.D. N.C. 1972).

<sup>65</sup> *H.M. Smith v. Travelers Indem. Co.*, 343 F. Supp. 605, 609 (M.D. N.C. 1972) (citing *Ellenstein v. Herman Body Co.*, 129 A.2d 268 (N.J. 1957)).

<sup>66</sup> *Id.* at 610.

<sup>67</sup> 580 F.2d 1311 (7th Cir. 1978). The presumption that information would be shared within a single firm, irrespective of the size, created by this case was the plaintiff corporation by a law firm which had lobbied on behalf of the American Petroleum Institute. In the course of that lobbying effort, the law firm had obtained confidential information regarding the businesses of several defendants in the antitrust suit. In this situation, the court adopted a broad view of the practice of law, and found a fiduciary relationship between the attorney-lobbyists and the defendants, even in the absence of a traditional attorney-client relationship. The court held that under the ABA Canons of Professional Ethics,<sup>68</sup> there was a conflict of interest in the attorney's continued representation of the plaintiff Westinghouse under canons 4,<sup>69</sup> 5<sup>70</sup> and 9.<sup>71</sup> The lower court had applied the principles of agency and determined that no conflict of interest existed. The Court of Appeals for the Seventh Circuit rejected this theory and held that an attorney-client relationship transcends that of agency.<sup>72</sup> In addition to the duties imposed by the agency relationship, the court also found a fiduciary relationship that encompassed confidentiality of communications between the attorneys and the businesses surveyed. A determinative factor for the Seventh Circuit Court hinged "upon the client's belief that he is consulting a lawyer in that capacity and [upon] his manifested intention to seek professional legal advice."<sup>73</sup> Here, the court held that the defendants "each entertained a reasonable belief that it was

submitting confidential information regarding its involvement in the uranium industry to a law firm which had solicited the information upon a representa-

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slightly relaxed a year later in *Novo Terapeutisk Lab. v. Baxter Travenol Lab.*, 607 F.2d 186, 194 (7th Cir. 1979). *Baxter* made rebuttal possible in certain circumstances not pertinent here.

<sup>68</sup> *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1320 (7th Cir. 1978). The Canons of Professional Ethics were in effect for 61 years, from 1908 to 1969, when they were superseded by the ABA Model Code of Professional Responsibility.

<sup>69</sup> *Westinghouse*, 580 F.2d at 1320-21 (quoting Model Code of Professional Responsibility Canon 4 “A lawyer should preserve the confidences and secrets of a client.”)

<sup>70</sup> *Id.* at 1320-21 (quoting Model Code of Professional Responsibility Canon 5 “A lawyer should exercise independent judgment on behalf of a client”).

<sup>71</sup> *Id.* at 1320-21 (quoting Model Code of Professional Responsibility Canon 9 “A lawyer should avoid even the appearance of impropriety”).

<sup>72</sup> *Id.* at 1317.

<sup>73</sup> *Id.* at 1320 (quoting McCormick ON EVIDENCE (2d ed. 1972), para 88, p. 179).

tion that the firm was acting in the undivided interest of each company.”<sup>54</sup> In applying the fiduciary relationship in this way, the court reinforced the obligations of an attorney relating to confidentiality, even in a situation where the attorney was dealing with an entity other than his actual client. The court also looked to the nature of the work and found that political lobbying can be a feature of “legal services,” especially since, as here, the attorneys “did not disavow its capacity as attorneys but came expressly represented as lawyers.”<sup>55</sup> From its analysis of the two primary factors, reliance of the clients and acts of the attorneys, the court thus found a fiduciary relationship sufficient to cause a conflict of interest in a subsequent adverse representation.

As part of its analysis the court described other instances when a “fiduciary obligation or an implied professional relation”<sup>56</sup> might exist, even when there is no express attorney-client relationship. The court listed examples of such situations including a preliminary consultation by a prospective client that does not result in employment, the exchange

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<sup>54</sup> *Id.* at 1321.

<sup>55</sup> *Id.* at 1320.

<sup>56</sup> *Id.* at 1319. <sup>77</sup> *Id.*

of information between co-defendants in a criminal case and the investigation of an insurance claim by an attorney on behalf of the insurer, with the insured cooperating in the investigation.<sup>77</sup> In all those instances, the court found a duty of confidentiality arising from the fiduciary relationship despite the lack of a traditional attorney-client relationship.

### B. *Applying The Case Law to Mediation*

In applying the case law discussed in the prior section, mediation must be evaluated in terms of the twofold test underlying all the decisions; client reliance and actual performance by the attorney. Both criteria would therefore have to be fulfilled to conclude that mediation is the practice of law.

#### *Actual Performance*

In evaluating actual performance, the courts in the above cases, have looked at what is commonly understood to be the practice of law,<sup>57</sup> the application of law to individual circumstances,<sup>58</sup> the allocation of working time on legal issues<sup>59</sup> and the concept of “legal services.”<sup>60</sup>

As noted above, the “commonly understood test” is unsatisfactory. First it is tautological, defining what is the practice of law by saying it is the practice of law. Second it is vague. For instance, if in twenty years time, mediation became a service offered by most attorneys, mediation may then become the practice of law, even if it could not now be so determined. Objections aside, it is possible to come to some conclusions regarding the traditional attorney’s role, which falls into three main areas, the function of advocate, the function of a counselor and in the specific relationship that is created between attorney and client.<sup>61</sup> As an advocate, an attorney’s role is necessarily adversarial. Whether a case goes to court, an attorney’s advice and actions must prepare for that eventuality so as to protect the client’s legal position. By contrast, mediation is by its nature non-adversarial. Indeed, the mediation process pays little heed to the possibility of future litigation, since it

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<sup>57</sup> *Arizona*, 366 P.2d at 8.

<sup>58</sup> *Dacey*, 234 N.E.2d at 459.

<sup>59</sup> *United Shoe*, 89 F. Supp. at 361.

<sup>60</sup> *Westinghouse*, 580 F.2d at 1320.

<sup>61</sup> See e.g., Model Rules of Professional Conduct.

aims to encourage free expression between parties, and this may lead to them revealing strengths and weaknesses without regard for possible future litigation.<sup>62</sup> Indeed the process is conducted under the cloak of confidentiality, in theory enveloping the mediator and both participants.

In a traditional attorney-client relationship, an attorney acts exclusively for the benefit of his client, and this, by definition, does not allow him to represent or be employed by a party with opposing interests to those of his client.<sup>84</sup> In mediation, the mediator does not act for the exclusive benefit of either party. In fact, the best interest of each party is relevant to the process only in terms of how their interests affect the negotiations during the mediation. The goal is to fashion a solution acceptable to both parties, not exclusively to the advantage of either.

As a counselor, an attorney advises a client concerning the law, and how it relates to the individual circumstances of that specific client. This is the test applied in *Dacey* and *United Shoe*. A mediator, by contrast, offers general information concerning legal principles, without applying it to specific facts. For instance, a mediator may explain the state of the law in a particular jurisdiction concerning child custody by explaining that courts decide these issues by applying the doctrine of “best interests of the child.” A mediator would not attempt to tell the participants how this doctrine would apply to their particular situation, nor make predictions about how a court may rule. While the advice given does take place by means of direct personal contact, which was not the exact situation in *Dacey*, it stays within the spirit of *Dacey* by avoiding application of the law to an individual. On balance, it would seem closer to a non-legal service than the practice of law. For a non-attorney mediator, crossing this line to give advice could well be deemed the unauthorized practice of law. An attorney-mediator should be especially wary, since legal training probably makes for a greater temptation to advise. Specific advice turns the attorney-mediator into an advocate, with its attendant relationship and obligations.

Applying the tests of *Arizona*, *Dacey* and *United Shoe*, mediation should not be interpreted by a court to be the act of any attorney. However, the decision in *Westinghouse Electric* requires more scrutiny. Here the court took a broad view of legal services and found that political lobbying was not “foreign to lawyers and in fact [was] a

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<sup>62</sup> See *supra* notes 7 through 12 and accompanying text. <sup>84</sup> Model Rules of Professional Conduct Rule 1.7.



common undertaking by Washington, D.C. lawyers.”<sup>63</sup> This is troublesome because it seems to imply that simply because attorneys engage in the task (in that case, lobbying), the task becomes the practice of law. A significant number of attorneys are engaged in mediation, so does this *ipso facto* make mediation the practice of law? It should not. The *Westinghouse* holding was quite narrow, confined to the facts of the case where the law firm was taking an adverse position to entities from which it had received related confidences. It is possible that a similar situation may arise where a mediator could use confidential information to damage a mediation clients interests. However, the only duty the court imposed on the attorneys was one of confidentiality, not the whole range of obligations expressed in the Model rules of Professional Responsibility.<sup>64</sup> Since mediation voluntarily embraces the concept of confidentiality, usually by means of a written agreement, it could be argued that a mediator is already bound by the standards of confidentiality imposed on the attorneys in *Westinghouse* by means of agency principles. This is an existing fiduciary arrangement arising out of the written agreement, and also in some cases by statute, and this protection for clients is arguably sufficient.

The *Westinghouse* attorneys were criticized because they “did not disavow [their] capacity as attorneys but came expressly represented as lawyers.”<sup>65</sup> An attorney’s mediation should involve a discussion of the fact that he is not acting as an attorney. Further an attorney mediator would be well advised to ensure that the client understands the disavowal.

#### *Client Reliance on the Mediator as an Attorney*

It is difficult to determine whether a client relies on the mediator to provide a legal service. Explanations that the mediator will not be acting in a legal capacity and advice that each client should retain an individual attorney should be sufficient to prevent a client from relying on the legal services of a non-attorney mediator, but if clients choose an attorney to mediate, their expectations may be very different.

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<sup>63</sup> *Westinghouse*, 580 F.2d at 1320.

<sup>64</sup> *Id.* at 1321.

<sup>65</sup> *Id.* at 1320.

One commentator argues that many clients choose an attorney-mediator over a non-attorney mediator precisely because of his or her legal knowledge and ability.<sup>66</sup> A client may believe he is getting the services of both a lawyer and a mediator for the price of one.<sup>67</sup> Even if the client accepts that the attorney is only acting as a mediator, he may correctly believe that an attorney knows best what the law is,<sup>68</sup> and he may feel that this knowledge would accept the mediator's concept of a "fair" settlement.<sup>69</sup> Licensing by the bar also implies that the attorney has a desirable degree of intelligence and integrity, and may also imply that he is held to the standard of care of other attorneys working in a traditional role.<sup>70</sup> Other commentators suggest that in a family law mediation there is also a risk that the emotions of the parties may be very strong. In some cases they may even affect the cognitive abilities of the parties.<sup>71</sup> A court would have to weigh this in any decision concerning the reasonable reliance of a client on the attorney acting as an attorney or as a mediator.

Case law suggests that each case will be determined on its particular facts. However, if an attorney is acting as a mediator, it should behoove him to pay particular attention to the question of reliance during the orientation at the start of the mediation, explaining fully the extent of his responsibilities. There should be a written waiver to protect the attorney's position, and to make it clear that the client will best protect their own interests with the help of independent counsel and not by relying on the attorney-mediator.<sup>72</sup>

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<sup>66</sup> Morrison, *supra* n.25 at 1121-3.

<sup>67</sup> *Id.* at 1121 n.101 (quoting Richard Crouch, *Mediation and Divorce: The Dark Side is Still Unexplored*, FAM. ADVOC. Winter 1982 at 34).

<sup>68</sup> *Id.* at 1122 n.140 (quoting Agran v. Shapiro, 273 P.2d 619, 626 (Cal. Ct. App. 1954)).

<sup>69</sup> *Id.* at 122 n.143 (quoting Coombs, *Now Court-connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. 469, 491 (1984)).

<sup>70</sup> *Id.* at 1122, n.145.

<sup>71</sup> Robert A. deMayo, *Practical and Ethical Concerns in Divorce Mediations: Attending to Emotional Factors Affecting Mediator Judgment*, 13 MEDIATION Q. 217, 218 (Spring 1996).

<sup>72</sup> See e.g., *Westinghouse*, 580 F.2d at 1320. <sup>95</sup>

Morrison, *supra* n.25 at 1124.

*C. Summary: Is Mediation the Practice of Law*

Some commentators argue that attorneys are always bound by their ethical obligations, regardless of their chosen occupations, and that any occupation in which the attorney mediator provides a service must therefore be determined to be the practice of law and under the authority of the applicable Rules of Professional Conduct.<sup>95</sup> The logical corollary of this argument is that non-attorneys practicing mediation are engaged in the unauthorized practice of law, and should refrain from mediating. As a commentator who believes that attorney-mediators are practicing law, Andrew Morrison has suggested an alternative, bifurcated system, providing that mediation is not the practice of law for a non-attorney, but it is for a licensed attorney.<sup>73</sup>

The conclusion is not practical, nor is it in the best interests of the public. Mediation succeeds because it attends to the needs of conflicting parties in a cost efficient and accommodating way. Morrison is correct to the extent that lawyers may bring their education to mediation, but legal knowledge is not the only skill necessary to be a successful mediator. Communication and listening skills are paramount: lawyers do not have a monopoly on these abilities. To deter non-lawyers from mediation would seem to deny good mediators to the public. A decision to ban the unauthorized practice of law should be made with the goal of protecting the public from unqualified practitioners.<sup>74</sup> Nonattorneys are qualified to mediate, since legal knowledge is an advantage, but not a necessity.<sup>75</sup> Rather than taking the radical step of determining that non-attorney mediators are engaged in the unauthorized practice of law, it seems more likely that a court would find the legal content in a mediation to be merely incidental to the practice, and thereby allow non-lawyers to continue to mediate.<sup>76</sup>

Morrison's theory falls when you examine the other side of the issue. If there is an good argument for mediation not being the practice

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<sup>73</sup> *Id.* at 1125-26.

<sup>74</sup> See *Auerbacher*, 59 A.2d at 864.

<sup>75</sup> See *Kovach*, *supra* n.6 at 30-39. (defining four skills of a mediator as communication, note taking and organization, counseling and calming skills and motivating human behavior).

<sup>76</sup> See *Auerbacher*, 59 A.2d at 864. Some states, however, do not recognize this exception. See *e.g.*, *Gardner v. Conway*, 48 N.W.2d 788 (Minn. 1951). <sup>100</sup> *United Shoe*, 89 F. Supp. at 360.

of law for a non-lawyer because of the incidental exception rule, then by extension, a lawyer performing the same function should also be deemed to be performing a non-legal service. It seems unlikely that a court would decide whether an act was the practice of law wholly on the basis of the parties' status as an attorney or a non-attorney. *United Shoe*, for example, determined that the work done by the employees in the patent department was not distinguishable on the basis of whether they were trained as attorneys.<sup>100</sup> The determination of whether they were engaged in the practice of law, justifying in that case an evidentiary privilege, was determined on the basis of their acts and how much of their work related specific facts to law and the expectations of their clients, the rest of the company, not on whether they were licensed as attorneys.

Courts do not seem willing to define an activity as the practice of law in one case and not the practice of law in another simply because of the licensing of the actor. In the case of *Ellenstein v. Herman Body Company*,<sup>101</sup> the court was asked to determine whether a lawyer acting as a labor negotiator was engaged in the practice of law. The court followed the reasoning of *Auerbacher*, which determined that a non-lawyer was not engaged in the practice of law when working as a labor negotiator. In both cases, the courts found that since the legal component of the work was incidental to the overall activity, neither the lawyer *Ellenstein* nor the non-lawyer *Auerbacher* was engaged in the practice of law. The court emphasized that "I can find nothing suggestive of the role of lawyer nor can I find that in the work as actually performed there was any significant intrusion of legal aspects, and insofar as *Ellenstein* may have somewhere along the line kept principles of law in mind, it was purely incidental to the primary work."<sup>102</sup>

In conclusion, it is the opinion of the authors that if an attorney mediator disavows the provision of legal services and gives only general information and not specific advice, mediation should not be judged to constitute the practice of law.

#### **IV. To What Extent are the Applicable Rules of Professional Responsibility Relevant to the Attorney-Mediator?**

##### *A. The Model Rules of Professional Conduct*



If mediation is not the practice of law, to what extent, if any, is an attorney mediator bound by the Model Rules of Professional Responsibility? One argument suggests that he is not bound at all. Certainly a non-critical application of the Model Rules to mediation could make it impossible for lawyers to mediate because the very process of mediation conflicts with several

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<sup>101</sup> 129 A.2d 268 (N.J. 1957).

<sup>102</sup> *Ellenstein v. Herman Body Co.*, 129 A.2d 268, 271 (N.J. 1957).

of the Model Rules. For example, the whole of section one, relating to the client-lawyer relationship is problematic since the parties to a mediation are not the clients of the attorney mediator. (In fact, in a private mediation, they are usually clients of another attorney.) A mediator cannot “act with commitment and dedication to the interest of the client”<sup>77</sup> if there is no relationship established, and the mediator also owes a duty to the opposing party in the mediation. The comments to Rule 1.6 regarding confidentiality make it clear that the purpose of the confidentiality rule is to encourage disclosure in order to allow the lawyer to fully advise her client as to the law and his rights.<sup>78</sup> This does not apply in a mediation situation, where the mediator imparts only general information regarding the law. While there is a duty of confidentiality imposed upon the mediator by mediation ethics, by statute, or by the principles of agency, this does not rise to the level of the lawyer-client relationship created by the Model Rules.

Rule 4.2 concerning communication with persons represented by counsel is similarly contradicted by the mediation process. The mediator has actual knowledge of whether the parties to the mediation are represented,<sup>79</sup> in fact he should advise that they should be represented by someone other than himself. Yet he still elicits confidential information from the mediation participants concerning the subject directly within the scope of the representation.<sup>80</sup> However, on its face the rule “only prohibits contact by a lawyer who is representing a client. Because the lawyer-mediator is not engaged in representation,

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<sup>77</sup> Model Rules of Professional Conduct Rule 1.3, comment [1].

<sup>78</sup> *Id.* Rule 1.6, comment [3].

<sup>79</sup> *Id.* Rule 4.2, comment [5].

<sup>80</sup> *Id.* Rule 4.2, comment [1] and [3].

the lawyer-mediator should not have to obtain the consent of counsel to speak to the parties.”<sup>81</sup>

Some commentators have argued that Rule 2.2 on Intermediaries brings the practice of mediation within the scope of the Model Rules.<sup>82</sup> This argument is not persuasive. While the language of the rule is initially attractive, the Rule clearly applies only to actual clients of the lawyer.<sup>83</sup> The comment to the rule, which is not binding, confirms that mediation is excluded from the scope of Rule 2.2 where the parties are not clients of the lawyer.<sup>84</sup> In addition to these objections, using 2.2 to bring mediation within the scope of the Rules would not obviate the conflicts with the other rules discussed above. The only satisfactory way to avoid those conflicts is to view mediation as not constituting the practice of law, to the extent that the professional rules of conduct define whether you are practicing law, and therefore subject to different rules.

If mediation is not the practice of law, and different rules apply to the process, then should an attorney-mediator be concerned about obligations arising from the Model Rules at all? The answer must be yes, since an attorney-mediator is always obligated by the residual Rules of Professional Conduct, as far as they relate to his personal integrity.<sup>85</sup>

The professional ethical obligations of an attorney, as long as he remains a member of the bar, are not affected by a decision to pursue his livelihood by practicing law, entering the business world, becoming a public servant, or embarking upon any other endeavor. If a lawyer elects to become a business man, he brings to his merchantry the professional requirements of honesty, uprightness and fair dealing. Equally, a lawyer who enters public life does not leave behind the canons of legal ethics.<sup>86</sup>

Certainly, an attorney mediator is held to these standards, embodied in rules 8.1 to 8.5, whatever his occupation, and these rules

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<sup>81</sup> Moore, *supra* n.5 at 715.

<sup>82</sup> See e.g., Irvine, *supra* n.1, at 163.

<sup>83</sup> Model Rules of Professional Conduct Rule 2.2(a).

<sup>84</sup> *Id.*, Rule 2.2 comment [2].

<sup>85</sup> See, *supra* notes 165 through 176 and accompanying text.

<sup>86</sup> Maryland State Bar Ass’n v. Agnew, 318 A.2d 811, 815 (Md. 1974).

pose no conflict with the goals and practice of mediation.<sup>87</sup> But neither do these rules aid the attorney mediator with the practical ethical problems arising out of the practice of mediation. Do the Model Rules offer any positive help to the practice of mediation or indeed to any other lawyer who performs nonlegal services in addition to legal services?

#### B. Model Rules 5.7

The addition of Rule 5.7 to the Model rules of Professional Responsibility regulating non-legal business activities of lawyers, was an attempt to offer some guidance to attorneys who find themselves in an ethical dilemma by an uncritical application of the Model Rules to their non-legal activities. The controversy and debate over which form of the rule to adopt indicated the level of concern and the sharply contrasting opinions within the legal community concerning attorneys providing non-legal services. The current rule 5.7 may not be the final word on this subject, and so this article explores the legislative history and the various positions that have been taken on this issue, and relates them to mediation.

Lawyers have often provided additional non-legal services as a service to their clients and as a way to make ends meet if there was not enough legal business.<sup>88</sup> Indeed these practices have gone on for well over a century, as practitioners have for many years offered additional services such as title insurance and search services or trust services.<sup>89</sup> In the 1980s there was a proliferation of ancillary businesses that evolved under the control of large law firms, including such large-scale business ventures as investment banking, offered to clients and non-clients alike.<sup>90</sup> The reactions to this trend in the legal profession ranged from a

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<sup>87</sup> This section of the Model Rules applies to the integrity of the profession. Rule 8.1 concerns truthfulness in admission to the bar and disciplinary matters, Rule 8.2 concerns respect for Judicial and Legal Officials, Rule 8.3 concerns the duty to report professional misconduct, Rule 8.4 defines professional misconduct, and Rule 8.5 the choice of law in a disciplinary action. *See* Model Rules of Professional Conduct Rules 8.1-8.5.

<sup>88</sup> ABA Litig. Sec. Rep. 3 (1991).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

desire to prohibit such activities<sup>91</sup> to a desire to regulate them<sup>92</sup> to a desire to leave well alone.<sup>93</sup>

*The Current Rule 5.7*

The House of Delegates Committee on Ancillary Business proposed the current version of Rule 5.7 as a means of regulating non-legal activities. It was adopted by the House of Delegates and thus became A.B.A. policy in 1994. This version is simpler and more encompassing than the proposals which were discussed in 1991, but its origin is seen clearly in the 1991 proposal from the Standing Committee on Ethics and Professional Responsibility.<sup>94</sup> As in the earlier proposal, the concern behind the rule is that a lawyer bear the responsibility of disclosing to a client the fact that he is working in a non-attorney capacity. In a non-attorney capacity the protections of the attorney-client relationship do not apply (although other ethical obligations may exist, even in the absence of an attorney-client relationship). If the lawyer fails to make this clear to the client, then all of the Model rules apply to the relationship, regardless of whether the attorney's activities are legal or law-related.

*Rule 5.7 Responsibilities Regarding Law-Related Services (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:*

- (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or*
- (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and the protections of the client-lawyer relationship do not exist.*

*(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.<sup>95</sup>*

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<sup>91</sup> *Id.*

<sup>92</sup> ABA COMM. OF ETHICS AND PROFESSIONAL RESPONSIBILITY, REP. 9 (1991).

<sup>93</sup> *Id.* Minority Report of Ralph G. Elliot.

<sup>94</sup> See *infra* notes 132 through 147 and accompanying text.

<sup>95</sup> Model Rules of Professional Conduct Rule 5.7.



Paragraph (b) of the Rule defines law related services as those which are given “in conjunction with and in substance are related to the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”<sup>96</sup> The rule defines that a lawyer shall be subject to all the Rules of Professional Responsibility with regard to law related services that are provided in a way that is indistinct from the provision of legal services.<sup>97</sup> This encompasses in-house provision of services by a law firm. If the services are offered by a separate business entity, then a lawyer may still be bound by the rules unless the lawyer takes “reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.”<sup>98</sup> The burden is therefore on the lawyer to adequately inform the client of the limits of his obligations. The comment to the Rule states that the information should be given in such a way as to ensure the understanding of the recipient, and the degree of explanation required would depend on the sophistication of the individual recipient.<sup>99</sup>

The definition of law-related services raises the question of whether it applies to mediation. In the comment to the Rules the committee lists specific examples of law related services.<sup>100</sup> The list is identical to that in the 1991 Proposed Rule 5.7 from the Standing Committee on Ethics and Professional Responsibility, except for the addition of financial planning and medical or environmental consulting. However in the 1991 Proposed Rule, the comment specifically excluded mediation from the list. The current Rule makes no specific omissions implying that the list offers guidelines, but is not necessarily complete.

The definition of law-related services has two parts, (1) nonlegal services might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and (2) the non-legal services are not prohibited as the unauthorized practice of law if performed by a non-lawyer.<sup>101</sup> As to (2), mediation would probably not be considered the practice of law. Part (1) is more problematic, and in

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<sup>96</sup> *Id.* at Rule 5.7(b).

<sup>97</sup> *Id.* at Rule 5.7(a)(1).

<sup>98</sup> *Id.* at Rule 5.7(a)(2).

<sup>99</sup> Model Rules of Professional Conduct Rule 5.7 cmt. 5-8.

<sup>100</sup> *Id.* cmt. (8).

<sup>101</sup> Model Rules Professional Conduct Rule 5.7(a)(2).

regard to mediation could be argued either way. Certainly clients are usually obtaining legal services from an attorney at the time of a mediation, and the mediation may be termed to be related in substance (same subject matter), and, in conjunction with independent counsel's representation, mediation may be the recommended means of resolution. On the other hand, the same person is not providing the legal and the law-related services, and the legislative history would imply that this rule attempts to provide guidance for an attorney who is himself providing both legal and non-legal services.<sup>102</sup>

There is also an argument that attorney mediators, even though they do not provide legal services to their mediation-clients may still need the guidelines as expressed in current Rule 5.7 for their protection because confusion may arise simply by virtue of their status as attorneys. It could be argued that mediation is performed in conjunction with and in substance is related to the provision of legal services, simply because the mediation clients have a legal dispute to be resolved that without the help of the mediator would go to court.

In summary, it can be argued, that the legal nature of mediated disputes, coupled with the potential for confusion that may arise from the mediator's status as an attorney, makes it reasonable to suppose that mediation does fall within the scope of Model Rule 5.7, which makes it clear that the attorney-client relationship does not attach.

Supporting this interpretation is the Report to the house of Delegates submitted with the proposal for current Rule 5.7 which stated that "the Rule, by reason of its general definition, will not be limited in its application to types of law-related services currently being provided."<sup>103</sup> Also, in its introductory remarks the committee identified arbitration and mediation as examples of current law-related services being offered by attorneys who responded to the committee's survey.<sup>130</sup> Despite the lack of specific reference to mediation in the Rule or comment, it seems that mediation should be included in the scope of Model Rule 5.7.

In conclusion, since the practice of mediation is inconsistent with the Model Rules, it would appear that an attorney mediator is being advised by Rule 5.7 to separate the business of mediation from the practice of law, either literally, or effectively by disavowing the

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<sup>102</sup> See *infra* notes 132 through 146 and accompanying text.

<sup>103</sup> HOUSE OF DELEGATES COMMITTEE ON ANCILLARY BUSINESS 5 (1994). <sup>130</sup> *Id.* at 4.

existence of an attorney-client relationship, and thus remove it from the responsibilities of the model Rules. The mediation business should be distinct from the legal practice, and in all cases the attorney mediator should make adequate disclosures to the mediation clients with regard to the lack of attorney-client relationship in the mediation setting. In this way, the practice of mediation can ethically be followed outside of the guidance of the Model Rules, and will be governed by alternative ethical codes and by external laws, for example that of principal and agent.<sup>104</sup>

This offers the first concrete guidance to attorney-mediators, and it is encouraging to see some clarity in an area where doubts have heretofore been unresolved. However, it must be noted that no State has yet adopted Model Rule 5.7 in this form. Pennsylvania is the only state to adopt a version of the rule, but there are significant changes in the Pennsylvania version, which will be explained later.

#### *Legislative History to Model Rule 5.7*

The prior attempts to regulate or prohibit non-legal activities offered little help to mediators, since both the previous proposals that were discussed in 1991 specifically excluded mediation from the scope of the Rule. However, the exclusion may have been in error since the concerns that the proposals addressed are to some extent the same concerns that mediators face, and an examination of the proposals is useful from this perspective.

#### *A.B.A. Standing Committee on Ethical Responsibility Recommendation and Report (1991)*

This proposal formed the basis of the current Rule 5.7. In its report and recommendation to the 1991 House of Delegates, the Standing Committee on Ethics and Professional Responsibility suggested a version of Rule 5.7 designed to regulate ancillary business rather than prohibit it. As the committee's investigation found no instances of harm to clients, the public or the profession as a result of lawyers participation in ancillary business activities,<sup>105</sup> it felt that a prohibition on the grounds of speculation about future problems was unjustified.<sup>106</sup> A regulatory

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<sup>104</sup> *Id.* Comment at 7.

<sup>105</sup> ABA Com. on Ethics and Professional Responsibility, Rep. 9 (1991).

<sup>106</sup> *Id.*

approach was designed to ensure against ethical problems while allowing the public the benefit of ancillary services, and allowing for evolution of the legal profession.<sup>107</sup>

The committee focused on the ethical problems encountered by individual practitioners who engaged in ancillary businesses. The proposed Rule defined an ancillary business as “an organization other than a law firm or other organization through which a lawyer provides legal services that provides an ancillary service” and is under the control of a lawyer or law firm.<sup>108</sup> An ancillary business was defined as functionally connected to the provision of legal services, i.e. could reasonably be needed in connection with the provision of legal services, was not the unauthorized practice of law for a non-lawyer and was provided by an ancillary business entity.<sup>136</sup> A client of an ancillary business entity was defined as a customer in order to differentiate that person from a client of an attorney.<sup>109</sup> The proposal suggested that these definitions be added to the terminology section, and additional sentences are added to Rules 1.8 and 5.1, respectively to avoid misunderstandings with the proposed Rule 5.7.<sup>138</sup>

The proposed Rule distinguished in-house services from those services offered by a separate entity. “Services provided directly by a lawyer or law firm (that is, through the law office or law firm) are not considered to be ancillary services under this rule, and a person or entity receiving such services directly from a lawyer or law firm is a client and must be treated as such in all respects for the purposes of these Rules.”<sup>110</sup> Consequently, the proposed Rule 5.7 was restricted to the ancillary business entities as defined above. This effectively restricted the scope of the rule to ancillary businesses that may reasonably be confused with legal services by a customer.<sup>140</sup> These services “have the potential for creating ethical problems, such as causing misunderstanding on the part of a consumer as to the lawyer’s role or obligations, jeopardizing expectations of confidentiality, creating conflicts of interest and compromising the independence of the lawyer’s professional judgment.”<sup>111</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1. <sup>136</sup> *Id.*

<sup>109</sup> *Id.* at 2. <sup>138</sup> *Id.*

<sup>110</sup> *Id.* at 5. <sup>140</sup> *Id.*

<sup>111</sup> *Id.*

Consequently, the proposed Rule determined that a customer will be treated as a client (and therefore protected by the obligations of the Model Rules of Professional Conduct) unless the lawyer discloses the nature of the lawyer's connection to the ancillary business in writing. In addition, a customer may still be treated as a client unless the ancillary service is "unrelated to any matter in which representation is provided by the lawyer" or law firm,<sup>112</sup> and the lawyer makes a written disavowal of the attorney-client relationship in the case of a customer.<sup>113</sup> If a customer is to be treated as a client under this test, then the lawyer with managerial authority takes the responsibility of ensuring that the ancillary business complies with the model rules.<sup>114</sup>

The comment to the proposed rule 5.7 gives specific examples of services that the committee considers to be functionally connected or not functionally connected to the provision of legal services.<sup>115</sup> Mediation is specifically excluded because the committee considered that it lacked a functional connection to the provision of legal services. This may be correct as it relates to this definition. However, later in the comment, the committee states that "[t]he rule embodies the principle that where the lawyer reasonably should know that there could be confusion as to the lawyer's role and as to the existence of a lawyer-client relationship, the burden is on the lawyer to take reasonable steps to dispel that confusion."<sup>116</sup> In spite of the fact that mediation is not functionally connected to the provision of legal services, it is apparent that there may well be confusion concerning the lawyer's role as a mediator and the possible existence of a lawyer-client relationship. An attorney-mediator should obviously desire to dispel any possible confusion prior to a mediation. This omission of mediation from the definition of ancillary businesses in the 1991 proposal is corrected in the current version.

*A.B.A. Litigation Section Recommendation and Report  
(1991)*

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<sup>112</sup> *Id.* at 3.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 3-4.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 7.

This proposal was adopted by the ABA House of Delegates in 1991 by a vote of 197 to 186.<sup>117</sup> It was repealed in August of 1992 by a vote of 190 to 183.<sup>118</sup>

The Litigation Section proposal advocated a near prohibition of ancillary businesses. Under its recommendation, the only way an ancillary business could be pursued was if it was brought completely in “house”, under the direct management of the partners of a law firm, and it was offered only in conjunction with legal services. All of the obligations of the Model Rules would then apply. The recommendation also restricted attorneys from owning or partly owning separate business entities whose business could reasonably be connected to the law.<sup>119</sup>

The driving concern behind the recommendation of this rule was that a greater concern for profit,<sup>120</sup> was causing a proliferation of ancillary businesses which was creating a threat to lawyers’ professionalism.<sup>151</sup> The Report detailed four potential problem areas. First, it saw a threat to independent professional judgment.<sup>121</sup> The committee envisaged a situation where an ancillary business and a legal business would feed each other, each one bringing in clients that can be transferred to the other business. The concern is that if the two became interdependent, then decisions may be made by the law firm for the benefit of the ancillary business, and thereby create a conflict of interest in the attorney’s motivation for profit.<sup>122</sup>

Second, it saw a danger to the quality of work of a lawyer who effectively pursues two careers.<sup>154</sup> They see a conflict between the goals of an entrepreneur and dedication to the law. Several authorities are cited on this point, including the New Jersey Supreme Court, which opined that “[p]erhaps society would be better served if practicing attorneys were to remain full-time lawyers rather than become part-time businessmen.”<sup>123</sup>

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<sup>117</sup> John S. Dzienkowski, *Professional Responsibilities Rules and Statutes*, at 98 (1996).

<sup>118</sup> *Id.*

<sup>119</sup> *See generally* ABA Litig. Sec. Rep. (1991).

<sup>120</sup> *Id.* at 7. <sup>151</sup> *Id.*

<sup>121</sup> *Id.* at 9.

<sup>122</sup> *Id.* at 9 (referencing Model Rules 1, 7, 2.2 and 5.4). <sup>154</sup> *Id.* at 11.

<sup>123</sup> *Id.* at 13 (quoting Carlsen, 111 A.2d 393, 397 (N.J. 1955)).

Third, the section saw a possible threat to the reputation of the profession that would arise if these ancillary businesses experienced financial failure or scandal.<sup>124</sup> Last, it saw a threat to the profession's obligations to society. An overemphasis on serving the client (that is with ancillary business) is a result of an overactive profit motive and it may mean that lawyers are avoiding responsibilities "to society, third parties, their profession and even themselves."<sup>125</sup>

A substantial part of the report was devoted to an affirmation of Model Rule 5.4 concerning professional independence.<sup>126</sup> The Litigation Section perceived the dangers of ancillary businesses, that is particularly keeping out non-lawyer influences from decision making positions in law firms, as being very closely linked to the dangers of departing from Model rule 5.4, and argued strongly that no change should be made to this Rule.

The comment to the proposal specifically excludes mediation from the definition of ancillary business.<sup>127</sup> The reason is that the Litigation Section did not believe that mediation "pose[d] serious ethical problems in the lawyer-client relationship."<sup>160</sup> This can be disputed. There is considerable potential for misunderstanding and miscommunication when an attorney is also acting as a mediator. It is by no means clear which of the ethical rules apply, particularly since it would appear that mediation is not the practice of law. However, it is logical to exclude mediation from the scope of this proposal, not on the basis of no serious ethical problems in the attorney client relationship, but because a mediation practice is unlikely to produce the problems of compromised independent judgment, quality of work, damage to the reputation of the profession and avoidance of wider responsibilities that this version of Rule 5.7 was intended to avoid.

An attorney's professional judgment may potentially be affected if his ancillary business is used to feed clients to his law practice and vice versa. It is usually the case that an attorney mediator will not represent former mediation clients in a legal capacity, although there have been

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<sup>124</sup> *Id.* at 13.

<sup>125</sup> *Id.* at 19 (quoting L. Harold Levinson, *Making Society's Legal System Accessible To Society: The Lawyer's Role and Its Implications*, 41 VAND. L. REV. 789, 790 (1988)).

<sup>126</sup> *Id.* at 25.

<sup>127</sup> *Id.* at 100. <sup>160</sup> *Id.*

cases when this has been considered ethically sound if the subject of the representation is far enough removed from the subject of the initial mediation, and confidentiality is maintained.<sup>128</sup> In general, however, the mediation venture is not designed to create business for the law firm, and the danger to professional judgment is therefore avoided.

The rationale behind the Litigation Section's belief that the quality of legal work may suffer as a result of an attorney following two careers is that the pursuit of profit is incompatible with the single minded pursuit of the law.<sup>129</sup> This may be true of an attorney mediator who is pursuing mediation for pure profit, but it is unlikely. The Litigation Section appears to be addressing pure entrepreneurialism which it differentiates from legal pursuits. Mediation involves a professional relationship between the mediator and the disputants, and is therefore closer to the practice of law than other types of ancillary business, for instance investment banking.<sup>130</sup>

In terms of danger to the reputation of the Profession, mediation is no more likely to bring scandal or dramatic financial failure to the profession than any law firm. Lastly, a mediator's obligation to society is not obstructed by mediation, rather it is enhanced. There are many members of the profession who believe that alternative dispute resolution is very beneficial to the social welfare of society as a whole, and certainly fulfills a need, often on a volunteer basis.<sup>131</sup>

Whatever ones feelings as to the validity of the Litigation Section's concerns, expressed through their recommended Rule 5.7, mediation is outside of their ambit.

*Pennsylvania Rule 5.7*

Only one state has so far approved a version of the innovative Model Rule 5.7. The Pennsylvania Supreme Court adopted a version of Rule 5.7 effective August 31, 1996. The rule reads as follows:

*Rule 5.7 Responsibilities Regarding Nonlegal Services*

(a) *A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the*

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<sup>128</sup> Dallas Bar Ass'n, Op. No. 1991-06, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:8401-02 (1991).

<sup>129</sup> See *supra* notes 147 through 158 and accompanying text.

<sup>130</sup> See *supra* note 116 and accompanying text.

<sup>131</sup> Many Court-ordered programs are staffed on a volunteer basis, see e.g., Philadelphia County Child Custody Mediation Program.



*Rules of Professional Conduct with respect to the provision of both legal and nonlegal services.*

(b) *A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.*

(c) *A lawyer who is an owner, controlling party, employee, agent, or is otherwise affiliated with an entity providing nonlegal services to a recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient is receiving the protection of a client-lawyer relationship.*

(d) *Paragraph (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.*<sup>165</sup>

The Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility produced a report and Recommendation of this version of the rule to the House of Delegates.<sup>166</sup> The committee felt compelled to draft an alternative version of the rule when it determined in a survey of ethical inquiries that the A.B.A. Rule 5.7 applied in less than half of the surveyed cases.<sup>167</sup> However, the Committee defined its goals as

<sup>165</sup> 42 Pa. Cons. Stat. Ann. R. Prof. Conduct, R. 5.7.

<sup>166</sup> 1996 PENNSYLVANIA BAR ASSOCIATION, COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, RECOMMENDATION AND REPORT [hereinafter Recommendation & Report].

<sup>167</sup> Laurel S. Terry, *Pennsylvania Adopts Ancillary Business Rule*, 8 PROF. LAW, 10, 11 (1996) (describing the explanatory memorandum accompanying the Rule from the Ethics Committee). As part of its research for the Report the committee found that Model Rule 5.7 was unhelpful in over half of the ethical being the same as the drafters of Model Rule 5.7, ensuring that the Professional Rules apply whenever appropriate and avoiding client confusion as to the role of the attorney providing the nonlegal service.<sup>168</sup> In achieving the first goal the committee aimed to change the focus of the rule from who provides the service to whether the recipient is receiving a service that is distinct from the provision of legal services. If the provision of the non-legal service is inseparable from the provision of legal services, then all of the Professional rules should

apply.<sup>169</sup> This should apply even if the legal and non-legal services were provided by different attorneys, if the services were not distinct.<sup>170</sup> To accomplish the second goal of avoiding client confusion in a situation that is distinct from the provision of legal services, the committee considered that distinctness alone was insufficient to adequately inform the client of the different relationship. The burden is on the attorney to ensure that the recipient is not confused<sup>171</sup> and the attorney should make “reasonable efforts to avoid any misunderstanding.”<sup>172</sup> The Rule also applied to a “lawyer who is an owner, controlling party, employee, agent, or is otherwise affiliated with an entity providing non-legal services.”<sup>173</sup>

The rule also avoided the term “law-related services” that was adopted by the Model Rule, since it felt that this in itself could cause confusion as to what service the attorney was provid-

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inquiries it had received concerning ancillary businesses. The A.B.A. version applied only if the provision of non-legal services was not distinct from the provision of legal services or if the non-legal services were provided by a separate entity controlled by the lawyer. Of the surveyed inquiries, none fell into the first category and less than half into the second. The committee was also concerned about situations when the attorney providing the service through the separate entity was not the controller of that entity. This situation accounted for over two thirds of the surveyed inquiries.

<sup>168</sup> Recommendation and Report, *supra* n.166 at 3.

<sup>169</sup> *Id.* at 4.

<sup>170</sup> Terry, *supra* n.167 at 12.

<sup>171</sup> Recommendation & Report, *supra* n.166 at 4.

<sup>172</sup> 42 Pa. Cons. Stat. Ann. R. Prof. Conduct, R. 5.7(d). A recent formal opinion has reinforced this criteria. In response to inquiry 96-39, the opinion was given that the use of “Esquire” following the name of an attorney mediator is not advised, since this would tend to reinforce an inference that the lawyer was providing legal services, and may lead to confusion.

<sup>173</sup> 42 Pa. Cons. Stat. Ann. R. Prof. Conduct R. 5.7(c). *See* Recommendation & Report, *supra* n.166 at 5.

ing. Instead, they use the term “non-legal service” to denote any service provided by an attorney, and to bring the full spectrum within the control of the rule.<sup>132</sup> The term non-legal services is defined in the

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<sup>132</sup> Recommendation & Report, *supra* n.166 at 6.

comment as “those not prohibited as unauthorized practice of law when provided by a non-lawyer.”<sup>133</sup>

The Report submitted with the rule, offers further clarification of the goals of Pennsylvania Rule 5.7. It makes it clear that even if the service provided is exempt from the operation of the Rules of Professional Responsibility, some of the rules always apply to an attorney engaged in any occupation. In particular they cite rules 8.4(c), concerning attorney misconduct, and require that any attorney engaged in business with a client consider rules 1.7(b), concerning conflict of interest and 1.8(a) concerning prohibited transactions with a client.<sup>176</sup> This is an interesting approach, since the rule itself seems to take the mediator whose business is a separate entity that disavows the attorney client relationship out of the ambit of the Rules of Professional Conduct. The report, however recognizes that not only the residual rules apply, but also that other rules may apply in special circumstances. Outside of the question of the attorney-client relationship, which is clearly excluded, Pennsylvania has yet to determine exactly when a mediator need apply the rules and when not.

## V. Legal Obligations — The Agency Relationship

A grievance arising out of a mediation is not without a remedy. Irrespective of the effect of the Model Rules or other ethical guidelines, certain legal obligations are incurred as a result of the mediation agreement. Clearly there are contractual and fiduciary obligations that create a remedy. Moreover, some may argue that the agreement may also create an agency relationship between the mediator and the participants by which the agent (mediator) is bound to certain duties.

Agency has been defined as “the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his<sup>134</sup> control and consent by the other so to act.” Thus, the term ‘agency’, in its legal sense, always imports commercial or contractual dealings between the parties by and through the medium of another.<sup>177</sup> A characteristic feature of an agency relationship is “the agent’s power to bring about or alter business and

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<sup>133</sup> *Id.* at 6 cmt. 1. <sup>176</sup> *Id.* at

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<sup>134</sup> Am. Jur. 2d *Agency* § 1 (1986).

legal relationships between the principal and third persons and between the principal and agent.”<sup>135</sup>

The terms of the agreement largely determine the scope of the duties of the agent, and the principal also has a duty to act in accordance with his or her promise, manifested in the agreement.<sup>136</sup> Within the scope of the agreement an agent has the fiduciary obligations of good faith, loyalty and honesty.<sup>137</sup> An agent also has the duty to exercise reasonable care, diligence and judgment, and is responsible for damages resulting from a failure to do this.<sup>138</sup> There is also a duty to obey all reasonable instructions and directions<sup>139</sup> and to hold in trust any funds or property of the principal.<sup>140</sup> Especially important for mediation are the duties not to act adversely toward the principal<sup>141</sup> and not to act for a party whose interests are adverse to those of the principal.<sup>142</sup>

These legal duties reflect an ethical mode of behavior that is reflected in the various ethical codes available for mediation, and to some extent in the Model Rules of Professional Conduct. Depending on the terms of the agreement, they will bind a mediator to these particular fiduciary duties. However, as the court in *Westinghouse* said, “the attorney is held to obligations to the client which go far beyond those of an agent and beyond the principles of agency.”<sup>143</sup> The question arises as to how far beyond the principles of agency do the obligations of the attorney-mediator extend.

## VI. Ethical Problems for Attorney-Mediators

It would therefore appear, that properly structured, a family mediation conducted by an attorney mediator will not be termed the practice of law, and the obligations and responsibilities of the Model Rules of Professional Responsibility will not apply to the mediation

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<sup>135</sup> *Id.* at § 2.

<sup>136</sup> *Id.* at § 209.

<sup>137</sup> *Id.* at § 210.

<sup>138</sup> *Id.* at § 215.

<sup>139</sup> *Id.* at § 218.

<sup>140</sup> *Id.* at § 222.

<sup>141</sup> *Id.* at § 228.

<sup>142</sup> *Id.* at § 241.

<sup>143</sup> *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir. 1978).

process. However, this leaves the attorney mediator with some troubling questions concerning the correct source of ethical guidance.

#### A. Confidentiality

It is generally agreed that an assurance of confidentiality is essential to the success of mediation.<sup>144</sup><sup>145</sup> It is a way to ensure full disclosure from the parties of sensitive information, and gives them the freedom to suggest solutions, maybe to “brainstorm” settlement options in a non-public setting. It protects each party from the fear of the opposing party using the process to gather information for attack, or to publicize unflattering details. It also ensures against unguarded statements being used in later court proceedings. Many people choose mediation precisely because mediation offers the opportunity to keep their private and business affairs really private. Confidentiality also serves to maintain the neutrality of the mediator because neither party need fear the mediator being called to testify for or against a disputant.<sup>146</sup>

However, recently there have been questions raised in the mediation community about possible abuses of confidentiality. Regarding the disputants, there have been suggestions that mediation has been used to delay a trial, and there has been evidence of bad faith in parties refusing to negotiate, or even misrepresenting facts.<sup>189</sup> On the part of the mediator, complete confidentiality may mean a lack of accountability, absent a claim concerning the fairness of the proceedings, where the substance of the mediation would necessarily become the substance of the suit.<sup>147</sup>

Without the traditional framework of confidentiality imposed on an attorney by the attorney-client relationship, enunciated in the Rules of Professional Conduct, the attorney mediator may find the boundaries of confidentiality in mediation to be vague and undefined. Whereas, except in certain circumstances, model rule 1.6 forbids an attorney to disclose any information relating to representation of a client without that client’s consent, the requirement of confidentiality for mediators is

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<sup>144</sup> Irene Stanley Said, *The Mediator’s Dilemma: The Legal Requirements Exception to Confidentiality Under the Texas ADR Statute*, 36 S. TEX. L. REV.

<sup>145</sup>, 580 (1995).

<sup>146</sup> Singer, *supra* n.4 at 173-4. <sup>189</sup>

Kovach, *supra* n.6 at 142.

<sup>147</sup> *Id. See, e.g., Moore, supra* n.5 at 704 (quoting *McKinlay v. McKinlay*, 648 So. 2d 806 (Fla. Dist. Ct. App. 1995)).

less clear cut. There is uniformity of opinion that the process should be confidential, but beyond that there is much variation in how this should be applied. Because mediation is still a relatively new field, there has not been time to develop a large body of case-law concerning mediation confidentiality.

People understand confidentiality to mean different things, from totally secret and never to be mentioned anywhere or to anyone, to a protection only from future court actions, that allows disclosure in other circumstances.<sup>148</sup> “The current trend in state statutes and many codes of ethics is to recognize that both mediators and parties may have affirmative duties to disclose confidential mediation information.”<sup>149</sup> In theory, this protects the system from abuse, by maintaining accountability without damage to clients by unnecessary revelations and by satisfying the demands of public policy regarding “matters concerning the environment, child abuse or threats of imminent harm.”<sup>193</sup> As with lawyers, the problems arise over the scope of these disclosures, when and to whom.

Within a mediation there are three persons bound by confidentiality; the mediator and the two parties. All three persons have a duty to maintain the confidentiality of the sessions, established by the terms of the mediation agreement. However, there are times when a mediator must caucus, or speak to each party independently of the other. Some commentators have suggested that this communication cannot be kept confidential from the other party.<sup>150</sup> However, it is generally accepted that the caucus is more useful if the communications between the mediator and the caucusing party are kept confidential from the excluded party.<sup>151</sup> The guidelines for caucus confidentiality should be laid out in the mediation agreement. However, if the caucus is to remain confidential from the other party, the mediator now owes a duty of confidentiality to each party individually as well as to both parties jointly and separately concerning the communications shared openly.

Professor Kovach explains that, as lawyers, we see confidentiality in at least two established forms; a simple evidentiary exclusion and a broader duty, which would prevent disclosure for more purposes than

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<sup>148</sup> Kovach, *supra* n.6 at 142.

<sup>149</sup> Said, *supra* n.187 at 583. <sup>193</sup> *Id.*

<sup>150</sup> Purnell, *supra* n.29 at 1007.

<sup>151</sup> *See, e.g.,* Moore, *supra* n.5 at 707; Kovach, *supra* n.6 at 85.

simply court proceedings.<sup>152</sup> It is helpful to bear these distinctions in mind when discussing the legal ramifications of mediator confidentiality.

#### *Standard of Practice*

As a starting point, it is advisable to look to the various ethical standards available in the field of family mediation. It should be noted that unlike the Model rules of Professional Conduct, none of these are enforceable against a mediator by means of sanctions imposed by a professional body, but they do offer guidance as to appropriate behavior. All of them stress the importance of confidentiality, but they approach the subject in different ways. The 1995 Model Standards of Conduct for Mediators was developed by the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution as the first attempt to create a national standard combining the efforts of three of the major professional groups involved in mediation.<sup>197</sup> This standard offers a broad and simple approach.<sup>153</sup> It requires mediators to meet the confidentiality expectations of the parties, as mutually defined in the mediation, unless all parties agree otherwise, or law or public policy requires a disclosure.<sup>154</sup> In fact, this leaves the mediator wide discretion to determine what exactly constitutes “public policy”, and whether this justifies breaking a confidence. However, under section VI, concerning the quality of the process, the mediator is also given the chance to withdraw if “the mediation is being used to further illegal conduct” or if a party’s judgment is impaired due to drugs, alcohol, mental or physical incapacity. These situations are clearly contrary to law or public policy, but even here, the standard only specifies withdrawal from the process, not specifically breaking confidentiality. This leaves the mediator very uncertain how to progress in less clear cut situations, such as a case of past illegal conduct. A case may be made that it would be in the public’s interest for him or her to divulge that information, but the ethical course to take is not clear. The example often cited for public

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<sup>152</sup> Kovach, *supra* n.6 at 143. <sup>197</sup> *Id* at 196-7.

<sup>153</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Standard Am. Arbitration in ABA, Soc’y of Professionals in Dispute Resolution (1995) [hereinafter Joint Standards].

<sup>154</sup> *Id.*

policy interest that requires reporting is an environmental problem, or child or elder abuse. The latter is usually covered by an affirmative statutory duty to disclose, the former may be purely a judgment call as to public policy. This standard does suggest that the mediator has a duty to others, as well as the participants, and in particular, society.

The Academy of Family Mediators takes a more relaxed approach to the issue, concentrating on the mediator's duty to inform and educate the participants as to any limits to the confidentiality of the process.<sup>155</sup> The burden is on the mediator to be personally informed and to be understood.<sup>156</sup> This standard also spells out a specific duty to third parties to the mediation, to children of the parties, and to others who are affected by it.<sup>157</sup>

The American Bar Association Section of Family Law, Task Force on Mediation, developed standards of practice that were adopted by the ABA House of Delegates in 1984, and therefore is now ABA policy.<sup>158</sup> These were aimed specifically at attorney mediators. The basic rule states that a mediator shall not disclose any information obtained in the mediation without the prior consent of both parties.<sup>204</sup> In the commentary, the drafters recognize the relatedness of confidentiality in mediation and the traditional view of privilege, but their chief concern is the possibility of the mediator being called to testify in future litigation or required to disclose information to third parties.<sup>205</sup> Standard IIB advises the mediator to create an agreement detailing the mediator's inability to disclose information without the requirement of law or the consent of the participants. This agreement should make any jurisdictional limits to confidentiality clear, including statutory or judicially mandated reporting.<sup>206</sup> Standard IIC advises the mediator to inform parties immediately in the event of a subpoena to testify, so that the parties can take the relevant steps necessary to "quash the process" if applicable.<sup>207</sup> Standard IIC advises the mediator to inform the parties of his inability to bind a third party to this agreement in the absence of any absolute privilege.<sup>208</sup> Standard IIID describes a responsibility to ensure that the best interests of children are considered in the

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<sup>155</sup> STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATORS, Academy of Family Mediators (1995) [hereinafter Academy Standards].

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> DIVORCE AND FAMILY MEDIATION STANDARDS OF PRACTICE (Task Force on Mediation, Section of Family Law, ABA 1986) [hereinaf-



mediation.<sup>209</sup> Without actually saying so, this implies that the mediator owes a duty to the children, as well as to the participants in a mediation. This is arguably different than an attorney, who, in a child custody case representing a parent, generally does not have an obligation to the child.

### *Judicial Approaches to Confidentiality*

Even in the absence of the traditional attorney-client relationship, there are still good arguments to be made for upholding mediation confidentiality. An evidentiary exclusion for attempts at compromise has long been recognized at common law,<sup>210</sup> and an analogy can be made to the process of mediation. However,

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ter ABA Mediation Standards]. These standards are currently under review by the Task Force.

<sup>204</sup> *Id.* Standard II at 2.

<sup>205</sup> *Id.* Standard II at 17.

<sup>206</sup> *Id.* at 18.

<sup>207</sup> *Id.* Standard IIB at 19.

<sup>208</sup> *Id.* Standard IIC at 20.

<sup>209</sup> *Id.* Standard IIID at 24. <sup>210</sup> *Id.* Standard IIB at 19.

the aim of this exclusion is primarily to limit the type of evidence to that which is probative to the issue. It is not designed to protect the settlement process itself. Since the evidence must first be disclosed in court in order that it may be evaluated on its admissibility,<sup>159</sup> it is of limited value in protecting client confidences.

The Federal rules of Evidence offer another avenue. Rule 408 protects an offer to compromise. This is a broader approach than the common law since it attempts not only to protect the probative value of the evidence admitted at trial, but also to foster free negotiations, which is closer to the goals of mediation.<sup>160</sup> However, the rule is limited solely to *compromises* concerning the *validity* or the *amount* of the claim at issue. It follows that statements made for any other purpose, such as generating options or promoting ideas, are potentially admissible.<sup>161</sup> It must be remembered, also, that Federal Rule 408 addresses only the question of admissibility of evidence. There is no restriction here on

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Kovach, *supra* n.6 at 144.

disclosure of confidential information to a third party, such as the press. This is helpful in part, but not sufficient to wholly safeguard the process.

The confidentiality agreement signed by the participants in the mediation may be helpful. This creates an independent confidential relationship between the parties and the mediator. As a contract, one could arguably sue for enforcement of that contract. It is questionable to what degree this may be successful, however, when weighed by a court against the need for relevant evidence. It would certainly be evidence of the intent of the parties going in to mediation.<sup>162</sup> Under agency principles, a duty of confidentiality is created by the written agreement, and the mediator therefore has a duty under the agreement to act in accordance with the promise made.<sup>215</sup> The scope of the confidentiality would therefore be determined by the instrument itself.

Perhaps a better analogy is to privilege, which is a legal protection of a confidential relationship. If it could be held that the mediator-participants relationship amounted to a privilege that would be the best protection from disclosure at trial that could be wished. Privileges exist at law between a doctor and patient and a lawyer and client. The test that determines whether a privilege applies is known as the Wigmore Test.<sup>163</sup> The first part of the test requires that the communications originated in the expectation that they would not be disclosed. This would apply to mediation provided that confidentiality is agreed upon during the mediator's introductory statements. The second part, requires that the element of confidentiality be essential to the full and satisfactory maintenance of the relationship between the parties also applies. The third requirement is that the relation be one that the community agrees should be fostered. This appears evident from the overwhelming growth of alternative dispute resolution in the last two decades, and particularly in light of the large number of existing court approved and statutorily ordained mediation programs. The last criterion is the crux of the issue, since it requires that the injury to the relationship from the disclosure be greater than the "benefit gained for the correct disposal of the litigation."<sup>164</sup> Obviously, the last part of the test is determined by a balance that could only be determined in a

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<sup>162</sup> ABA Mediation Standards, *supra* n.203 Standard IIA at 18. <sup>215</sup> Am. Jur.

2d *Agency* § 209 (1986).

<sup>163</sup> Kovach, *supra* n.6 at 145 (quoting John H. Wigmore, EVIDENCE § 2285 (McNaughton rev. 1961)).

<sup>164</sup> *Id.* at 145.

particular circumstance. However, the privilege is obviated if a third party other than a representative of either the lawyer or the client is present to hear the communication. In the case of mediation, opposing parties to the mediation have interests adverse to one another, and thus would qualify as third parties other than representatives. Thus, the privilege would be obviated. However, there is a variation to this rule in the joint defense privilege that may apply more closely to mediation. This allows for communications between adverse parties and their attorneys to be privileged if the communication is made for a common purpose, such as information shared by two separately represented defendants offering a common defense.<sup>165</sup>

Mediation statutes vary greatly from state to state. The different views include: (1) a broad duty of confidentiality;<sup>166</sup> (2) some only an evidentiary exclusion;<sup>220</sup> (3) some apply to just the participants and the mediator;<sup>167</sup> (4) some just apply to the mediator;<sup>168</sup> (5) some include any third party who is brought into the mediation process;<sup>169</sup> (6) and some enumerate instances when the confidence may be broken, for instance, with the agreement of all parties,<sup>170</sup> or when a right may be waived by one party,<sup>171</sup> for purposes of bringing an action against the mediator,<sup>172</sup> the threat of criminal injury to person or property,<sup>227</sup> threat to a minor

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<sup>165</sup> See e.g., *Westinghouse*, 580 F.2d at 1319.

<sup>166</sup> See e.g., FLA. STAT. § 44.201(5) (1995); COLO. REV. STAT. § 13-22-307; OR. REV. STAT. 36.205 (1995).

<sup>167</sup> See e.g., COLO. REV. STAT. § 13-22-307 (1996); FLA. STAT. § 44.201 (5) (1995).

<sup>168</sup> See e.g., N.Y. Jud. § 849-b; Okla. St. tit. 12, § 1805 (1995) (noting that a mediator's knowledge is confidential and privileged, participants have an evidentiary exclusion); see also *Rosson v. Rosson*, 178 Cal. App. 3d 1094 (1986); (noting that participants cannot prevent a court choosing to waive the mediator's privilege of confidentiality). But see *McLaughlin v. McLaughlin* 140 Cal. App. 3d 473 (1983) (stating that the court cannot receive a recommendation from the mediator without the parties having the right of cross examination, unless the parties waive that right).

<sup>169</sup> See e.g., OR. REV. STAT. § 36.205 (1995); MASS. GEN. L. CH. 233, § 236 (1996); WASH. REV. CODE § 7.75.050 (1995).

<sup>170</sup> See e.g., OR. REV. STAT. § 36.205 (1995).

<sup>171</sup> See e.g., *McKinlay v. McKinlay*, 648 So. 2d 806 (Fla. Dist. Ct. App. 1995) (noting that a plaintiff who challenged the prior conduct of the attorneys and mediator, by accusing them of pressuring her into a settlement, had effectively waived her right to confidentiality, thus allowing the defendant to also break confidentiality and have the mediator testify).

<sup>172</sup> See e.g., Okla. St. tit. 12, § 1805 (1995). <sup>227</sup> See e.g.,

WASH. REV. CODE § 7.75.050 (1995).

child<sup>173</sup> or other statutory reporting requirement.<sup>174</sup><sup>175</sup> It should be noted, however, that even if the confidentiality statute is silent on the issue, there may be other affirmative statutory obligations to report in other parts of the code, e.g., child and elder abuse reporting requirements. There are also court orders for mediation and agency mediation regulations that may be considered analogous to statutes for the purpose of this discussion.

*National Labor Relations Board v. Macaluso, Inc.*,<sup>230</sup> was a test case involving mediation confidentiality in a labor relations setting. Following a mediated collective bargaining agreement, a

<sup>220</sup> See e.g., MASS. GEN. L. CH. 233, § 23C (1996); WASH. REV. CODE § 7.75.050 (1995).

factual dispute arose between the parties. Macaluso subpoenaed the mediator to resolve the issue by offering testimony concerning the mediation discussions. The N.L.R.B. revoked the subpoena on the grounds that revocation was necessary to preserve the neutrality and effectiveness of the mediator by not requiring a mediator to testify. Thus, the court was asked to weigh the need for relevant evidence against the need for confidentiality in the mediation process. Judge Wallace held that

[t]he public interest protected by revocation must be substantial if it is to cause us to concede that the evidence in question has all the probative value that can be required, and yet exclude it because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth.<sup>176</sup>

In conclusion, the court ruled that the public interest in maintaining confidentiality did outweigh the mediator's testimony benefits. In effect, the court created a mediator privilege based on a statutory provision.

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<sup>173</sup> See e.g., COLO. REV. STAT. § 13-22-307 (1996).

<sup>174</sup> *Id.*

<sup>175</sup> F.2d 51 (9th Cir. 1980).

<sup>176</sup> Nat'l Labor Relations Bd. v. Macaluso, Inc., 618 F.2d 5154 (9th Cir. 1980).

This case has since been followed by other cases.<sup>177178179</sup> In the case of *United States v. Gullo*,<sup>233</sup> a federal court acknowledged a privilege on the basis of the New York Judiciary Law, which established the Community Dispute Resolution Centers Program. Part of the Act created a privilege of confidentiality for mediation and arbitration proceedings and decisions.

In an interesting 1994 case, *Smith v. Smith*,<sup>234</sup> the U.S. District Court for the Northern District of Texas decided a question of mediation confidentiality in favor of maintaining confidentiality on very narrow grounds. In a dispute following a mediation a subpoena was issued to a mediator. A magistrate quashed the subpoena.<sup>180</sup> The appeal was decided only on narrow grounds and the court declined to decide the issue of a possible mediator privilege.<sup>181</sup> However, Judge Fitzwater went on to include a four page analysis of the question of privilege recognized by the federal courts, looking at *Macaluso* and the following cases. He also recognized the “absence of consensus concerning the scope of the right of confidentiality. ‘The unsettled state of the law reflects disagreement among judges and legislators on the weight of competing interests.’”<sup>182</sup> He rejected the idea that a future decision may be based purely on consideration of the general concept of mediator confidentiality, suggesting that more will be needed to attain a privilege:

The determination whether to recognize a mediator privilege should not be resolved, however, at the level of generality represented by examination of mediation confidentiality. To accept as a given the process of private party mediation<sup>183</sup> should take place in confidence is not of itself sufficient to

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<sup>177</sup> See e.g., *Maine Cent. R.R. Co. v. Bhd. of Maintenance of Way Employers*, 117 F.R.D. 485 (1987). The court applied the reasoning of *Macaluso* to give a protective order in favor of an arbitrator appointed by the National Mediation Board. the mandate of the Board was analogized to that of the FMCS in *Macaluso*.

<sup>178</sup> F. Supp. 99 (W.D.N.Y. 1987).

<sup>179</sup> F.R.D. 661 (N.D. Tex. 1994).

<sup>180</sup> *Smith v. Smith*, 154 F.R.D. 661, 669 (N.D. Tex. 1994).

<sup>181</sup> *Id.* at 661.

<sup>182</sup> *Id.* at 674 (quoting Michael D. Young & David S. Ross, *Confidentiality of Mediation Procedures*, C879 ALI-ABA 571, 575 (1993).

<sup>183</sup> Here the court noted, “The court does not refer to mediation involving government-entity parties. No government unit is a party to the present case, and the debate concerning confidential treatment of this type of mediation involves issues that are not germane to the court’s discussion.” *Id.* at 673. n.15. <sup>239</sup> *Id.* at 673.

excuse a mediator from an obligation of disclosure upon the request of a disputant.<sup>239</sup>

It appears that each case will be decided on its own merits, and a privilege should not necessarily be relied on.

#### Other Dilemmas of Confidentiality 1.

##### *Affirmative duties to disclose*

##### *a. Child and elder abuse*

Statutes establish mandatory reporting for different situations, including, most commonly, environmental abuses and child or elder abuse. As an example, it is helpful to look to the requirement to report child abuse.<sup>184</sup> Public policy is very strong on this issue in most states. Specific statutes may vary and there is little case law than may help determine when breaking a confidence is appropriate for a mediator.

An analogy may be made to psychology, where the role of the psychologist in receiving confidential information may be similar to that of a mediator in that it is a time limited involvement for a specific purpose in a confidential setting where the evidence was given verbally.<sup>185</sup><sup>186</sup> In *Bird v. W.C.W.*,<sup>242</sup> a psychologist received verbal reports of child abuse by the natural father during a psychological exam of the child, mother and stepfather. Charges were brought against the father and later dropped, but the father then sued the psychologist for negligent misdiagnosis. The psychologist argued that the examination was court ordered and the affidavit asserting child abuse was part of the litigation and therefore privileged. The court agreed and held that it was privileged, stressing that there was a strong public policy to protect children that required “full and free disclosure from witnesses unhampered by fear of retaliatory lawsuits.”<sup>187</sup> Verbal reports in a

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<sup>184</sup> Many statutes enumerate the persons required to report. *See e.g.*, 23 PA. CONS. STAT. ANN. § 6311 (identifying health, education and law enforcement professionals, but also noting a general rule that requires anyone to report who has cause to suspect child abuse based on “medical, professional or other training and experience” when a child comes “before them.”). Repealed effective 4/20/95.

<sup>185</sup> Said, *supra* n.187 at 610-11.

<sup>186</sup> S.W.2d 676 (Tex. 1994).

<sup>187</sup> *Bird v. W.C.W.*, 868 S.W.2d 767, 772 (Tex. 1994).

confidential setting may be sufficient to justify an affirmative duty to report.<sup>188</sup>

Against this type of case, it should be remembered that not every situation is completely analogous. The psychologist had the opportunity to directly examine the child. This may not be an available or necessary option for the mediator. Individual statutes should be reviewed for when the reporting obligation should apply. If the statute does not specifically mandate reporting for a lawyer or a mediator, beyond a general reporting clause, it is difficult to determine under what specific circumstances a mediator would be obliged to report. However, it may be safe to assume that if a state legislature felt strongly enough on an issue to legislate a reporting requirement, then certain safeguards will be in place to protect the good faith reporter.

*b. Threat of imminent harm*

Some statutes require a report in cases of a threat of imminent harm.<sup>189</sup> However, if there is no statutory requirement, is the attorney-mediator still bound to report? If the statute contains no exceptions to the duty of confidentiality, one could argue not.<sup>246</sup> It appears that such a disclosure would in fact be contrary to the prevailing statute.

However, an attorney-mediator is still an attorney, and still has a duty under some, if not all of the applicable rules of professional conduct. In this instance, it may be advisable to follow the guidelines of, for example, Model Rule 1.6(b)(1), since case law supports a duty to report over a privilege when the case concerns the threat of imminent harm to an individual. In the case of *Tarasoff v. Regents of University of California*,<sup>247</sup> a therapist was informed by his patient of an intent to kill his former girlfriend. The court found that he had a duty to take whatever steps were reasonably necessary, including warning the potential victim. This duty does apply to an attorney,<sup>248</sup> and may also apply to a mediator.<sup>249</sup> A later case, *Thompson v. County of Alameda*<sup>250</sup> limited this duty to cases where the therapist “does in fact determine or under applicable professional standards should have determined that a patient posed a serious danger of violence to others.”<sup>251</sup> This standard may be considered unreasonable for mediators, but the line of cases “do support disclosure of egregious threats against another.”<sup>252</sup> However, an

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<sup>188</sup> Said, *supra* n.187 at 611.

<sup>189</sup> See e.g., COLO. REV. STAT. § 13-22-307 (1996). The Model Rules of Professional Conduct seem to be in line with this type of statute, allowing for a

attorney mediator can avoid this problem by disclosing the duty to report in the initial contract to mediation.

*c. Affirmative duty to report attorney misconduct under Rule 8.3(a)*

As discussed above, many statutes provide a comprehensive duty of confidentiality, in a blanket form, that does not specifically allow for any exceptions. Yet once again, an attorney-medi-

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revelation of a confidence if there is a risk of imminent death or substantial bodily harm. Model Rules of Professional Conduct Rule 1.6(b)(1).

<sup>246</sup> See e.g., WASH. REV. CODE 7.75.050 (1995).

<sup>247</sup> 551 P.2d 334 (Cal. 1976).

<sup>248</sup> The attorney-client privilege is superseded in a case where a client threatens serious harm to another. Remaining silent would involve the attorney in furthering a crime. See, e.g., *State of Washington v. Hansen*, 862 P.2d 117 (Wash. 1993).

<sup>249</sup> Said, *supra* n.187 at 621-22.

<sup>250</sup> 614 P.2d 728 (Cal. 1980).

<sup>251</sup> *Thompson v. County of Alameda*, 614 P.2d 728, 734 (Cal. 1980). <sup>252</sup> Said, *supra* n.187 at 622.

ator must evaluate whether he/she is bound by the general conduct rules that bind all attorneys.<sup>190</sup> A conflict could arise if an attorney-mediator is put in the position of witnessing the professional misconduct of another attorney.<sup>191</sup> As mediation has developed, and expanded into civil litigation, a role has developed for attorney advocates who participate in the mediation along with their clients.<sup>192</sup><sup>193</sup> This in turn has exposed mediators to attorney conduct, and raises a problem if they see a need to report professional misconduct.<sup>256</sup>

The case of *In re Waller*<sup>257</sup> reflects this dilemma. It involved an attorney advocate representing a plaintiff in a medical negligence and product liability suit. As part of the litigation, the court ordered the parties to mediation. In the course of the mediation the attorney-mediator asked Waller why the surgeon involved had not been named

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<sup>190</sup> Model Rules of Professional Conduct Rule 8.4(c).

<sup>191</sup> Model Rules of Professional Conduct Rule 8.3(a).

<sup>192</sup> Irvine, *supra* n.1 at 159-60 (citing the civil mediation program in the Superior Court of the District of Columbia and the mediation program in the U.S. District Court in the District of Columbia, Washington, D.C.). <sup>256</sup> Model Rules of Professional Conduct Rule 8.3.

<sup>193</sup> A.2d 780 (D.C. 1990) (per curiam).



as a defendant in the case. Waller replied that he was the surgeon's attorney. The mediator informed Waller that this was a conflict of interest, but Waller disagreed and did not take the matter up with the trial judge as the mediator suggested. The mediator then approached the Judge directly and an investigation resulted in disciplinary proceedings and a sixty day suspension of the attorney.<sup>194</sup>

There was no statute in this case, only a court order that stated that "no statements of any party or counsel shall be disclosed to the court or be admissible as evidence for any purpose at the trial of this case."<sup>195</sup> The mediator argued that the matter had nothing to do with the negotiations between the parties, but he felt that it would affect the administration of justice.<sup>196</sup> Presumably he was guided in this by the Model Rules which give affirmative duties to uphold the justice system.<sup>197</sup> The District of Columbia Board of Professional Responsibility and later the Court of Appeals upheld this breach of confidentiality, and did not let it become an issue in the case. Indeed the Board stated, in opposition to the plain language of the court order, that they did not "feel that the confidentiality requirement was intended to preclude disclosure such as that made by the mediator to the Judge in this case."<sup>198</sup>

Understandably, in a blatant misconduct case such as this, the judges wished to sanction Waller and were not going to let a confidentiality provision stop them. However, it leaves troubling questions for the attorney-mediator. The court did not directly address the question of confidentiality or the protections to be given to an attorney advocate, nor the parameters surrounding reporting misconduct.<sup>199</sup> In the end the attorney-mediator made a judgment call and the court supported him. This may not happen in all cases, and this remains a troubling question for many attorney mediators.

## 2. Duties to Third Parties

The issue of to whom the mediator owes a duty remains problematical. Each of the codes of ethics reviewed make strong

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<sup>194</sup> *In re Waller*, 573 A.2d 780, 785 (D.C. 1990) (per curiam).

<sup>195</sup> *Id.* at 781 n.4.

<sup>196</sup> *Id.* at 781.

<sup>197</sup> See e.g., Model Rules of Professional Conduct rule 3.3, Preamble.

<sup>198</sup> *Waller*, 573 A.2d at 785 n.5.

<sup>199</sup> *Irvine*, *supra* n.1 at 180.

suggestions that the mediator has some responsibility to third persons as well as to the disputants in a mediation,<sup>200</sup> for instance to children as the subject matter of child custody disputes.<sup>201</sup> Some statutes support this, requiring the mediator to be mindful of and protect the best interests of the child.<sup>202</sup> One commentator, Loretta Moore, reports an instance where even in the absence of a specific statute, a mediator felt obliged to withdraw from a mediation where she felt that the parents were proposing a custody agreement would be injurious to the child. She determined that the case was not suitable for mediation, and the case was litigated with the result that the child was protected.<sup>203</sup> The mediator here saw an affirmative duty to protect a third party, the child. However other issues arise, for instance the rights of third parties to confidential information. The duty could extend to close family members or to society at large.<sup>204</sup> Thus far, these issues remain unresolved.

#### B. Drafting the Mediated Settlement

When a mediator drafts a settlement, his actions go beyond that of a mere scrivener to a craftsman of language. Since it is a legal document, this task has traditionally been viewed as the practice of law and performed by attorneys.<sup>205</sup> If an attorney mediator also reviews the document with an eye to its legal sufficiency, the line has certainly been crossed and the attorney-mediator could well be deemed to be practicing law.<sup>206</sup> The participants to a mediation may certainly expect this review from an attorney mediator.<sup>207</sup>

Most mediators see this as beyond the mediator's role, and it is common practice to draft merely a memorandum of agreement and submit it to the participants' attorneys for final drafting and review.<sup>208</sup> However, this is not always possible or desirable. There are many good

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<sup>200</sup> Kovach, *supra* n.6 at 149.

<sup>201</sup> See *supra* notes 197 through 209 and accompanying text.

<sup>202</sup> Moore, *supra* n.5 at 718. See e.g., *Kan. Stat. Ann.* § 23-603 (1995); *Kan. Sup. Ct. R.* 901 (1995).

<sup>203</sup> Moore, *supra* n.5 at 719.

<sup>204</sup> Kovach, *supra* n.6 at 149.

<sup>205</sup> See *supra* notes 29 through 48 and accompanying text.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

reasons that support the mediator drafting the final document. Drafting by the neutral is thought to be a major contribution to the settlement process.<sup>209</sup> Indeed a total ban on mediator drafting may considerably reduce the number of mediated settlements.<sup>210</sup> If the mediator drafts the document, the chances are that it may be a more workable document than the parties could achieve by themselves, so it may aid compliance.<sup>211</sup> Not least of all the arguments is that the parties may not be able to afford counsel. A prohibition on mediator drafting would impose hardship upon such parties.<sup>212</sup>

On the other hand, there are good arguments as to why mediators are not the best people to draft the document. Drafting does require a degree of legal expertise, and does involve the application of law to the facts of a particular case. Inadequate drafting is therefore very possible. There is also some doubt as to whether the participants would fully understand the implications of the finished document without the opportunity of review by counsel, who would look at it specifically from the individual's point of view.<sup>213</sup> A mediator by definition is not in a position to do this. Ideally, a mediator could draft a non-binding memorandum of understanding to be used by independent counsel in drafting the final agreement. This, however, is not a solution to the problems of a pro-se client.

There is some suggestion that a more lenient approach may be taken towards mediators performing volunteer services in a court ordered program or serving clients on a pro-bono basis.<sup>214</sup> However this has not been formally tested, so the question remains unresolved.

Another issue connected to the drafting of a settlement is how far an attorney-mediator may go in proposing legally sound methods of achieving the desired result of a mediated settlement. For instance, if a mediator suggests ways to protect either or both parties' property interests, has the mediator crossed the line from giving general information to applying the law to a specific situation?<sup>215</sup> It could be

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<sup>209</sup> Nancy H. Rogers and Craig A. McEwen, *Mediation and the Unauthorized Practice of Law* 23 *MEDIATION Q.* 23, 26 (Spring 1989).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 27.

<sup>215</sup> Moore, *supra* n.5 at 710-16.

argued that the mediator is now acting as an attorney and practicing law. Moore describes this as an ethically untenable situation for attorney mediators.<sup>216</sup> On the one hand the lawyer is obliged to refrain from giving professional advice, on the other the mediator has the obligation to ensure that the parties achieve an equitable, fair and feasible settlement that is fully understood by them.<sup>281</sup> Ideally, the matter should be referred to others to provide professional advice, but in the case of a pro se client, this may not be a realistic option.

Some mediators have questioned whether they could go to court on behalf of the divorcing couple to assist the parties to achieve judicial approval of a mediated agreement.<sup>217</sup> However, this puts the attorney mediator squarely in the realm of advocate, and thus immediately runs foul of the applicable rules of professional conduct, for instance Model Rule 1.7(a) that forbids representation of one client that is directly adverse to representation of another. The Supreme Courts of Vermont and Wyoming have specifically ruled against this practice,<sup>218</sup> and it seems clear that this is not within the mandate of mediation.

### C. Business Associations

An issue arises as to whom an attorney mediator may professionally associate with, and whether that association be governed by the Rules of Professional Conduct. There is little guidance available to an attorney-mediator, so not surprisingly, some attorney-mediators have turned to their state bar associations for an informal opinion on how to proceed. There is great disparity among the different opinions as to how this should be handled. The deciding factor for most states is whether they view mediation as the practice of law. Some of the opinions specifically state that they do not believe mediation is the practice of law.<sup>219</sup> Another specifically takes the opposing opinion.<sup>220221</sup>

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<sup>216</sup> *Id.* at 712. <sup>281</sup> *Id.*

<sup>217</sup> *Id.* at 709.

<sup>218</sup> *Id.* at 709-10 (quoting *Barbour v. Barbour*, 505 A.2d 1217, 1220-21 (Vt. 1986); *CSP v. DDC*, 842 P.2d 528, 534 (Wyo. 1992)).

<sup>219</sup> Ind. State Bar Ass'n, Op. No. 5 of 1992, *Laws. Man. on Prof. Conduct* (ABA/BNA) 1001:3304 (1992); Ky. Bar Ass'n, No. Op. E-377, *Laws. Man. on Prof. Conduct* (ABA/BNA) 1001:3905 (June 6, 1995); N.H. Bar Ass'n, No. Op. 1993-94/4, *Laws. Man. on Prof. Conduct* (ABA/BNA) 1001:5706 (Dec. 16, 1993).

<sup>220</sup> N.J., Op. No. 676, *Laws. Man. on Prof. Conduct* (ABA/BNA)

<sup>221</sup> :5806 (April 15, 1994).

However, even where the issue is not clearly articulated, certain results are predicated upon an implied decision on the question of practice of law. This is true of whether a lawyer can join with a non-lawyer as a partner or as a corporation,<sup>222</sup> fee sharing with a non-lawyer<sup>223</sup> and whether it would be misleading to operate under a trade name.<sup>224</sup> Where a state Bar Association feels that mediation is not the practice of law, the opinions find that an attorney-mediator can be professionally associated with a nonlawyer, may share fees and practice under a trade name with impunity.<sup>225</sup> Other bars have decided that an attorney-mediator is still bound by all the Model Rules in these areas.<sup>226</sup>

This may be understood in the light of previous discussion concerning the practice of law. However, answers to questions concerning other Rules do not follow necessarily from this “practice of law” distinction. When it comes to advertising, some of the states that decided mediation was not the practice of law, still require mediators to follow the Model Rules when advertising for the mediation business, Rule 7.2.<sup>227</sup> Indeed Kansas offers an opinion only on this point, but says

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<sup>222</sup> Model Rules of Professional Responsibility Rule 5.4.

<sup>223</sup> *Id.*

<sup>224</sup> Model Rules of Professional Responsibility Rule 7.5.

<sup>225</sup> Me. Bd. of Overseers of the Bar, Op. No. 149, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:4206 (March 30, 1996); Vt. Bar Ass’n, Op. No. 93-5, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:8605 (1993); Ill. State Bar Ass’n, Op. No. 92-5, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:3010 (Oct. 23, 1992); Or. State Bar, Op. No. 1991-101, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:7114 (July, 1991).

<sup>226</sup> R.I., Op. No. 95-1, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:7838 (Mar. 6, 1995); Iowa, Op. No. 94-13, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:3618 (Dec. 14, 1994); Fla. Bar, Op. No. 94-6, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:2505 (Apr. 30, 1995). Florida makes an inhouse business the practice. The implication is that if the attorney-mediator ran the business as a separate business entity, then the rules may not apply.

<sup>227</sup> Ky. Bar Ass’n, Op. No. E-377, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:3905 (June 6, 1995); Kan. Bar Ass’n, Op. No. 95-2, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:3810 (May 26, 1995). Pennsylvania requires that mediators comply with the advertising and solicitation rules even after the adoption of Model Rule 5.7. PA Inquiry 96-167 (Dec. 30, 1996).

that the rules apply even if mediation is not court related and there is no attorney-client relationship, i.e. no practice of law.<sup>228</sup>

Two states offer opinions concerning Rule 4.2, which requires that an attorney attorneys deal directly with another attorney if a party is represented. Maryland allows attorneymediators to mail letters to possible mediation clients, but strongly encourages that they send copies to the potential clients' attorneys and work through those attorneys if possible.<sup>229</sup> A Kentucky opinion forbade attorneys from using their clients to circumvent this rule, and required a divorce mediator to discover if participants are represented by counsel.<sup>230</sup> This is a state that does not believe that mediation is the practice of law, but seems to be suggesting that attorney-mediators should abide by Rule 4.2, a rule incompatible with the goals of participant self-determination inherent in the mediation process.

The State of Iowa also refuses to allow an attorney-mediator to enter into a restrictive anti-competition agreement, in contravention of Rule 5.6.<sup>231232</sup> This is perhaps more understandable since Iowa also disallows a mediator from operating under a different name than that of the law-firm.<sup>233234</sup> This seems to be another state that prefers to see mediation as the practice of law.

There is still considerable confusion over the question of whether mediation is the practice of law. Even if this is decided in the negative, that mediation is not the practice of law, there is still much disagreement on the extent that the applicable rules of professional conduct may apply.

#### D. Conflicts of Interest

Possible conflicts of interest arise for an attorney-mediator in situations where she has formerly represented the client on an unrelated

<sup>228</sup> Kan. Bar Ass'n, Op. No. 95-2, Laws. Man. on Prof. Conduct (ABA/ BNA) 1001:3810 (May 26, 1995).

<sup>229</sup> Md. State Bar Ass'n, Op. No. 93-10, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:4309 (Jan. 4, 1993).

<sup>230</sup> Ky. Bar Ass'n, Op. No. E-365, Laws. Man. on Prof. Conduct (ABA/ BNA) 1001:3904 (Mar. 11, 1994).

<sup>231</sup> Ia. Op. No. 91-38, Laws. Man. on Prof. Conduct (ABA/BNA) 232 :3606 (Feb. 13, 1992).

<sup>233</sup> Ia., Op. No. 94-13, Laws. Man. on Prof. Conduct (ABA/BNA) 234 :3618 (Dec. 14, 1994).

issue (or a member of her firm has), she has personal knowledge of the person, or she wishes to represent a former mediation participant on an unrelated issue.<sup>235</sup> This problem must be seen from two angles. Legal clients may affect one's ability to mediate and mediation clients may affect one's ability to represent. This is an area to which particular attention should be paid. This is especially true when it is in the best interests of both attorney and mediator to avoid the *appearance* as well as the actuality of a conflict of interest. Model Rule 1.7 through 1.9 set forth the guidelines concerning the attorney's obligations regarding consultation and consent when there is a conflict of interest between concurrent clients or between a present and former client. The goal of the rules is to aid the attorney in maintaining independent judgment and loyalty in regard to each client. Obviously, since a mediator represents neither party to a mediation, a mediator cannot have the independent judgment and loyalty to each that the rules are trying to ensure. By definition, the rules cannot be applied successfully to a mediation situation. The rules can help in offering practical guidance only in an intangible sense. The spirit of the rules can be seen as a requirement to give whole hearted attention to the task in hand, unclouded by other issues or responsibilities, or the appearance of influence by other issues. This is certainly the spirit that is recognized in the mediation standards.

The existing standards of practice all address this issue, but are inconsistent in their approach. The Academy of Family Mediators prohibits mediation "if previous legal or counseling services have been provided to one of the participants."<sup>236</sup> If such services have been provided to both disputants, then the distinct change in relationships is to be discussed and the participants are given the choice whether to proceed.<sup>237</sup>

The 1995 Model Standards give the mediator the responsibility to disclose all potential conflicts and allows the parties to make an informed decision.<sup>238</sup> The mediator is also required to withdraw if the conflict "casts serious doubt on the integrity of the process." The standard goes on to stress that a mediator should avoid an appearance of conflict of interest before, during and after the actual mediation. It forbids later professional relationships in a related matter without the

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<sup>235</sup> Kovach, *supra* n.5 at 195.

<sup>236</sup> Academy Standards, *supra* n.200 at 174.

<sup>237</sup> *Id.*

<sup>238</sup> Joint Standards, *supra* n.198, Standard III cmt. 4.

consent of all parties, or even in an unrelated matter that may cast serious doubt on the integrity of the mediation process.<sup>239</sup>

The ABA standards of practice for attorney-mediators simply forbid representation of any party to a mediation before, during or after the mediation.<sup>240</sup> The reasoning expounded in the comment is enlightening. The first argument is that the mediator's role is incompatible with that of representation since the obligations of the attorney-client relationship extend beyond the term of the representation. Second, the change in role from counselor to neutral and the switch of client from advisee to self determinator is too great of a change to be reasonably sure of success.<sup>241</sup>

It seems that both the Model Rules and the available Standards of Practice discourage overlap between two disciplines, and this seems to make logical sense for both professions. Both are interested in the professional giving whole hearted attention to the task in hand, unclouded by other issues, or the appearance of influence by other issues. Beyond this, the Model rules can give no practical guidance, and a mediator should look to his own judgment in applying the principals of undivided attention and avoiding possible conflict.

The informal opinions of the State Bar Associations again offer some guidance, even though the decisions are not binding. Most generally look to the attorney part of the attorney-mediator, and so apply the Model rules concerning conflict of interest, irrespective of whether they should logically apply. For instance, one opinion does not allow a mediation for a former legal client.<sup>242</sup> Another requires mediation funds to be put in a trust account.<sup>243</sup> A third concluded that a part time prosecutor to have a conflict of interest if he mediates child custody cases in the same county as he may potentially have to prosecute for non-payment of support or custody violations.<sup>245</sup> These results are probably logical, but none take note of the fact that mediation and the

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<sup>239</sup> *Id.*

<sup>240</sup> ABA Mediation Standards, *supra* n.203, Standard IIIA at 21.

<sup>241</sup> *Id.* at 22.

<sup>242</sup> Laws. Man. on Prof. Conduct (ABA/BNA) at 1001:7114(OR), 1001:5702 (NY); Model Rule 1.9.

<sup>243</sup> *Id.* at 1001:7122, (OR); Model Rules of Professional Conduct Rule 1.5.

<sup>245</sup> Laws. Man. on Prof. Conduct (ABA/BNA) at 1001:3301, Model Rules of Professional Conduct Rule 1.7.



Model Rules are incompatible, and all require adherence to the Model Rules. Significantly, Pennsylvania Model Rule 5.7, which appears to take mediation out of the ambit of the model rules, contains a provision in the report that suggests that the rules on conflict of interest should still apply.<sup>246</sup>

Other decisions are made with less rigid adherence to the Rules. One Texas bar ethics opinion suggests a mediator may represent a former mediation client in a future legal issue if that issue is unrelated to the subject of the mediation.<sup>247</sup> The Maine bar allows a mediator to mediate even if the participants are former clients of a law firm to which he is affiliated, even though conversely the law firm would not be able to represent a client for whom he had previously mediated, on the grounds of imputed disqualification. This distinction is made because mediation is not equated with representation.<sup>248</sup> These decisions seem more in line with an acknowledgment that mediation is not the practice of law.

There is a notable New York case concerning a mediator conflict of interest.<sup>249</sup> A wife in a divorce action attempted to disqualify her husband's attorney because a member of the attorney's law firm was the mediator for a failed mediation attempt between the couple. In fact, the mediation broke down at the initial session. The motion was denied because the court believed that the mediation never really started. The wife appealed, and appeals court affirmed the denial without comment. However, the dissent took a different view and felt that the attorney should be disqualified, since the orientation session was an "integral first step in the mediation process."<sup>250</sup> The dissent's reasoning is persuasive, since it analogizes the orientation session of a mediation to an initial consultation with a lawyer, and similarly disqualifies the mediator from representing a spouse in a divorce action.<sup>312</sup> The dissent argues that to avoid the appearance of impropriety, a goal of mediation standards and of the Model rules, an attorney mediator and the mediator's law firm must be disqualified by the initial orientation

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<sup>246</sup> See *supra* note 176 and accompanying text.

<sup>247</sup> Dallas Bar Ass'n, Op. No. 1991-06, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:8401 (1991).

<sup>248</sup> Me. Bd. of Overseers of the Bar, Op. No. 142, Laws. Man. on Prof. Conduct (ABA/BNA) 1001:4205 (Aug. 19, 1994).

<sup>249</sup> *Bauerle v. Bauerle*, 206 A.D.2d 937 (N.Y. App. Div. 1994).

<sup>250</sup> *Id.* at 939. <sup>312</sup> *Id.*

session from representing either party involved in that mediation session in future litigation involving the same matter.<sup>251</sup> Even though the majority did not agree with this reasoning, it seems a practical guideline for mediators, and lawyers alike, to avoid even the appearance of impropriety when faced with a conflict of interest.

In the final analysis, the judgment is made by the individual attorney-mediator. There is guidance as to general principles, but not yet extensive case by case situations to offer practical guidance.

*E. Impartiality, Self Determination and the Goals of Fairness and Achieving a Fully Informed Settlement*

Can a mediator ever be truly impartial? Can one ever truly divorce oneself from one's decisions? If one is truly neutral, does this conflict with the concept of achieving a fair settlement, since a concept of fairness must be used in order to achieve this? Can the process really be self-determinative if the mediator directs the process? The process would not work without a degree of direction, general advice and education of the parties,<sup>252</sup> but neither would it work without impartiality, neutrality and selfdetermination. At some level, these concepts conflict, and a mediator must grapple with the balance that must be achieved between them. Mediators need to know their own biases, and disclose them to the parties, and continuously assess whether they can continue to mediate if the bias obstructs neutrality.

*F. Regulation and Accountability*

"It seems as if the seventies were the time for experimentation with mediation; the eighties were the time of implementation of programs; and now in the nineties we confront issues of regulation of the field."<sup>253</sup> There is a growing trend in the mediation community towards developing systems of accountability for mediators. Courts, bar associations, and mediator groups are beginning to examine these issues.<sup>254</sup> So far, several states have introduced comprehensive

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<sup>251</sup> *Id.* at 940.

<sup>252</sup> Kovach, *supra* n.5 at 196.

<sup>253</sup> *Id.* at 202.

<sup>254</sup> *Id.*

certification guidelines with regulations or licensing procedures,<sup>255</sup> and there is considerable debate over the need for regulation. One side of the argument points to the benefits to mediators, the profession and society of increased regulation. The mediators receive pre-career guidance, standardized training, enhanced credibility in the eyes of their clients, and a sense of professionalism. Qualifications establish mediation as a profession, and help guide the future growth of mediation within acknowledged boundaries. Society as a whole will benefit from a clear understanding of the profession, assurances that controls are in place and a path created for redress in the case of a grievance.<sup>256</sup>

The other side of the debate expresses strong reservations concerning the regulation of mediation. Mediation is predicated on flexibility, and it is feared that regulation may stifle future growth. Research has yet to determine a link between training and skills and a successful mediation. Success in mediation has been defined differently by different commentators and courts,<sup>257</sup> and costs would certainly rise as a result of regulation.<sup>258</sup>

There is the threshold question of who will be doing the regulating and holding mediators accountable. There are many options, including a court, a professional board or organization leaders. A comprehensive overview of regulation and accountability must also include the following:

#### *Qualification and Selection of Individuals*

There is little uniformity as to what criteria are necessary to qualify a mediator. Existing programs usually require a degree, and often a postgraduate degree. In practice in court based programs, this is usually a law degree. This may be considered insufficient or even unnecessary. Much of mediation depends on the intangibles of communication skills

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<sup>255</sup> *Id.* (citing Fla. R. Civ. Proc. Rule 10.120(b) (1992). Utah Code Ann. § 58-39a-2 (1993). N.C. Gen. Stat. § 50-13.1, Stat. of Rules 7(a)-494 (1983). Va Code Ann. §§ 8.01-576.5, 581.21 (1991).

<sup>256</sup> *Id.*

<sup>257</sup> *See e.g.*, Busch and Folger, THE PROMISE OF MEDIATION (1994). Mediation is successful only if there is a transformation and empowerment of the parties.

<sup>258</sup> Kovach, *supra* n.6 at 203.

or innate qualities such as conflict management styles.<sup>259</sup> Some research has shown this to be more important than education.<sup>260</sup> What qualifications are necessary is in itself an unsettled question.

#### *Education and Training*

There is also little agreement as to what training is necessary. Most professions require at least one year of training before entering the field. Even the most stringent mediation courses require only 40 hours of training before mediating.<sup>261</sup> It would seem inevitable that this training requirement will increase, but there is also preliminary research to say that more training does not make better mediators.<sup>262</sup> This is another area that seems to raise more questions than can currently be answered.

#### *Regulation, Certification and Licensure*

As mentioned, some states are already beginning to move in this direction. Utah has given the responsibility for regulating mediators to the State Division of Occupational and Professional Licensing.<sup>263</sup> Florida controls mediation through the court, and has issued comprehensive guidelines for certification and de-certification.<sup>264</sup> Other states take different approaches.<sup>264</sup> The issues raised include whether a professional board should be involved in this process, whether government should regulate, or whether the courts should be more closely involved since the subject matter involves potential litigation. The questions are intriguing.

#### *After the Fact Controls: Liability*

Professor Kovach points to several legal theories that could potentially be used to create liability for mediators. General negligence is the broadest and most likely, but others could possibly include: the Deceptive Trade and Practices Act (in fee generating mediations,

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<sup>259</sup> *Id.* at 207.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 208 (citing Fla. R. Civ. Proc. Rule 10.010 (1992)).

<sup>262</sup> *Id.* (quoting Margaret L. Shaw, *Selection Training and Qualification of Neutrals, A Working Paper for the National Symposium on Court-Connected Dispute Resolution Research* (September 1993)).

<sup>263</sup> UTAH CODE ANN. § 58-39A-2 (1993). <sup>264</sup> Fla. R. Civ. Proc. Rule 10.010 (1992).

<sup>264</sup> See e.g., Fla. R. Civ. Proc. Rule 10.120(b) (1992); UTAH CODE ANN. § 58-39a-2 (1993); N.C. Gen. Stat. § 50-13.1 (1983); VA. CODE ANN. §§ 8.01576.5, 581.21 (1992).

participants could qualify as consumers under the act); breach of contract; fraud, false imprisonment; libel or slander (depending on the confidentiality laws of the state regarding mediation);<sup>265</sup> breach of fiduciary duty and tortious interference with a business relationship.<sup>266</sup>

Under negligence standards, proving breach of a duty may be difficult, given the lack of uniform standards. As the profession progresses, certain consistent standards are emerging, however, e.g. impartiality. As standards of practice emerge, adherence to them will become more necessary to avoid possible liability under a negligence theory.<sup>267</sup> However, in a truly voluntary process, it may be very hard to determine damages, unless it is a situation that involves a specific problem such as reliance on incorrect advice.<sup>268</sup>

Immunity may be possible for a mediator under statutory provisions as an extension of the traditional common law judicial immunity theory.<sup>269</sup> This theory has long been applied to arbitrators,<sup>270</sup> and there is some indication that courts may be inclined to extend it again in regard to mediators, at least when acting on the instigation of the court.<sup>271</sup> However, a court must weigh the impossibility of recourse from any existing professional body against the desired protection of mediators (often volunteer and court appointed) against malpractice claims.<sup>335</sup>

While there is not universal approval in the community, it seems that there is a slow but sure progression towards uniform standards for mediation and the ultimate establishment of mediation as a profession. While this would not satisfy all attorneymediators conflicts between the legal and mediation codes of ethics, it would simplify the task of

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<sup>265</sup> See *supra* notes 219 through 229 and accompanying text.

<sup>266</sup> Kovach, *supra* n.6 at 219.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 220.

<sup>270</sup> See *Jones v. Brown*, 6 N.W.140 (Iowa 1880).

<sup>271</sup> Kovach, *supra* n.6 at 223-25. See e.g., *Howard v. Drapkin*, 271 Cal. Rptr. 893 (1990). This case involved a psychologist asked by the court to perform a psychological evaluation. The court concluded "that defendant, acting in the capacity of a neutral third person engaged in efforts to effect a resolution of a family law dispute, is entitled to the protection of quasi-judicial immunity for the conduct of such dispute resolution services." *Id.* at 843. See also, *Wagshal v. Foster*, No. 92-2072, 1993 WL 86499 (D.D.C. 1993).<sup>335</sup> Kovach, *supra* n.6 at 221.

reconciling two roles considerably. Two established codes with standards that require accountability can be reconciled more easily because the public interest is protected by both professional bodies. The existing mediation codes are each excellent in their own ways, but without an obligation to be accountable to them, mediators have no standards to reach nor breach. Thus participants are left in a difficult situation in the event of proving malpractice. The state bar associations and governing courts would probably be more willing to “let-go” of attorney-mediator issues, if there was the assurance of standards, and adherence to those standards by another professional body.

Is regulation imminent? Probably not, but the indications are that the community is moving towards the establishment of a profession. The progress itself will highlight, and hopefully resolve some of these questions along the way. In the meantime, the questions remain.

## VII. Conclusion

Mediation is still a young discipline. As the profession expands and develops in scope, ethical questions arise that require resolution. To aid in those decisions, attorney-mediators have looked to the available sources of ethical guidance, the Model Rules and surrounding case law, the available mediation standards and legal principles. None of these are wholly satisfactory, in that none provide uniform practical answers to the practical problems encountered by an attorney-mediator.

However, the issues are moving toward resolution. The discussion surrounding the practice of law has been ongoing for over a decade,<sup>272</sup> and some states have now recognized in their informal bar opinions that mediation cannot reasonably be considered so.<sup>273</sup> The incorporation of Model rule 5.7 recognizes that there are times when an attorney may not be bound by all of the Model Rules. This Rule has still to be adopted as it stands, and therefore has not been tested, but it is an innovation nonetheless. The conflict between many of the Model rules and the practice of mediation has long been recognized, and Model Rule 5.7 may go some way to alleviate this difficulty. More and more organizations are seeing the need to establish ethical guidelines.<sup>274</sup> More states are legislating mediation.<sup>339</sup> Finally, the trend towards

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<sup>272</sup> See e.g., Morrison, *supra* n.25.

<sup>273</sup> See *supra* notes 29 through 78 and accompanying text.

<sup>274</sup> See *supra* notes 316 through 328 and accompanying text. <sup>339</sup> See *supra* notes 220 through 230 and accompanying text.

establishing mediation as a self-regulating profession is encouraging. If successful, then a way may be established to debate and resolve some of these issues in a more concrete way.

In the meantime attorney-mediators must negotiate the pitfalls as best they can. The pitfalls of practice of law can probably be avoided by offering mediation in a way distinct from the law firm and by scrupulously avoiding specific advice. Care should be taken to follow relevant statutes and the mediation agreement should be created bearing in mind that it forms the basis of legal obligations. It pays to be well informed as to the prevailing bar opinions in a particular jurisdiction. The growth of mediation is testimony to the fact that, despite the problems, mediation is a viable alternative method of dispute resolution in many circumstances.

