

## SUING MEDIATORS

MICHAEL MOFFITT\*

INTRODUCTION .....	148
I. SUING A MEDIATOR SUCCESSFULLY IS DIFFICULT.....	149
A. <i>Few Mediators Have Been Sued for Their Mediation Conduct</i> ...	150
B. <i>Liability is Hard to Establish</i> .....	153
1. Malpractice and Professional Negligence Standards are Difficult to Meet.....	153
2. Other Tort-Based Actions Pose Similar Challenges.....	159
3. Contracts Provide Little Basis for a Claim.....	163
4. Fiduciary Duties do not Regularly Attach to Mediators.....	167
5. Non-Mediation Professional Standards Govern Only Narrow Aspects of Mediation Practice.....	169
6. Access to Mediation Information is Limited.....	172
7. Immunity Sometimes Extends to Mediators.....	173
C. <i>Damages are Often Difficult to Demonstrate</i> .....	175
1. Non-Settlement as Injury.....	176
2. Unfavorable Settlement Terms as Injury.....	178
3. Settlement Terms Injuring Non-Parties.....	180
4. Injuries not Reflected in the Mediation Outcome.....	182
II. MEDIATORS' LIMITED AND UNCERTAIN EXPOSURE TO LIABILITY COMES WITH COSTS .....	183
A. <i>Compensation to Victims is Often Unavailable</i> .....	183
B. <i>The Boundaries of Mediation Practice Remain Poorly         Articulated</i> .....	184
C. <i>The Public Learns Little About Current Practices</i> .....	187
III. MEDIATION IS A UNIQUE PRACTICE, DEMANDING UNIQUE LIABILITY TREATMENT .....	188
A. <i>Mediation Parties are Best Able to Assess the Effectiveness of         Mediators' Actions</i> .....	188
B. <i>Dissatisfied Mediation Parties can Vote With Their Feet</i> .....	190
C. <i>Four Different Mediation Scenarios Demand Different         Liability Treatment</i> .....	193

---

\* Assistant Professor, University of Oregon School of Law. I am indebted to Professors Joan Malmud and Scott Peppet for their thoughtful comments on earlier drafts of this Article. I received outstanding research assistance from Tenielle Fordyce-Ruff, Mark Jefferis, Jeffrey Johnson, Jenifer Lassell, Zack Mittge, and Kevin Thwing. I also gratefully acknowledge the support I received from the Hewlett Foundation while I conducted initial research as a Senior Research Fellow at Harvard Law School.

1. A Custom-Based Claim When the Party Walked.....	195
2. A Custom-Independent Claim When the Party Withdrew ....	195
3. A Custom-Based Claim When the Party Remained in the Mediation.....	196
4. A Custom-Independent Claim When the Party Remained in the Mediation.....	197
D. <i>Custom-Independent Claims Against Mediators Should not be Dismissed as Duplicative of Malpractice Claims</i> .....	198
E. <i>Mediators Should Enjoy no Immunity Shield Against Custom- Independent Claims</i> .....	200
CONCLUSION.....	206

#### INTRODUCTION

As the use of mediation explodes in popularity, assuring the quality of mediation services has become an increasingly visible challenge. Most occupations and professions have credentialing or other barriers to entry into practice, statutory or regulatory restrictions on practice methods, and oversight of some sort. In addition to these structural methods of assuring quality services, most service providers operate under the potential threat of private legal actions brought by dissatisfied clients. In contrast, mediation operates with few, if any, formal structures for assuring the quality of mediation services.

In the absence of formal quality control mechanisms, private lawsuits offer a theoretical vehicle for controlling mediators' practices. In reality, however, it is extraordinarily difficult to sue a mediator successfully for her<sup>1</sup> mediation conduct. As an empirical matter, few former clients have sued mediators for injuries stemming from mediation-specific conduct, and none of those suits has resulted in an enforced legal judgment for the former client. A number of factors may contribute to the infrequency with which parties resort to lawsuits against mediators. The most significant barrier, described in Part I of this Article, stems from the current legal theories applicable to mediators' practices.

Part II describes the costs imposed by the uncertain and difficult legal hurdles facing prospective plaintiffs in lawsuits against mediators. Legal hurdles preclude recovery in many cases, leaving parties uncompensated for injuries caused by mediators' conduct. Furthermore, mediator misconduct remains essentially undeterred absent any recourse for substandard behavior. Because there are few lawsuits, the public has few occasions to learn about current mediator practices. Absent public dissatisfaction with the current state of practice, changes to the current statutory, regulatory, and judicial treatment of mediator conduct are unlikely.

---

<sup>1</sup> As a convention for handling gendered pronouns, throughout this Article I refer to mediators in the feminine and mediation parties in the masculine. By assigning arbitrary but consistent genders to each of the actors relevant to this Article's topic, I intend to add clarity without suggesting gender-related assumptions.

Several unique aspects of mediation suggest that mediators' exposure to liability should be crafted differently from that of other service providers. Because mediation parties have extraordinary insight into mediation practices, they are the best judges of mediator conduct. Mediation parties also have the ability to terminate mediation services they deem inadequate. An appropriate liability regime would consider each of these factors. Furthermore, the fluid nature of mediation practice—both at the individual level and in the broader field of mediators generally—demands that a responsible liability system distinguish between accusations that a mediator breached a customary duty of care, and accusations that a mediator breached a duty articulated beyond custom. Part III of this Article surveys some of these unique aspects of mediation practice and suggests a different conception of liability for mediator misconduct.

#### I. SUING A MEDIATOR SUCCESSFULLY IS DIFFICULT

Mediators enjoy no special immunity from lawsuits unrelated to their work. A mediator who runs over a pedestrian faces the same legal exposure as any other driver. A mediator who breaches a contract to buy widgets is treated no differently under the law than any other purchaser. When a mediator acts as a private citizen, she is treated like any other citizen. Finding legal relief is considerably more difficult, however, for a disputant who believes he was injured by a mediator's conduct as a mediator.

Mediators make decisions about a host of issues during the course of a mediation.<sup>2</sup> Who should be in the room? How should sessions be structured? What questions should be explored? In what order? What ideas, opinions, or advice should be given? By whom? What deadlines should apply? Mediators face these and many other issues as they work. As a result, one can with little imagination construct an array of mediator behaviors that could raise legitimate concerns. A mediator in a private caucus gives the parties fabricated, conflicting information, inducing a settlement. Part-way through a mediation, a mediator secretly buys stock in the defendant's corporation. A mediator adopts an untested, and ultimately unsuccessful, agenda management technique and refuses to adapt her approach to the needs of the parties. A mediator discloses a party's confidential information to the media. A mediator drifts into a lengthy catnap as a party attempts to recount the circumstances

---

<sup>2</sup> Mediators' conduct before or after a mediation may also create a cause of action. Before a mediation, a mediator who falsely portrays her experience in order to procure clients, or who fails to disclose conflicts of interest, may create grounds upon which parties can sue. Similarly, following a mediation, a mediator who breaches confidentiality may face liability. The theories underlying each of these actions are more fully described below in the context of inappropriate mediator conduct occurring during the mediation itself. While most of the examples in this Article are of mediator misconduct occurring during a mediation, I intend for this Article's analysis to apply equally to pre- and post-mediation conduct.

underlying the dispute. A mediator berates and humiliates one party in front of the other parties. In theory, a mediator who makes bad decisions during the mediation creates the grounds upon which the injured parties may sue. In practice, however, very few mediator behaviors create exposure to liability.

A. *Few Mediators Have Been Sued for Their Mediation Conduct*

As an empirical matter, mediators have enjoyed almost absolute freedom from lawsuits alleging injury stemming from mediation conduct. Reported cases in U.S. federal courts,<sup>3</sup> in U.S. state courts,<sup>4</sup> and in the court systems of Canada,<sup>5</sup> Britain,<sup>6</sup> Australia<sup>7</sup> and New Zealand<sup>8</sup> include only *one* case in which a mediator was found liable to a party for mediation conduct.<sup>9</sup> In the Missouri case of *Lange v. Marshall*,<sup>10</sup> the defendant mediator successfully appealed the jury award, and the judgment was reversed.<sup>11</sup> As a result, no cases exist in the

---

<sup>3</sup> A search of the Westlaw and Lexis-Nexis databases on May 13, 2002 yielded no reported cases.

<sup>4</sup> A search of the Westlaw and Lexis-Nexis databases on May 13, 2002 yielded no reported cases.

<sup>5</sup> See Jennifer Schulz, *Mediator Liability in Canada: An Examination of Emerging American and Canadian Jurisprudence*, 32 OTTAWA L. REV. 269, 271 (2000-2001) (noting that suits against mediators in Canada are almost non-existent). A Westlaw search on May 14, 2002 yielded no reported cases.

<sup>6</sup> See LAURENCE BOULLE & MIRYANA NESIC, *MEDIATION: PRINCIPLES PROCESS PRACTICE* 512 (2001) (indicating that no proceedings had been brought against mediators in the United Kingdom, either because of the relative novelty of formal mediation or because of protection from liability for mediators). A Westlaw search on May 14, 2002 yielded no reported cases.

<sup>7</sup> See Andrew Lynch, "Can I Sue My Mediator?"—*Finding the Key to Mediator Liability*, 6 AUSTL. DISP. RESOL. J. 113, 113 (1995) (suggesting that the very nature of mediation precludes mediator liability). A Westlaw search on May 14, 2002 yielded no reported cases.

<sup>8</sup> A Westlaw search on May 14, 2002 and a Lexis-Nexis search on July 8, 2002 yielded no reference to liable mediators in the secondary literature or reported cases.

<sup>9</sup> At least one mediator has been charged with the unauthorized practice of law ("UPL"). In *Werle v. R.I. Bar Ass'n*, 755 F.2d 195 (1st Cir. 1985), a psychologist offering divorce mediation services sued the state bar association because it sent him a letter requesting that he cease and desist practicing law without a license. I discuss UPL in Part I.B.5. Absent any claim of malpractice, however, even a successful accusation of UPL would not constitute an example of a mediation party recovering from a mediator for her misconduct in a mediation. Bar associations, not clients, bring UPL actions, and the remedies are typically injunctive or criminal, rather than civil payments to parties.

<sup>10</sup> 622 S.W.2d 237, 239 (Mo. Ct. App. 1981).

<sup>11</sup> The Missouri Court of Appeals held that the party suing her attorney-mediator in *Lange* failed to establish that she suffered any damages proximately caused by the attorney-mediator's alleged negligence. The defendant asserted that his actions did not constitute negligence because, as a mediator rather than as an attorney, he owed no duty to perform the tasks the plaintiff claimed he negligently failed to perform. The Court of Appeals

official reporters in which a mediator ultimately paid a former client for injuries the mediator caused during a mediation. Official reporters, of course, capture only a fraction of lawsuits, and it is possible that there have been instances of unreported, successful cases against mediators. However, mediation association newsletters, academic journals, and on-line resources reveal no such cases.<sup>12</sup> Even malpractice insurers, who do an apparently healthy business providing insurance to mediators annually, report very few claims against those policies. In a series of telephone interviews, mediator liability insurance providers reported no more than a handful of claims in any year.<sup>13</sup> Whatever ire former clients may hold toward their mediators is apparently not being expressed in the form of lawsuits.

The lack of successful suits against mediators, however, does not mean that mediators never injure their clients through substandard mediation practices. Mediation occurs in an extraordinary variety of legal and social contexts, and consumers of the process are equally varied. Furthermore, few quality control mechanisms exist to deter substandard practices. There are no licensure systems, no stringent barriers to entry into the practice, and little public insight into the mediation process. It is folly to believe that out of the millions of decisions mediation practitioners across the country make each year, none of them constitutes injurious conduct. We must assume that some mediators are making mistakes.

If mediators are making mistakes, why are no injured mediation parties bringing lawsuits against their mediators? One possible contributing factor, suggested by the general literature on agency,<sup>14</sup> is the possibility of information asymmetry between mediators and their clients. Mediators may

---

specifically declined to resolve the precise nature of the defendant's duties in its opinion, resolving the matter on the issue of proximate causation instead. *Id.* at 238.

<sup>12</sup> See, e.g., CR Info, <http://www.crinfor.org> (accessed Oct. 15, 2002); Mediate.com, <http://www.mediate.com> (accessed Oct. 15, 2002); Association for Conflict Resolution, <http://www.acresolution.org> (accessed Oct. 15, 2002); Journal Storage, <http://www.jstor.org> (accessed Oct. 15, 2002); University of Oregon Libraries, <http://libweb.uoregon.edu/network/fulltext.html> (Academic Search Elite) (accessed Oct. 15, 2002); California Dispute Resolution Council, <http://www.cdrc.net> (accessed Oct. 15, 2002).

<sup>13</sup> Telephone and E-mail Interviews with Betsy Thomas, Broker, Complete Equity Markets (May 22, May 30, and July 8, 2002). Jeffrey Johnson and Tienielle Fordyce-Ruff conducted these interviews under my direction. It is not clear that any of the claims in question would have resulted in a finding of liability at trial. The findings of this research are consistent with Kimberlee Kovach's interviews almost ten years ago. See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 219 (1993) (finding that at the end of 1993 an average of five cases per year were filed against mediators).

<sup>14</sup> For a comprehensive treatment of the foundational principles of principal-agent dynamics, see John W. Pratt & Richard J. Zeckhauser, *Principles and Agents: An Overview*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* 1, 4-8 (John W. Pratt & Richard J. Zeckhauser eds., 1985) (discussing how information asymmetry is moderated in a market economy).

hold some specialized knowledge about mediation practice that is inaccessible to disputants. If this specialized knowledge translates into circumstances in which parties do not know why or what their mediators are doing,<sup>15</sup> it would follow that parties may not know that a mediator has engaged in an injurious practice. Absent a known harmful act, of course disputants will not think to pursue a legal action against their mediator.

A shared disposition toward settlement may provide a component explanation for the low incidence of litigation against mediators. The vast majority of legal complaints result in settlements, rather than litigation.<sup>16</sup> Disputants who sought non-adjudicative means of resolving their initial dispute might similarly favor a non-adjudicative resolution of a dispute involving the mediator. Disputes resolved before they reach the legal system are impossible to track with certainty. Therefore, any inclination of mediation parties towards out of court settlements could reduce the number of cases appearing in any search for lawsuits against mediators. Furthermore, mediators themselves may be inclined to settle complaints from former clients, rather than litigate those complaints. A mediator's professional inclination toward settlement, coupled with the high risks associated with being "the first one on the professional block to be sued,"<sup>17</sup> may make some mediators willing to settle cases, even at a premium. The pro-settlement inclinations of both parties and mediators may at least partially explain the rarity of litigation against mediators.

Neither of these explanations, however, sufficiently explains the nearly complete lack of lawsuits against mediators. Even if some incidents of mediator malpractice were invisible to clients, mediator malpractice is not utterly impossible to detect. Just as lawyers and doctors will occasionally make unfortunate decisions with profoundly visible impacts, so too must mediators sometimes make gargantuan mistakes. In those cases, even information asymmetry would not deter all lawsuits. Furthermore, mediation parties' access to information regarding mediator conduct is less asymmetric than clients' access to relevant information in most professional-client relationships. As a result, information asymmetry is inadequate to explain fully the lack of lawsuits against mediators. Similarly, even if some mediation parties have a predisposition against following cases through to litigation, all

---

<sup>15</sup> In a separate article, I suggested that mediators should make significant portions of their conduct more transparent, thereby increasing the parties' insight into mediator practices. See Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1, 49 (1997).

<sup>16</sup> ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 13-15 (3d ed. 2002) (surveying a range of studies indicating litigation rates ranging from three to twenty-five percent, depending on the study and the subject matter of the dispute); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 147 (2002) (noting a pre-litigation settlement rate of ninety-five percent).

<sup>17</sup> I am indebted to Scott Peppet for calling my attention to this possible dynamic.

mediation parties are not so litigation-averse. With mandatory participation in mediation in some jurisdictions,<sup>18</sup> not all mediation parties can be responsibly described as adverse to the litigation process. There is insufficient homogeneity among mediation consumers to support an assertion that mediators enjoy freedom from lawsuits because mediation consumers do not, as a rule, bring lawsuits. Similarly, not all mediation practitioners are so risk-averse or so opposed to litigation that they would settle all claims at any cost. Even if parties lack complete insight into mediator conduct, and even if some disputants and mediators prefer to settle disputes prior to formal legal resolution, the nearly complete absence of lawsuits against mediators requires another explanation.

B. *Liability is Hard to Establish*

The most significant contributing factor to the lack of lawsuits against mediators is the difficulty of succeeding on such claims. Malpractice, professional negligence, and virtually all other tort claims are available only in extraordinary circumstances. Mediation contracts provide few explicit bases for claims, and none of the bases likely to be implied effectively covers mediator behavior. Fiduciary obligations, like other theories of liability drawn from relationships beyond mediation, have never attached to mediators. The immunity and confidentiality shields that protect a significant number of mediators further complicate the establishment of liability. Current legal structures create a series of obstacles facing any dissatisfied mediation consumer seeking to establish mediator liability.

1. Malpractice and Professional Negligence Standards are Difficult to Meet

In theory, a mediator's conduct may give rise to a claim of malpractice or professional negligence. However, like any other tort claim based fundamentally in negligence,<sup>19</sup> maintaining a malpractice or professional

---

<sup>18</sup> See, e.g., SARAH R. COLE ET AL., 1 MEDIATION: LAW, POLICY AND PRACTICE § 7 (2d ed. 2001) (providing in depth coverage of the use of mandatory mediation as well and legal and policy issues arising from the use of mandatory mediation); Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031 (1996) (surveying the utilization of mediation in the several states); Robert Rack & Nancy H. Rogers, *Introduction to Symposium on the Structure of Court-Connected Mediation Programs*, 14 OHIO ST. J. ON DISP. RESOL. 711, 712 (1999) (describing the variations in mandatory mediation mechanisms in different jurisdictions).

<sup>19</sup> See *Ertel v. Nat'l Fire Adjustment Co.*, 152 F.R.D. 454, 458 (W.D.N.Y. 1993) (“[I]t is significant to note that elements for a claim based on a theory of professional malpractice are the same as those for traditional types of negligence actions.”); *Candler Gen. Hosp., Inc. v. McNorrill*, 354 S.E.2d 872, 876 (Ga. Ct. App. 1987) (“A professional malpractice action is merely a professional negligence action . . . .”); Michael J. Polelle, *Who's on First, and What's a Professional?*, 33 U.S.F. L. REV. 205, 205 (1999) (describing malpractice as being “more accurately called professional negligence”); Theodore Silver, *One Hundred Years of*

negligence action requires, among other things,<sup>20</sup> that a plaintiff demonstrate both that the mediator had a duty to conform to certain standards of conduct *and* that the mediator engaged in conduct that breached those standards.<sup>21</sup> Neither of these elements can be satisfied easily in the context of mediator conduct.

First, a clear standard of practice for mediators is difficult to identify. Mediation is a fragmented occupation, with practitioners varying to a tremendous degree in their training and methodology. While some have argued that mediation should be treated as a profession,<sup>22</sup> the lack of coherence in admission and practice standards makes the analogy imperfect at best.<sup>23</sup> Instead, mediators operate under a patchwork of standards, promulgated by a range of practice associations, program administrators, and court systems. One mediator might practice under restrictions from several sources simultaneously,<sup>24</sup> while another might operate without any restrictions beyond

---

*Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1193 (“A medical malpractice action is identical in all vital respects to any and every suit sounding in negligence.”).

<sup>20</sup> An action in malpractice also requires a demonstration of injury and a causal connection between the sub-standard conduct and the injury. See 1 DAN B. DOBBS, *THE LAW OF TORTS* § 242, at 631 (2001) (outlining the elements of malpractice). Part I.C below treats these requirements in greater detail, as these elements are also difficult for unhappy mediation parties to demonstrate to a legal sufficiency.

<sup>21</sup> See *Ertel*, 152 F.R.D. at 458; *Onwuteaka v. Gill*, 908 S.W.2d 276, 281 (Tex. Ct. App. 1995); 65 C.J.S. *Negligence* § 162 (2000).

<sup>22</sup> See, e.g., Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 243-45 (2002) (noting the growth of certification and licensing requirements, practice standards, and professional organizations, as contributing to the development of an evolving profession).

<sup>23</sup> Regardless of whether mediation is considered a profession, a mediator will likely be held to owe a heightened duty of care toward her clients. The fact that a mediator may not be considered a “professional” will not generally protect her from liability for professional negligence. See *Alexander v. Culp*, 705 N.E.2d 378, 382 (Ohio Ct. App. 1997) (stating that any professional, not exclusively licensed professionals, can be sued for professional negligence); *Nat’l Found. Co. v. Post, Buckley, Schuh & Jernigan, Inc.*, 465 S.E.2d 726, 729 (Ga. Ct. App. 1995) (noting that an architect owes a duty of care to third parties who foreseeably could be harmed by a negligent design). Some jurisdictions, however, limit malpractice claims to attorneys, physicians, licensed members of a profession, or those professions expressly designated by statute. See *Mich. Microtech, Inc. v. Federated Publ’ns, Inc.*, 466 N.W.2d 717, 721-22 (Mich. Ct. App. 1991) (holding a malpractice statute inapplicable to journalists); 65 C.J.S. *Negligence* § 162 (explaining that malpractice may include the negligence of attorneys, physicians and those expressly designated by statute, those professing membership in a state-licensed profession, or professional or engineering service corporations).

<sup>24</sup> For example, a mediator might be a member of several voluntary associations, such as ACR and a state mediation association, each of which has established a different code of



her specific contract to mediate.<sup>25</sup> In the absence of clear customary practice,<sup>26</sup> and with a lack of common law, statutory, or judicial articulations of mediators' duties,<sup>27</sup> a plaintiff would have a difficult time identifying a standard against which a mediator's behavior should be judged.

Even if professional mediation standards existed, a breach of those standards would be difficult to establish. Unlike other practices or professions, mediators' decisions are often difficult to discern, much less to evaluate. If a doctor leaves a surgical instrument inside a patient, or a lawyer fails timely to file a brief, judging these actions as sub-standard is relatively easy. Indeed, some instances of malpractice will be so egregious that even a person who is

---

conduct for mediators. The same mediator might be operating through a mediation program, such as a community mediation program or a professional mediation outfit. Such a program is likely to have set standards. Finally, this mediator might be conducting the particular mediation in question through a referral source. If, for example, the mediator were doing a court-annexed mediation, the court program may have its own rules regarding the mediator's conduct. Further complicating the picture is the prospect of cross-professional practice by mediators. Mediators who are also members of a separate profession will often face conflicting obligations according to that profession's standards of practice. See Michael Moffitt, *Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross-Profession Practice*, 1 HARV. NEGOT. L. REV. 203, 211 (1996).

<sup>25</sup> For example, a prominent community businesswoman might receive an unsolicited call from two startup software companies engaged in a patent dispute. She might reasonably agree to serve as a mediator in their emerging dispute without ever having received specialized training, and without operating under any codified restrictions on her conduct.

<sup>26</sup> In a typical malpractice or professional negligence action, the defendant's conduct is compared with the customary practice of those engaged in a similar profession or practice. See, e.g., *Osborn v. Irwin Mem'l Blood Bank*, 7 Cal. Rptr. 2d 101, 127 (Cal. Ct. App. 1992) ("[P]rofessional prudence is defined by actual or accepted practice within a profession, rather than theories about what 'should' have been done."); 1 DOBBS, *supra* note 20, § 242, at 633 ("The professional standard of care is not the reasonable person standard used in most negligence cases . . . . [T]he professional standard asks the trier only to determine whether the defendant's conduct conformed to the medical standard or medical custom in the relevant community."). But see Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 164 (2000) (suggesting that at least in the realm of medical malpractice, courts are moving away from custom in favor of a reasonable physician standard of care).

<sup>27</sup> *Horak v. Biris*, 474 N.E.2d 13 (Ill. App. Ct. 1985), illustrates a process by which a court may create an affirmative duty where none was previously recognized. In *Horak*, the court articulated four potential considerations in arriving at the conclusion that social workers owe a special duty of care toward those they serve. The court noted that:

A person's duty to act with reasonable care does not extend to the world at large, but, rather, is defined and limited by various considerations such as the relation between the parties, the gravity and foreseeability of the harm, the utility of the challenged conduct and the burden of guarding against the injury.

*Id.* at 17.

not a member of the profession will be able to identify the behavior as sub-standard.<sup>28</sup> However, it is much more difficult to say that the decisions and actions of a mediator fall below an accepted standard of practice.

Almost anything a mediator does during the course of a mediation might be explained by one or more of the current, competing theories of mediation practice. Some mediators keep the parties separated almost exclusively.<sup>29</sup> Others keep them together in almost every circumstance.<sup>30</sup> Some mediators play an active role in structuring conversation during the mediation. Others view such procedural decisions as part of the parties' role.<sup>31</sup> A mediator who

---

<sup>28</sup> In the context of legal malpractice, however, "the concept of *res ipsa loquitur* is not applicable . . . . [T]he standard of care against which the attorney defendant's conduct will be measured must generally be established through expert testimony." *Barth v. Reagan*, 564 N.E.2d 1196, 1199-1200 (Ill. 1990). Not all decisions by professionals such as lawyers will be assessed so easily. For example, a lawyer's decisions in exercising peremptory challenges, in conducting a cross-examination, or in making a closing argument are all subjective and difficult for outsiders to assess. For this reason, deferential treatment under such rules as the "Lawyer Judgment Rule" have served to shield some discretionary professional actions from subsequent review. See *O'Brien & Assocs. v. Tim Thompson, Inc.*, 653 N.E.2d 956, 962 (Ill. App. Ct. 1995) ("A mere error of judgment does not subject an attorney to liability even if that erroneous judgment leads to an unfavorable outcome for the client."); *Bernstein v. Oppenheim & Co.*, 554 N.Y.S.2d 487, 489 (N.Y. App. Div. 1990) (holding that "an attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment, where the proper course is open to reasonable doubt," and that "selection of one among several courses of action does not constitute malpractice" (internal citations and quotations omitted)); Norman B. Arnoff et al., *An Updated Primer on the Law of Legal Malpractice in New York*, in LEGAL MALPRACTICE: TECHNIQUES TO AVOID LIABILITY, at 195, 221 (PLI Litig. & Admin. Practice Course, Handbook Series No HO-003Q, 1999) (discussing the differences between mandated tasks and the "Lawyer's Judgment Rule" as they relate to legal malpractice claims).

<sup>29</sup> See, e.g., Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 327-29 (1994) (presenting an economic argument for caucus-based mediation, relying on the parties' willingness to provide confidential information to the mediator); Christopher W. Moore, *The Caucus: Private Meetings That Promote Settlement*, 16 MEDIATION Q. 87, 88-90 (1987) (arguing in favor of the use of caucuses in mediations generally).

<sup>30</sup> See, e.g., JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 131 (2001) (surveying differences among mediators on the question of caucusing); *MEDIATING LEGAL DISPUTES* § 3.2, at 68 (Dwight Golann ed., 1996) (describing the no-caucus model frequently adopted in the family mediation context).

<sup>31</sup> See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 195-96 (1994) (suggesting that mediators should leave many process decisions to the disputants); COLE ET AL., *supra* note 18, § 3:2 ("Although some mediators are more aggressive than others in suggesting outcomes, their strongest control is over the process."); DEBORAH KOLB ET AL., *WHEN TALK WORKS* 475 (1994) (quoting a mediator describing himself as "the orchestra leader . . . . If they want to play in this orchestra, they're going to have to play when I point at them"); Moffitt, *supra* note 15, at 2-3 (suggesting that mediators should make process

decides to offer suggestions or to evaluate the merits of the disputants' claims is either right on track or wildly out of bounds, depending on the school of mediation.<sup>32</sup> One mediator might cajole, strong-arm, threaten, argue with, beg, or even bribe the disputants to reach a compromise.<sup>33</sup> Another would view each of these as anathema to the role of a mediator.<sup>34</sup> In short, a mediator can do few things that will constitute a clear breach of *all* conceptions of acceptable mediator practice.

Mediation is not alone in having diverging viewpoints on appropriate practices within the same discipline. In the medical field, for example, health practitioners often disagree about appropriate diagnostic and treatment approaches. However, this variation does not render all medical practitioners effectively immune to charges of malpractice. Instead, courts hold practitioners to whatever standard exists within their particular "school" of health practice.<sup>35</sup> A chiropractor, therefore, is not judged by the standards of

---

decisions explicit, in part to invite parties' autonomous judgment about the merits of the process decisions).

<sup>32</sup> See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23-24 (1996) (describing variation among practitioners according to a facilitative-evaluative continuum); COLE ET AL., *supra* note 18, § 3:4 (noting that "[m]ediators and mediation programs have diverse approaches to recommending a settlement if the parties fail to reach one during the mediation session," and that "[m]ediators disagree on whether legal evaluation by the mediator is appropriate"). Compare Marjorie Corman Aaron, *Evaluation in Mediation*, in MEDIATING LEGAL DISPUTES, *supra* note 30, § 10.3.1, at 272-74 (arguing for mediators' occasional use of evaluation), with Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALT. TO HIGH COSTS OF LITIG. 31 (1996) (arguing for a definitional exclusion of evaluation).

<sup>33</sup> See ALFINI ET AL., *supra* note 30, at 107-48 (describing a range of mediator practices aimed at producing settlement); MEDIATING LEGAL DISPUTES, *supra* note 30, § 1.1.1, at 17 ("Mediators vary greatly in how actively they are willing to intervene in a dispute."). Golann later suggests that mediators should adopt a flexible approach to mediating, responding to the particular challenges of the dispute in question. *Id.*

<sup>34</sup> See, e.g., BUSH & FOLGER, *supra* note 31, at 203-04 (arguing against mediator involvement in the substantive outcome of the mediation in favor of party empowerment and inter-party recognition). For a broader exploration of different practitioners' responses to so-called "pressure tactics," see KENNETH KRESSEL ET AL., MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 418-20 (1989) (noting that nearly all mediators use pressure tactics to varying degrees of success).

<sup>35</sup> Vergara v. Doan, 593 N.E.2d 185, 187 (Ind. 1992) ("[A] physician must exercise that degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under the same or similar circumstances."). The so-called "two schools of medical thought" doctrine holds that a physician's conduct will not be considered malpractice "if the physician, in using his best judgment, followed one of the two or more alternative treatments recognized in the profession as acceptable." Glenn E. Bradford & David G. Meyers, *The Legal and Regulatory Climate in the State of Missouri for Complementary and Alternative Medicine—*

an orthopedic surgeon. Instead, he or she is judged against the standard set by the ordinarily competent chiropractor.<sup>36</sup> The same is true of psychotherapists who adhere to a particular approach to therapy, whether Freudian, Client-Centered, or Gestalt.<sup>37</sup> Anyone “who engages in a business, occupation, or profession must exercise the requisite degree of learning, skill, and ability of that calling with reasonable and ordinary care.”<sup>38</sup> Variation within an occupation or profession, in most cases, merely demands judging the specific conduct in question in comparison to those who approach the occupation or profession using a similar underlying theory of practice.

Mediation differs from other occupations, however, because currently no responsible set of labels for different mediator practices exists that would permit categorization or comparative evaluation. Some scholars have endeavored to describe some of the variations between mediation practitioners. While these descriptions may be intellectually stimulating, they are far from descriptively precise. For example, one common distinction drawn between mediators distinguishes those who are considered “evaluative” from those who describe themselves as “facilitative.”<sup>39</sup> At a minimum, treating evaluative and facilitative practices as polar opposites, demanding a binary choice, oversimplifies mediation practice. Even more troubling for the purpose of establishing clear schools of mediation is that most responsible mediators adapt the services they provide to the context of the dispute. Some parties, in some circumstances, might benefit from practices which, in another context, with other parties, would be unhelpful. Disputants’ needs drive mediator

---

*Honest Disagreement Among Competent Physicians or Medical McCarthyism?*, 70 UMKC L. REV. 55, 75 (2001).

<sup>36</sup> See *Vergara*, 593 N.E.2d at 187 (noting that the conduct of a physician facing a malpractice claim will be measured against, among other things, the current state of knowledge in the profession).

<sup>37</sup> See Lawrence P. Hampton, Note, *Malpractice in Psychotherapy: Is There a Relevant Standard of Care?*, 35 CASE W. RES. L. REV. 251, 271-72 (1984-1985) (indicating that traditional psychoanalysis and client-centered therapy as well as newer Gestalt therapy are accepted psychotherapeutic “schools of thought”).

<sup>38</sup> 57A AM. JUR. 2D *Negligence* § 190 (1989); see also 1 DOBBS, *supra* note 20, § 242, at 631-32 (explaining that physicians implicitly agree to act with at least the normal “skill, knowledge and care . . . exercised by other members of their profession”).

<sup>39</sup> In wooden terms, an evaluative mediator provides the parties with her assessment of the likely treatment the case in question would receive in court, while a facilitative mediator focuses instead on helping the parties to communicate. The distinction is surely not as simple as this footnote suggests, and countless pages have been spent among mediation scholars engaging in descriptive and normative debates about this distinction. See, e.g., ALFINI ET AL., *supra* note 30, at 170-92 (comparing the facilitative and evaluative approaches to mediation); Aaron, *supra* note 32, § 10, at 267-305 (discussing the proper place for evaluation in mediation); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71, 71-75 (1998) (challenging Professor Riskin’s grid, which outlines the mediation universe along an evaluative-facilitative continuum and a narrow-broad problem definition continuum).

practices, making mediator practices difficult to pin down with any certainty. Many experienced, thoughtful mediators would be hard pressed to name any approach they would always or never adopt. The same mediator may even vary her practices in mid-stream, apparently jumping from one “school” to another, during a mediation.<sup>40</sup> Efforts to categorize mediators into clear, consistent practices has yielded little consensus.

Given the lack of clear standards of practice and the difficulty of proving any mediator behavior substandard, it would be exceptional if a plaintiff were able to use a malpractice or professional negligence claim to establish liability.

## 2. Other Tort-Based Actions Pose Similar Challenges

Beyond malpractice or simple negligence, a dissatisfied party could theoretically bring a number of tort claims against a mediator. Intentional infliction of emotional distress, false imprisonment, tortious interference with contractual relations and invasion of privacy each provide a possible basis for recovery from a mediator. In practice, however, none of these exposes most practicing mediators to sweeping liability.

In an egregious set of circumstances, a mediator could conceivably be held liable for intentionally inflicting emotional distress on one of the parties. However, an action under intentional infliction of emotional distress requires that “the defendant cause[d] severe emotional distress, intentionally or recklessly, by extreme and outrageous conduct.”<sup>41</sup> The aggressive approach some mediators adopt in challenging parties’ perceptions and assessments would not come near to satisfying the requirements for demonstrating tortious infliction of emotional distress. *Howard v. Drapkin*<sup>42</sup> involved an allegation of intentional infliction of emotional distress in a context somewhat analogous to mediation. In that case, a divorcing couple hired Robin Drapkin, a psychologist, to assess the circumstances underlying a custody and visitation dispute. Pursuant to her agreement with the couple, Drapkin conducted her

---

<sup>40</sup> For example, Marjorie Corman Aaron has suggested that mediators turn to evaluation only after having tried “to address every other major barrier” to settlement, including “emotion, communication, imbalance of information, [and] differing negotiation styles.” Aaron, *supra* note 32, § 10.2, at 272. A simple characterization of Aaron’s mediation style would therefore label her as “evaluative,” when in fact, in many mediations, she would presumably find no need to engage in evaluation at all. Aaron’s is a dynamic, and in my view, very thoughtful vision of mediation.

<sup>41</sup> 2 DOBBS, *supra* note 20, § 303, at 826 (enumeration omitted) (including outrageous conduct as an element of intentional infliction of emotional harm); *see also* 86 C.J.S. *Torts* § 69 (1997) (“A claim for intentional infliction of emotional distress arises when one by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.”); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 12, at 60 (5th ed. 1984) (“[T]here is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind.”).

<sup>42</sup> 271 Cal. Rptr. 893 (Cal. Ct. App. 1990).

investigation and produced a report and recommendation. Vickie Howard, one of the divorcing parents, subsequently sued Drapkin, alleging intentional infliction of emotional distress. According to Howard, during the one-session investigation, Drapkin “personally attacked plaintiff, screamed at her, ridiculed her, accused her of lying and fabricating evidence, threatened she would lose custody of her son if she persisted in believing his allegations about his father, and misrepresented that the child’s doctors and other experts involved in the case did not believe the child had been abused.”<sup>43</sup> The complaint was dismissed on summary judgment, without a determination of the merits of the intentional infliction of emotional distress claim, because the court accorded a form of immunity to Drapkin. Even if the claim had proceeded, the fact that Drapkin’s assessment, like most mediations, was voluntary, would have made the assertion difficult to maintain. An utterance from an outside party without the capacity to impose a resolution would rarely be so injurious as to cause cognizable emotional distress, particularly in the context of a mediation. The fact that a party can leave a mediation at any point makes it likely that only the most extraordinarily egregious examples of mediator misconduct will subject a mediator to liability under a theory of intentional infliction of emotional distress.

False imprisonment, like intentional infliction of emotional distress, represents a potential ground for recovery to an injured mediation party that could be applicable in outrageous circumstances. In practice, however, a mediator’s behavior will seldom, if ever, satisfy the requirements of false imprisonment. False imprisonment applies only if a defendant unlawfully restrained the plaintiff’s voluntary movement by means of force, threat of force, physical barrier or assertion of legal authority.<sup>44</sup> A popular image of mediating may include locking the parties in a room and refusing to let them out until they have reached an agreement. If the mediator actually locked the parties in a confined space against their will, then the tort of false imprisonment might be available.<sup>45</sup> Even among mediators who might subscribe to such a theory, however, the “locking” in question is almost never literal. Instead, the parties’ unfavorable assessments of the prospects of non-

---

<sup>43</sup> *Id.* at 895.

<sup>44</sup> See RESTATEMENT (SECOND) OF TORTS §§ 38-41 (1965) (discussing the tort of false imprisonment); 1 DOBBS, *supra* note 20, §§ 36-37, at 67-72 (same).

<sup>45</sup> False imprisonment requires that the confinement be against the will of the person confined. Consent raises potential issues regarding the prospect of mediation parties making an Odysseus-like pre-commitment to a particular mediation strategy, such as the imposition of a strict and unchangeable deadline. In lieu of consenting to be lashed to a mast, mediation parties conceivably could consent to an arrangement that would prevent them from terminating a mediation for a specified period of time. Such an exercise of autonomy would preclude a subsequent claim of false imprisonment, assuming that the mediator “bound” them to the mediation for no longer than they had originally consented to be bound. *Cf.* HOMER, THE ODYSSEY 180-85 (E.V. Rieu trans., Penguin Books 1991) (1946).

settlement are what keep them at the table. While false imprisonment does not require physical confinement, it does require a threat to a legally protected interest. Threats to a speculative interest in receiving a favorable settlement of a legal dispute fall outside the scope of actions proscribed by the tort of false imprisonment.<sup>46</sup> Furthermore, unless the mediator somehow persuasively mischaracterizes the basic voluntary nature of mediation, the fact that a party may simply end a mediation or refuse to agree to a proposed settlement makes the tort essentially unavailable to parties complaining of a mediator's efforts at persuasion.

Outside the realm of outrageous conduct, an aggrieved mediation party could assert that a mediator tortiously interfered with his contractual rights or economic opportunity. As a simple illustration, in a mediation between a plaintiff and a defendant, the plaintiff, as the aggrieved party, would claim that the mediator's actions wrongfully caused injury to the plaintiff's contractual rights with respect to the defendant. To prove the tort of interference with contractual relations, the injured plaintiff would have to show that the mediator intentionally and wrongfully interfered with the plaintiff's contractual rights.<sup>47</sup> Demonstrating intent, as opposed to simple negligence, in a mediation would be difficult, to say the least.<sup>48</sup> Even more challenging is the requirement that the mediator's acts or omissions cause a loss of contractual rights or a decrease in the value of the contract to the injured party. Mediations generally take place in a context in which no contractual relation between the parties exists. Indeed, one purpose of the mediation may be to explore whether the parties can enter into a contract whose terms would resolve the dispute that brought them to mediation in the first place. In the absence of an existing contract, a mediator could at most be liable for interference with a party's economic

---

<sup>46</sup> Cf. 1 DOBBS, *supra* note 20, § 37, at 69-72 (describing the methods of confinement considered false imprisonment).

<sup>47</sup> See *id.* § 446, at 1259-60 (naming as elements of interference with contract or economic opportunities "(1) the existence of a contract (or economic opportunity) involving the plaintiff and another, (2) the defendant's knowledge of it, (3) the defendant's malicious, improper, or intentional interference with it, (4) breach of the contract or other legally cognizable disruption of economic opportunity, and (5) resulting damage to the plaintiff").

<sup>48</sup> There is some ambiguity about the precise parameters of the intent requirement in the mediation context. The tort of intentional interference with performance of contract by a third person can be brought even if the mediator did not specifically intend to interfere with the contractual relationship in question, for the tort applies to circumstances,

in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action.

RESTATEMENT (SECOND) OF TORTS § 766 cmt. j (1965); cf. 2 DOBBS, *supra* note 20, § 446, at 1259 ("[N]egligently caused economic harm is generally not actionable.").

opportunity or prospective advantage.<sup>49</sup> Tort liability for interference with economic opportunity protects against injuries to expectancies such as the benefits one anticipates receiving from a contractual relation. The hurdles to establishing intent for interference with economic opportunity, however, are at least as difficult as those for interference with contractual relations.<sup>50</sup> Furthermore, the very nature of expectancies is speculative. What terms would the parties have agreed to if the mediator had not made a particular intervention? Unless the mediator made a deal-breaking intervention just as the parties were standing, pens in hand, ready to sign a prepared contract, to say what would have happened in a mediation would be extremely speculative. Therefore, while tortious interference with prospective contractual advantage is theoretically available to aggrieved mediation parties, only a narrow set of mediation circumstances would actually support such a claim.

Finally, the tort of invasion of privacy could conceivably expose mediators to liability. If a mediator breached confidentiality in a particular set of circumstances, a privacy action may be available to injured parties.<sup>51</sup> Since the emergence of privacy as a basis for tort in the late nineteenth century, courts in various jurisdictions have recognized several different forms of invasion of privacy.<sup>52</sup> The most obviously relevant form regards the disclosure of private information.<sup>53</sup> Though it is not a uniformly adopted tort,<sup>54</sup> public disclosure of private information may present an opportunity for an aggrieved mediation party. Privacy actions generally require a public disclosure of private information that “would be highly offensive” and objectionable to a reasonable

---

<sup>49</sup> See 2 DOBBS, *supra* note 20, § 450, at 1275 (noting that interference with economic opportunity does not require interference “with an existing and enforceable contract but merely with the plaintiff’s probable economic advantage, such as a likely prospect of selling goods to a buyer who was willing to purchase,” and that “[t]he plaintiff need not have a prospect of obtaining a contract; it is enough if she has a probable prospect of economic gain”).

<sup>50</sup> A potential exception would be if a court held the mediator to owe a special duty to the parties in a way that made negligent interference with prospective advantage actionable. *Cf.* *Western Union Telegraph Co. v. Bowman*, 37 So. 493, 496 (Ala. 1904) (holding a telegraph company liable for negligent failure to deliver a message that would have created a favorable contract); *Western Union Telegraph Co. v. McKibbin*, 14 N.E.2d 894, 897 (Ind. 1887) (same).

<sup>51</sup> Because many contracts also contain promises of confidentiality, mediator behavior that gives rise to a privacy-based tort claim may also give rise to a breach of contract claim.

<sup>52</sup> See 2 DOBBS, *supra* note 20, § 424, at 1197-98 (describing the various manifestations of the invasion of privacy tort).

<sup>53</sup> Other forms of invasion of privacy have little apparent relevance to the mediation context. *Cf.* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (describing other aspects of privacy, including appropriation, unreasonable intrusion, and false light).

<sup>54</sup> See 2 DOBBS, *supra* note 20, §§ 424-27, at 1197-1208 (describing privacy rights and related tort liability for appropriation of personality, and intruding upon and publicizing private life).



person of ordinary sensibilities in a context in which legitimate public interest did not demand its disclosure.<sup>55</sup> For example, a mediator might learn, during a private caucus with the defendant, sensitive and potentially offensive information about the defendant. If the mediator then called a press conference during a break in the mediation to announce what she learned about the defendant, the disclosure of that private information could qualify as a tortious invasion of the defendant's privacy. The subject matter of most disputes reaching mediation is sufficiently mundane, however, that even a complete breach of confidentiality by the mediator would not likely satisfy the requirements of an invasion of privacy action. The subject matter simply would not be objectionable enough to warrant a claim. Still, mediations in some contexts, such as divorce, may include exposure to highly sensitive, embarrassing information of the sort that would be legitimately protected under tort standards. Imagining a context in which a mediator would choose to make such information public, however, demands considerable speculation and creativity. The narrowness of the requirements for an invasion of privacy action makes the tort applicable only to a set of uncommon circumstances.

### 3. Contracts Provide Little Basis for a Claim

Contractual obligations may theoretically bind mediators in a way that would provide legal recourse to injured parties. In order to bring a successful contract action against a mediator, however, a party would need to demonstrate a breach of either an express term or an implied term in the mediation contract. As a practical matter, neither of these is easy to do.

In the rare instance when the mediator has *ex ante* detailed contractually all of the services she will provide, an action for breach of contract would be relatively easy to maintain. If mediation services resembled those of an auto mechanic, for example, one would expect the service contract to include an accounting of the services to be provided. A customer who agrees to a mechanic's proposal to "put in new fan belts, adjust the timing, replace the spark plugs and the wipers" has a catalog of express promises. Any failure by the mechanic to perform one of these services may create a cause of action for the consumer.

Most of the detailed, express promises contained in mediation agreements, however, do not address the question of what the mediator will actually do during the mediation. Instead, most mediation contracts, to the extent they make any express promises, address mediators' behaviors in advance of the mediation—for example, disclosures of conflicts of interest<sup>56</sup>—or after the

---

<sup>55</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1965).

<sup>56</sup> For examples of promises to investigate and disclose conflicts of interest see JOHN W. COOLEY, *MEDIATION ADVOCACY* app. G, ¶ 2 (1996) ("The Mediator and each party confirm that they have disclosed . . . any past or present relationship that a reasonable person would believe would influence the Mediator's impartiality . . ."); CPR Institute for Dispute Resolution, CPR Model Mediator Retainer Agreement (Excerpt), *at*

completion of the mediation—for example, maintaining confidentiality of mediation communications.<sup>57</sup> The research for this Article included an examination of several dozen mediation contracts currently being used in the United States, Canada, and New Zealand. Few mediation agreements contain specific promises about actions the mediator will or will not take during the mediation.

The few express contractual provisions addressing a mediator's conduct during the mediation tend overwhelmingly to be statements of broad principle or purpose, rather than specific promises. Some mediation contracts will spell out relatively insignificant<sup>58</sup> aspects of the mediation in great detail—the timing of meetings and billing procedures, for example. Language aimed at more significant and challenging mediator practices typically suffers from vagueness that will defeat contract-based claims.<sup>59</sup> For example, mediators' contracts commonly contain language declaring that the mediator will be “even-handed,” “impartial,” or “neutral” in the discharge of her services.<sup>60</sup>

---

<http://www.cpradr.org/conflict.htm#retainer> (accessed Jan. 9, 2003) (“The Neutral has made a reasonable effort to learn and has disclosed to the parties in writing . . . [any circumstances] that may create doubt regarding the Neutral's impartiality in the Proceeding.”). At least one scholar has suggested that conflicts of interest are so critical to the integrity of mediation that failure to disclose a conflict of interest should be considered a breach of an implied term. Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 RUTGERS L. J. 131, 168 (1999).

<sup>57</sup> Virtually every mediation contract examined in the preparation of this Article includes a confidentiality promise of some form. None of those clauses distinguishes between maintaining confidentiality during the course of a mediation and maintaining it following a mediation. See, e.g., MARK D. BENNETT & MICHELLE HERMANN, *THE ART OF MEDIATION* 219-20 (1996); BARBARA ASHLEY PHILLIPS, *THE MEDIATION FIELD GUIDE: TRANSCENDING LITIGATION AND RESOLVING CONFLICTS IN YOUR BUSINESS OR ORGANIZATION* app. F (2001); BETTE J. ROTH ET AL., *THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE* pt. III, app. 5 (1993); JOHN R. VAN WINKLE, *MEDIATION: A PATH BACK FOR THE LOST LAWYER* 127-28 (2001); *J.A.M.S./Endispute Mediation Agreement*, in BENNET G. PICKER, *MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES* app. H (1998); Memorandum and Agreement to Mediate from United States Arbitration & Mediation, to Michael Moffitt, Assistant Professor, University of Oregon School of Law (May 15, 2002) [hereinafter USAM Memo] (on file with author). In addition to pursuing the contract-based claims described here, a party whose mediator has breached confidentiality may be able to assert a tort claim of invasion of privacy. The availability of a privacy action, however, is speculative since no such actions have been maintained successfully to date.

<sup>58</sup> These terms are insignificant only in the sense that they are unlikely to form the basis of a subsequent legal claim.

<sup>59</sup> See, e.g., Arthur Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 CINC. L. REV. 731, 737 (1984) (arguing that the vagueness of any mediation agreement limits its usefulness as a source of contract rights for clients against the mediator); Lynch, *supra* note 7, at 113-16 (supporting Chaykin's argument).

<sup>60</sup> Sorensen-Jolink, Trubo, Williams, McIlhenny & Williams, LLP, *Agreement for Mediation* (on file with author) (“neutral”); Natran Mediation Services, *Mediation Contract*,

Mediation contracts also often include general language about the role of the mediator. For example, contracts may describe the mediator's role as "assist[ing] the parties," "organizing the discussions," or "help[ing] the parties to communicate effectively, gather and analyze information, define issues, generate alternatives, explore consequences and reach agreements acceptable to both parties."<sup>61</sup> Because these terms appear on the face of the contract, they are treated as express. Their breadth and vagueness, however, pose significant challenges to any party seeking to demonstrate a breach.<sup>62</sup> Was the mediator's statement biased, or merely a diligent and honest effort aimed at protecting the parties' self-determination? Did the mediator's decision to cut off one party's statement facilitate or hinder communication? A mediation contract typically says little about the mediation decisions and actions most likely to upset a party.

Even when a mediation contract expressly incorporates externally created

---

available at <http://www.natran.ca/contract.html> (accessed May 10, 2002) ("impartial"); David E. Hollands, *Standard Terms of Engagement as Mediator* ¶ 2, available at <http://homepages.ihug.co.nz/~deh/med-terms.htm> (accessed May 10, 2002) ("even-handed"); see also Robert B. Fitzpatrick, *ADR and Settlement Forms, Superior Court for the District of Columbia* 713, 716 (ALI-ABA Course of Study, Dec. 2, 1999) ("unbiased, neutral and independent"). Certain actions, such as failure to disclose a conflict of interest, may constitute a breach of these terms. See Esquibel, *supra* note 56 (suggesting that "a mediator that has a conflict of interest and has failed to disclose it has breached his contract to provide mediation services"). The best analogy, perhaps, to the difficulty of establishing partiality in the context of conduct is the requirement in the Code of Judicial Conduct that judges behave with "impartiality." Even "indecorous" or "intemperate" behavior from a judge is not held to evidence sanctionable bias, however. The actions may be sanctionably inconsistent with appropriate judicial temperament, but that criterion does not rest on impartiality. Instead, absent actual conflicts of interest, a judge's comments will be considered improperly partial only when they evidence an unwillingness to consider further evidence or arguments. See SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS §§ 3.02-3.10, 4.07 (3d ed. 2000) (discussing judicial demeanor, impartiality, and competence).

<sup>61</sup> Van Winkle, *supra* note 57, at 126 ("assists the parties"); USAM Memo, *supra* note 57, at 1 ("organizing the discussions"); Tennessee Administrative Office of the Courts, *Agreement to Mediate*, at <http://www.tsc.state.tn.us> (accessed Oct. 18, 2002) ("help[ing] the parties to communicate effectively, gather and analyze information, define issues, generate alternatives, explore consequences and reach agreements acceptable to both parties").

<sup>62</sup> An exception to this is the mediation contract employed by Diane Neumann & Associates Divorce Mediation Services. Article 8 of their standard contract states, "At the conclusion of the [mediation] sessions, the mediator will prepare a written Separation Agreement (which will be our divorce agreement), which sets forth the divorce settlement, and we will each receive a copy." Diane Neumann & Associates Divorce Mediation Services, *Mediation Contract*, at <http://www.divorcemed.com/Contract.htm> (accessed May 10, 2002). Surprisingly, this contract appears to provide a specific promise of a divorce agreement, potentially exposing the mediator here to a contract action should the mediation fail to produce an agreement. In order to avoid such liability, most other mediation contracts avoid making any representations about the outcome of the mediation.

standards of conduct, there are few specific promises on which to base a contract claim. The standards of conduct created by mediation associations and referral services are often replete with generalized, aspirational calls for mediators to do things like “remain impartial,” “recognize . . . the principle of self-determination,” or “help [the parties] make informed decisions.”<sup>63</sup> The lack of specificity in these standards not only provides little guidance to practicing mediators,<sup>64</sup> but also makes it extraordinarily difficult for a party to demonstrate a mediator’s breach.

In the absence of express contractual terms on which to base a claim, certain terms may be considered implied within the contract. Suits alleging a breach of an implied contractual term, however, are no easier to maintain than any of the other theories listed above. The principal term implied into a mediation contract would be a covenant of good faith, binding a mediator to mediate with reasonable skill and care.<sup>65</sup> Reasonableness, however, is tested against the norm of practice within mediation generally, making it difficult to base a claim on such a duty.<sup>66</sup> Any effort to demonstrate a breach of an implied covenant to exercise reasonable care would likely face extraordinary obstacles because, as is described above, mediation practitioners rarely agree that a single practice is “correct” or “standard” in a given situation.

Liability waivers, commonly found in mediation contracts, present a final obstacle to mounting a successful contract-based claim against a mediator. In some standard form mediation contracts, parties are asked—and presumably often agree—to waive rights to sue mediators for any acts or omissions in connection with the mediation.<sup>67</sup> Other standard forms limit the scope of the

---

<sup>63</sup> See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standards I, II (1994), available at <http://www.abanet.org/dispute/modelstandardsofconduct.doc> (accessed Oct. 18, 2002) (outlining model standards of conduct for mediators).

<sup>64</sup> See Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEG. L. REV. 87 (1997).

<sup>65</sup> See Esquibel, *supra* note 56 (suggesting that mediation depends so heavily on an absence of conflicts of interest that a duty to disclose conflicts should also be considered implied in any mediation agreement).

<sup>66</sup> See BOULLE & NESIC, *supra* note 6, at 513-17 (discussing a mediator’s potential liability in contract and tort); Schulz, *supra* note 5, at 285-86.

<sup>67</sup> See, e.g., COOLEY, *supra* note 56, app. G, ¶ 8 (the mediator “shall have the same limited immunity as judges and court employees would have under federal law”); Fitzpatrick, *supra* note 60, at 721 (“[T]he Parties agree not to hold the mediator responsible either for the outcome of this mediation or for her actions or inactions.”); Hollands, *supra* note 60, ¶ 23 (“The mediator shall not be liable to any person or entity, including the parties, for any act or omission including negligence or breach of confidentiality or for any advice or opinion or comment associated with his engagement as mediator and involvement in the dispute.”); Van Winkle, *supra* note 57, at 128 (“The parties agree that the mediator shall have immunity in the same manner and to the same extent as a judge in the state in which the mediation is conducted.”); Internet Neutral, *Internet Neutral Mediation Rules*, at <http://www.internetneutral.com/rules.htm> (accessed May 10, 2002) (the mediator shall not

waiver by allowing for suit only in cases of willful misconduct.<sup>68</sup> Not all mediation contracts include language that limits liability,<sup>69</sup> but the prevalence of these waivers almost certainly serves to limit the number of successful suits against mediators. A waiver clause, if upheld, would bar at least negligence-based claims.<sup>70</sup> Even if the provisions were not enforceable, it is reasonable to assume that some parties may be deterred from suing based on an assumption that they had contractually waived their right to do so.

#### 4. Fiduciary Duties do not Regularly Attach to Mediators

As a theoretical matter, an injured mediation party could assert that the mediator's behavior constituted a breach of fiduciary obligations. Fiduciary theories of liability for mediators are premised on the idea that certain mediation circumstances may trigger trust-based fiduciary obligations for mediators. As a general matter, a person acts as a fiduciary when he or she handles a transaction for the benefit of another, acting in a position of confidence, trust, and good faith.<sup>71</sup> The attachment of fiduciary obligations is not driven by title or status, but by circumstances. As a result, the inquiry about the existence of fiduciary duties is fact-specific.<sup>72</sup> One scholar, Arthur

---

"be liable to any Party for any act or omission relating to" the mediation); USAM Memo, *supra* note 57, ¶ 8 (the "mediators are entitled to an immunity from suit").

<sup>68</sup> See, e.g., ADR Institute of Canada, Rules & Protocol, *Model Mediation Procedure* ¶ 27, available at <http://www.amic.org/rules/model.html> (accessed May 10, 2002) (mediators shall not "be liable to the parties for any act or omission in connection with the services provided by them, in or in relation to, the Mediation, unless the act or omission is fraudulent or involves willful misconduct").

<sup>69</sup> Perhaps not surprisingly, an example of a mediation contract without a waiver of liability is published by the National Institute for Trial Advocacy. See BENNETT & HERMANN, *supra* note 57, at 217-25 (providing a sample agreement to mediate). For other examples of contracts without waiver provisions, see Natran Mediation Services, *supra* note 60; PICKER, *supra* note 57, app. G at 128-37.

<sup>70</sup> Note, however, that attorneys may not include liability waivers in their representation contracts with clients. See 2 DOBBS, *supra* note 20, § 484, at 1385 n.4 ("Lawyers are forbidden to contract out of malpractice liability." (citing RESTATEMENT OF THE LAW GOVERNING LAWYERS § 76(1) (Tentative Draft No. 8, 1997))); MODEL RULES OF PROF'L CONDUCT R. 1.8(h) (2002) ("A lawyer shall not make an agreement prospectively limiting the lawyer's liability for malpractice unless [permitted by law and] the client is independently represented in making the agreement . . .").

<sup>71</sup> 36A C.J.S. *Fiduciary* at 381 (1961) (describing a "fiduciary" as "a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking"). A precise, universally applicable definition of "fiduciary" is elusive. A fiduciary relationship is "any relationship of blood, business, friendship, or association in which the parties repose special trust and confidence in each other and are in a position to have and exercise influence over each other, and implies a condition of superiority of one of the parties over the other." *Id.* at 383.

<sup>72</sup> See Chaykin, *supra* note 59, at 741 (arguing that there is no per se rule defining persons as fiduciaries).

Chaykin, has suggested that the hallmark of this inquiry in the mediation context would be merely whether the mediation party (or parties) “justifiably trusted” the mediator.<sup>73</sup> If the injured party was justified in trusting the mediator, then according to this theory of liability, the mediator would be strictly liable for any breach of that trust.

Fiduciary obligations could extend into the realm of mediation, however, only with a degree of judicial adaptation unlikely to be forthcoming. Chaykin’s proposal drew skeptical response from many within the mediation community.<sup>74</sup> At best, fiduciary obligations involve highly flexible standards that would produce relatively uncertain—even perhaps chaotic or “idiosyncratic”—treatment.<sup>75</sup> In practice, a litigant arguing the presence of fiduciary obligations would face considerable obstacles in establishing that mediation obligations are sufficiently fixed to permit the application of fiduciary obligations.<sup>76</sup> Furthermore, a prospective plaintiff would need to overcome the structural difficulty of asserting that the mediator owes simultaneous fiduciary obligations to parties with opposing interests in the matter at hand. Fiduciary obligations cannot be structured responsibly in a way that would damn the mediator no matter what she did, yet holding a fiduciary obligation simultaneously to opposing parties risks exactly that.<sup>77</sup> Finally, a plaintiff seeking to establish a fiduciary obligation on the part of a mediator would be challenged to demonstrate that the mediator occupied a position not only of “influence,” but also of “superiority” sufficient to warrant fiduciary status.<sup>78</sup> Unlike an agent, an attorney, an officer or a trustee, a mediator is not empowered by the party to make decisions on behalf of the

---

<sup>73</sup> *Id.* at 744 (arguing that the justifiable trust concept is easily placed in the mediation context).

<sup>74</sup> See, e.g., Joseph Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85 (1986) (disagreeing with Chaykin’s assumptions regarding the mediator’s role); Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876 (1986) (rejecting comprehensive models and endorsing a more flexible approach to mediator liability).

<sup>75</sup> Chaykin, *supra* note 59, at 748 (discussing flexible standards and a wide variety of outcomes in determining whether someone was acting as a fiduciary in a particular context).

<sup>76</sup> See Stulberg, *supra* note 74, at 85 (criticizing Chaykin’s view of mediator’s obligations as unnecessarily rigid); *Sultans of Swap*, *supra* note 74, at 1883 (criticizing Chaykin’s proposal for unwisely grouping all mediators together, regardless of the legal and contractual context in which they operate).

<sup>77</sup> BOULLE & NESIC, *supra* note 6, at 519 (arguing that the nature of the fiduciary obligation fits uneasily with the mediator’s dual obligations to adverse parties). Chaykin responds to this criticism in particular by naming it a misconception of the nature of fiduciary duties. He points to the example of corporate actors who must balance between the potentially conflicting interests of shareholders, directors, officers, and employees. Chaykin, *supra* note 59, at 747.

<sup>78</sup> 36A C.J.S. *Fiduciary* at 383 (1961) (noting that influence and superiority are necessary factors in declaring fiduciary status).

party. Indeed, the mediator is not even charged with protecting the complaining party's interests as they might conflict with another mediation party's interests. Fiduciary obligations constitute a sloppy mechanism for creating mediator obligations—one that is very unlikely to be available to prospective litigants.

5. Non-Mediation Professional Standards Govern Only Narrow Aspects of Mediation Practice

A mediator who engages in conduct falling within the purview of a separate profession may be subject to malpractice liability under the standards of that separate profession. Furthermore, if a mediator engages in professional activity for which she is not appropriately licensed, she may be subject to sanction regardless of the quality of her professional services. In theory, perhaps, there would be no overlap between conduct falling within the scope of mediation and conduct falling within the purview of a distinct practice or profession. If that were the case, a mediator would act as a mediator only up until the point when she acts as something else, as a lawyer, as a doctor, or as a therapist. In practice, the line is unclear,<sup>79</sup> and thus the question of cross-professional or multi-professional practice merits mention.

The mediator activities perhaps most likely to raise cross-professional questions are those related to the practice of law. The precise parameters of "the practice of law" are not easily articulated. Typical definitions inquire whether a person is acting in a representative fashion, whether a person is "counseling or advising another in connection with their legal rights and duties," whether one is exercising legal judgment, and whether the relationship is one of trust based on legal advice.<sup>80</sup> If a mediator advises one or both of the parties about the legal implications of a proposed agreement and suggests an alternate way of structuring the deal, most would agree that the mediator is engaging in the practice of law. Less clear are examples of mediator conduct such as reducing agreements to writing or providing quasi-legal information.<sup>81</sup> If a mediator's conduct is held to be the practice of law, she will be judged against the standards of legal practice—even though she was titularly

---

<sup>79</sup> See, e.g., Nolan-Haley, *supra* note 22, at 269-82 (describing the potential overlap between mediation and the practice of law).

<sup>80</sup> Shane L. Goudey, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 894 (1996) (quoting STATE BAR OF ARIZONA, REPORT OF THE UNAUTHORIZED PRACTICE OF LAW COMMITTEE 4 (1991)).

<sup>81</sup> For a useful summary of the application of UPL principles to mediators' practices, see Nancy Rogers & Craig McEwen, *Mediation and the Unauthorized Practice of Law*, 23 MEDIATION Q. 23 (1989). See also Department of Dispute Resolution Services of the Supreme Court of Virginia, *Guidelines on Mediation and the Unauthorized Practice of Law*, available at [http://www.courts.state.va.us/text/drs/upl/appendix\\_A.html](http://www.courts.state.va.us/text/drs/upl/appendix_A.html) (surveying UPL application to mediators in various jurisdictions) (accessed Aug. 2, 2002).

mediating at the time of the behavior.<sup>82</sup> Comparatively more developed than the jurisprudence regarding mediator practices, legal malpractice presents a genuine opportunity for an injured party to recover against a mediator for her lawyerly misconduct.<sup>83</sup>

If a mediator is not licensed to practice law, but nonetheless engages in the behavior described above, not only will the mediator be subject to scrutiny as if she were a lawyer,<sup>84</sup> but she will also face the potentially serious charge of unauthorized practice of law (UPL). Sanctions for UPL can include injunctions, contempt, fines or imprisonment.<sup>85</sup> Importantly, however, because the complainant in a UPL action is typically the state bar association, UPL presents no separate opportunity for parties to recover damages beyond a legal malpractice claim. Therefore, a mediator who engages in unauthorized, but otherwise flawless lawyering, faces no threat of liability to the mediation parties. The party in question will have suffered no actual injury from the mediator's competent, but unlicensed, legal services. At most, the mediator will face the prospect of a UPL complaint.<sup>86</sup>

Other professions also enjoy monopolies that enable them to restrict certain practices to licensed members of the profession. Practicing medicine without a license, for example, carries a risk of civil or criminal sanction.<sup>87</sup> It is difficult to imagine that a mediator would spontaneously<sup>88</sup> slip into behavior especially

---

<sup>82</sup> In addition to scrutinizing the mediator's behavior against lawyers' practice standards, the practice of law within the context of mediation or any other dual representation circumstance raises ethical considerations as well. *See generally* Moffitt, *supra* note 24; Nolan-Haley, *supra* note 22.

<sup>83</sup> Without engaging too deeply into the ongoing debate regarding the appropriateness of evaluative mediation, I would note that a mediator who engages in case evaluation increases her exposure to malpractice liability because the process of evaluation almost certainly falls within the parameters of the practice of law. *Cf.* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. L. REV. 937, 938-39 (1997) (arguing that evaluative mediators combine roles that are incompatible). Love does not name specifically the increased risk of liability among her ten reasons for mediators not to evaluate. Without joining in some of Love's reasoning, I would suggest that increased liability exposure ought to figure in a mediator's decision regarding evaluation.

<sup>84</sup> *See* COLE ET AL., *supra* note 18, § 11:3.

<sup>85</sup> *See, e.g.*, CONN. GEN. STAT. ANN. §§ 51-88 (West Supp. 2002) (providing penalties for unauthorized practice of law).

<sup>86</sup> *But see* Nolan-Haley, *supra* note 22, at 269-70 ("Case law is sparse and thus to a large degree mediation practice by non-lawyers operates more under the shadow or threat of UPL regulations rather than under an active enforcement regime.").

<sup>87</sup> *See* FLA. STAT. ANN. §456.065 (West Supp. 2002) (making the unlicensed practice of medicine a third degree felony); ALISON BARNES ET AL., HEALTH CARE LAW DESK REFERENCE 25-27 (2001) (describing both criminal and civil remedies); GEORGE J. ANNAS, STANDARD OF CARE: THE LAW OF AMERICAN BIOETHICS 128-29 (1993) (noting that "[h]ealth professionals are licensed by state agencies in each of the fifty states," and that "[l]icensing grants a monopoly and makes the practice of their profession without a license a crime").

<sup>88</sup> Certain states' restrictions against the unlicensed practice of medicine include a



reserved for surgeons mid-mediation. It is easier, however, to imagine that mediator practices may fall within the proper purview of psychotherapy, creating risks of claims of malpractice or professional negligence similar to that of lawyers.<sup>89</sup> The line between the practice of mediation and the practice of therapy is both fine and significant, particularly in cases such as divorce, where the disputants commonly seek therapeutic services at the same time they seek mediation services.<sup>90</sup> Separate professions' standards of conduct, therefore, serve as theoretical bases for establishing mediator liability in certain circumstances.

Most mediators' behaviors, whether helpful, ineffective, or injurious do not fall within the scope of a separate profession. Many professionals ask clients questions and help them to arrive at creative solutions to difficult problems. No profession, however, has a professional monopoly on such services. No one faces a risk of being charged with the unauthorized posing of open

---

"holding out" requirement under which an individual charged with the unlicensed practice of medicine must have made some public representation offering medical services. BARRY R. FURROW ET AL., HEALTH LAW 64-65 (2d ed. 2000). In those states, theoretically, a mediator who accidentally practiced medicine would not face the same exposure to criminal liability. Again, the issue is unlikely to arise in mediation.

<sup>89</sup> Psychotherapy is a state licensed practice, in many ways similar to the practice of law or medicine. *E.g.*, CAL. BUS. & PROF. CODE § 2903 (West 2002) (stating that "[n]o person may engage in the practice of psychology, or represent himself or herself to be a psychologist, without a license . . ."); ALASKA STAT. § 08.86.180 (Michie 2000) (stating that "[u]nless licensed under this chapter, a person may not practice psychology or hold out publicly as a psychologist or as practicing psychology"). Penalties for the unlicensed practice of psychotherapy include criminal liability and, in the event of professional negligence, the risk of civil liability. *E.g.*, COLO. REV. STAT. § 12-43-702.5 (2001) (making the unlicensed practice of psychotherapy a class three misdemeanor); Hampton, *supra* note 37 (describing the opportunities and obstacles for recovery against therapists under tort and contract theories of recovery). In at least one state, it is a statutorily defined public nuisance for an unlicensed person to render psychotherapy services, a violation of which law gives rise to the possibility of a suit seeking an injunction and a cease-and-desist order. 225 ILL. COMP. STAT. 15/27 (2001); Corgan v. Muehling, 574 N.E.2d 602 (Ill. 1991) (finding support for an implied private cause of action in the statutorily defined public nuisance).

<sup>90</sup> See, *e.g.*, JAY FOLBERG & ANN MILNE, DIVORCE MEDIATION: THEORY AND PRACTICE 130-32 (1988) (comparing mediation and therapy); Jay Folberg, *Divorce Mediation: Promises and Problems*, in GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 458-64 (3d ed. 1999) (describing the tensions between attorneys, mental health professionals, and family mediators in drawing the boundaries of each practice); Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. OF MATRIMONIAL L. 353 (1997) (comparing lawyers' vision of certain divorce issues as "legal" to the mental health professionals' view of the same issues as primarily "emotional" in the same context), *reprinted in* ALFINI ET AL., *supra* note 30, at 518-19; John Haynes, *Mediation and Therapy: An Alternative View*, 10 MEDIATION Q. 21 (1992) (describing some potential overlap between mediation and therapeutic approaches, while arguing that mediators must not engage in therapy "under the guise of mediation").

questions or the unlicensed facilitation of a discussion. The boundaries of activities reserved uniquely for members of a single profession are relatively narrow.<sup>91</sup> Parties' reference to other professions' standards of conduct is relevant only in that subset of mediation circumstances in which the mediator is correctly considered to be engaging in professional practice beyond mediation.

#### 6. Access to Mediation Information is Limited

Because mediation generally takes place under a shroud of confidentiality, those seeking to establish mediator liability have a difficult time comparing a mediator's conduct in one mediation with the conduct of other mediators in other cases. Confidentiality enjoys a prominent role in mediations in almost all circumstances. In many instances, mediation confidentiality is ensured by a statutory privilege. The leading example of this mechanism for structuring mediation confidentiality is the Uniform Mediation Act ("UMA"), which was recently approved by the National Conference of Commissions on Uniform State Laws. Under the terms of the UMA, and many similar state statutes, parties hold a privilege that effectively permits them to block disclosure of information related to the mediation.<sup>92</sup> Even in the absence of statutory confidentiality protections, virtually all mediation contracts include provisions assuring at least some level of confidentiality.<sup>93</sup> While neither statutory privilege nor contractual provisions serve as a foolproof bar against revelations about the mediation, their protections limit the ability of outsiders to assess what took place during the mediation. Even when confidentiality protections include exceptions for disputes arising out of the mediation, a party to one mediation will have no meaningful ability to assess how his mediation experience compares with that of others.

Exceptions to confidentiality for purposes of addressing disputes about the mediation are relatively common.<sup>94</sup> These exceptions prevent the absurd outcome of precluding a mediator from defending herself with testimony about the mediation in a case in which a mediation party is suing a mediator for

---

<sup>91</sup> Jacqueline Nolan-Haley has argued that mediations invariably include a component of legal evaluation, skirting along the borders of the practice of law. See Nolan-Haley, *supra* note 22, at 277-80. Even if this suggestion is true, it speaks only to a subcategory of the activities undertaken by a mediator. Much of what mediators do during the course of a mediation has nothing to do with the practice of law.

<sup>92</sup> See UNIF. MEDIATION ACT §§ 2, 4-8 (2002). For a thoughtful critique of the UMA's confidentiality provisions, see Scott Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9 (2001) (criticizing the UMA's confidentiality provisions).

<sup>93</sup> See sources cited *supra* note 57.

<sup>94</sup> For example, the UMA provides that the typical mediation privilege does not apply to mediation communications "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator." UNIF. MEDIATION ACT § 6(a)(5).

mediation malpractice. These exceptions do not, however, provide outside parties an opportunity to learn how the mediation transpired. Mediation commentators have largely been in favor of these confidentiality protections, asserting that heightened visibility into mediations would damage or destroy the ability of mediators to perform their functions.<sup>95</sup> Regardless of the wisdom of these protections, limited visibility into mediation makes it all the more difficult for an unhappy litigant to assert that a mediator's behavior fell below customary practice. Confidentiality protections prevent plaintiffs from having meaningful access to information regarding customary practice.

#### 7. Immunity Sometimes Extends to Mediators

Even if a complaining party could overcome the obstacles listed above and establish liability, civil immunity attaches to shield certain mediator actions or inactions from the scrutiny of litigation. Immunity does not extend to all functions of all mediators in all contexts.<sup>96</sup> Common law and statutory immunity, however, preclude successful lawsuits against a significant subset of mediators.

Quasi-judicial immunity is one form of protection potentially available to mediators. In order to protect the independence of judicial functions, the common law doctrine of judicial immunity serves as absolute protection for a judge's jurisdictionally sound, discretionary decisions.<sup>97</sup> The Supreme Court has extended this form of immunity to certain actors outside of the judiciary when the functions in question are essentially judicial in nature. In *Butz v. Economou*,<sup>98</sup> the Court adopted a three-prong test for determining whether judicial immunity extends to a non-judicial official: (1) Is the official's function comparable to that of a judge; (2) is the official likely to suffer harassment or intimidation as a result of performing that function; and (3) are there other procedural safeguards capable of protecting against unconstitutional conduct?<sup>99</sup> When such immunity is extended to non-judicial

---

<sup>95</sup> Compare Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988) (citing candor, fairness, privacy and neutrality as justifications for mediation confidentiality), with Eric A. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986) (suggesting that the asserted need for confidentiality in mediation is overstated).

<sup>96</sup> Immunities generally attach to conduct, rather than to people or to their official positions. As is discussed below, for example, a judge enjoys immunity only for judicial actions. Even the stunningly broad protections of diplomatic immunity—a protection that seemingly attaches to people, rather than to actions—include certain exceptions that examine the nature of the conduct in question. See Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Nov. 8, 1972, art. 31, 23 U.S.T. 3227.

<sup>97</sup> Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629, 635-48 (1997) (discussing judicial and quasi-judicial common law immunity).

<sup>98</sup> 438 U.S. 478 (1978).

<sup>99</sup> *Id.* at 513-16.

actors, it is termed quasi-judicial immunity.

The principal case suggesting that quasi-judicial immunity may extend to mediators is *Wagshal v. Foster*.<sup>100</sup> In the action underlying *Wagshal*, Jerome Wagshal brought a suit against Charles Sheetz, and the trial court judge referred the parties to neutral case evaluation through the District of Columbia Superior Court's ADR Program. During the case evaluation process, Wagshal asserted that the appointed case evaluator, Mark Foster, was biased. Pursuant to the rules of the court's ADR program, Foster wrote a letter to the trial court judge seeking recusal and recommending continued settlement efforts. In the letter, Foster made statements to the judge implying that the barrier to settlement was Wagshal's unwillingness to be reasonable. The trial court accepted Foster's recusal and appointed a different case evaluator. Wagshal subsequently settled the claim against Sheetz, but then initiated a suit against Foster alleging that Foster's biased conduct forced Wagshal to settle for less than he otherwise would have received.<sup>101</sup> In upholding the trial court's extension of quasi-judicial immunity to Foster, the D.C. Court of Appeals determined that the case evaluator's functions were sufficiently judicial and that there was sufficient risk of harassment by dissatisfied litigants to merit quasi-judicial immunity.<sup>102</sup> Although Foster served in this dispute as a case evaluator, a function distinct from mediation,<sup>103</sup> the court's language treated the two terms interchangeably.<sup>104</sup> Because quasi-judicial immunity "flows not from rank or title or location within the Government but from the nature of the responsibilities of the individual official,"<sup>105</sup> the *Wagshal* determination does not stand as an absolute extension of immunity to all court-appointed mediators. Instead, common law<sup>106</sup> quasi-judicial immunity demands a fact-specific inquiry into the functions of the official in question. *Wagshal*,

---

<sup>100</sup> 28 F.3d 1249 (D.C. Cir. 1994) (holding that the mediator was protected by quasi-judicial immunity).

<sup>101</sup> *Id.* at 1250-51.

<sup>102</sup> *Id.* at 1252-53. The court in *Wagshal* did not consider in detail the third prong of the *Butz* test—regarding the adequacy of protections against constitutional violations—because the plaintiff in *Wagshal* had not sufficiently articulated a constitutional claim. The court did, however, cite the availability of recusal requests as evidence of such protections. *Id.* at 1253-54.

<sup>103</sup> The debate within the mediation community regarding the distinction—if any—between mediation and evaluation has a long and long-winded history. In this instance, at least, the creators of the D.C. Superior Court's ADR Program distinguished between Mediator and Case Evaluator inasmuch as they required a choice of ADR mechanism in which each was separately available.

<sup>104</sup> *Id.* at 1251 n.2. The court's holding specifically states "that absolute quasi-judicial immunity extends to mediators and case evaluators" in the ADR program. *Id.* at 1254.

<sup>105</sup> *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (internal citation omitted).

<sup>106</sup> Quasi-judicial immunity may also be extended to mediators statutorily. *E.g.*, FLA. STAT. ANN. § 44.107 (West 1998) (extending to mediators "judicial immunity in the same manner and to the same extent as a judge").

therefore, supports but does not resolve the suggestion that mediators affiliated with a court<sup>107</sup> may enjoy quasi-judicial immunity.

Some jurisdictions statutorily supplement or replace quasi-judicial immunity—typically a common law protection—with statutorily defined “qualified immunity.” Some states reserve qualified immunity to mediators associated with the court system, while others extend qualified immunity even to purely private mediation service providers.<sup>108</sup> Qualified immunity is more limited in scope than quasi-judicial immunity, often excluding coverage in cases involving bad faith or intentional misconduct.<sup>109</sup> In some respects, qualified immunity is a compromise seeking both to protect mediators from harassing lawsuits and to deter mediators from abusing their position. Statutorily created qualified immunity typically shields a mediator, for example, from suits alleging negligence. If, however, a plaintiff alleged that the mediator willfully disregarded the rights of one of the parties, qualified immunity would not bar the suit. As a practical matter, where it is held to apply, qualified immunity is broad enough to shield mediators from lawsuits in all but the most egregious of cases.

Putting aside for the moment questions about the wisdom of immunity in the context of mediation,<sup>110</sup> common law and statutory immunity stand as partial explanations for the dearth of lawsuits against mediators. Not surprisingly, in those jurisdictions where mediators enjoy a form of immunity, mediators have also enjoyed relative freedom from litigation.

### C. *Damages are Often Difficult to Demonstrate*

Mediator misconduct could create four different kinds of injuries. First, a mediator’s behavior might inappropriately cause the mediation to result in no settlement. Second, a mediator’s inappropriate behavior might produce a settlement, with terms injuriously unfavorable to one party. Third, a mediated agreement might injure the interests of a party absent from the mediation, whose interests the mediator was obliged to protect. Fourth, a mediator might

---

<sup>107</sup> Immunity typically extends only to official actors. *See, e.g.*, *Dalton v. Miller*, 984 P.2d 666 (Colo. Ct. App. 1999) (refusing to extend quasi-judicial immunity to psychologist hired by one of the parties, while approving the use of quasi-judicial immunity for court-appointed psychologists performing essentially the same function). At least one case has suggested that quasi-judicial immunity could be extended to private, neutral parties. In *Howard v. Drapkin*, 271 Cal. Rptr. 893 (Cal. Ct. App. 1990), the California Court of Appeal extended quasi-judicial immunity to a privately contracted neutral psychologist hired by a divorcing couple. The court’s language asserted that quasi-judicial immunity would extend to any neutrals providing “arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes.” *Id.* at 860. However, courts have yet to apply this holding or its logic to mediators.

<sup>108</sup> *See* Esquibel, *supra* note 56, at 145 (noting statutory provisions adopted by states).

<sup>109</sup> *Id.* at 145-47.

<sup>110</sup> I return to the question of the appropriate scope of mediator immunity in Part III.E.

injure a party in ways not reflected in the outcome of the mediation.<sup>111</sup> For the reasons listed below, a party alleging any of these injuries faces significant difficulties in establishing damages.

### 1. Non-Settlement as Injury

If a mediation produces no agreement, the mediator's conduct may be to blame. A mediator can never claim unique responsibility for producing settlement in a case. Similarly, only in an extraordinary circumstance would a mediator bear unique responsibility for the parties' failure to arrive at a settlement. Some cases are destined not to produce settlements—for example, because each of the parties reasonably perceives its non-settlement alternatives as more attractive than anything a mediated settlement might produce.<sup>112</sup> Other cases fail to settle because of one party's strategic or tactical decisions falling outside of the influence of the mediator.<sup>113</sup> Still others may fail to settle for structural reasons largely outside of the control of any of the parties or of the mediator.<sup>114</sup> Given the complexity of settlement dynamics and the uncertainty of causation, a party to a mediation would face tremendous challenges demonstrating that the mediation would have produced a settlement but for the mediator's inappropriate behavior.

Even if a party could demonstrate that a settlement would have been reached but for the mediator's actions, the parties' opportunity to mitigate the injury generally would limit the damages from the failure to settle. In almost all circumstances, nothing prevents parties from settling cases outside of the auspices of a mediator. If the mediation terminated without settlement but a settlement had been readily available, then the parties should have arrived at

---

<sup>111</sup> A final, bizarre circumstance in which a party might claim injury stemming from a mediator's actions would occur if the mediation produced a settlement, and one party later regretted not the terms of the settlement, but the fact of settlement. In essence the party in such a case would claim, "But for the mediator's actions, there would have been no settlement and I would have won in court." The causation problems with such a claim are obvious. Even if a party overcame the proof problems associated with a claim that the mediator was too successful in facilitating an agreement, the measure of damages associated with such a claim would be intolerably speculative.

<sup>112</sup> A case in which each party perceives its non-settlement alternative as more attractive than any possible settlement option is said to be one with no Zone of Possible Agreement ("ZOPA"). For more on the concept of ZOPAs in the context of bargaining, see ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 19-21, 107 (2000).

<sup>113</sup> For a perspective on the impacts of strategic negotiation behavior on settlement prospects, see Robert Mnookin & Lee Ross, *Introduction* to KENNETH ARROW ET AL., *BARRIERS TO CONFLICT RESOLUTION* 3-10, 22-24 (1995) (discussing mediation failures, even when settlement is in the parties' best interests).

<sup>114</sup> *See id.* at 19-24 (identifying restricted channels of information and communication, multiple interest groups, and the principal/agent problem as structural barriers to successful dispute resolution).

the settlement shortly after the termination of the mediation. At most, therefore, a party's injury stemming from the poorly conducted mediation would be limited to the expenses of the mediation itself. With mediation expenses comparatively low, and damages unavailable beyond the mediation itself, an unhappy mediation party is unlikely to incur the costs of bringing a suit against a mediator on the hope merely of recovering mediation-related expenses.

In an extreme case, a party might assert that the mediator's failure to facilitate an agreement where one was possible caused more significant injury than simple waste of time. For example, a party could claim that the failure of the mediation caused a change in the settlement dynamics such that what was once capable of settlement became incapable of settlement. The proof problems in such an assertion, of course, would be tremendous. A party able to overcome the difficulty of demonstrating that the case proceeded to trial because of the mediator's ineptitude could, theoretically, make a claim for the larger costs associated with trial. The party might even assert that his injuries included the difference between the theoretical settlement point the mediator failed to produce, and the trial outcome and costs.<sup>115</sup> Such a claim, however, lapses quickly into so extraordinary a level of speculation that a court would be unlikely to entertain the assertion.

A more likely example of non-settlement injuries, though also difficult to quantify, is the damage a failed mediation can have on the parties' relationship. Two disputing parties who voluntarily hire a mediator are, in some ways, signaling recognition that they are unable to resolve the dispute on their own. After all, if they had been able to resolve the relevant issues without outside facilitation, one would reasonably assume that they would have done so. For some, going through a mediation that produces no settlement only serves to reinforce the perception that the dispute is difficult, if not intractable. Even worse, in the hands of an unskilled mediator, each party inappropriately may attribute non-settlement to the other party's bad faith. If, after the fact, parties determine—again assuming that such a determination were possible—that a settlement had been possible, they might claim that the no-settlement mediation decreased their ability to identify agreement opportunities. Essentially, the parties would argue: "We didn't settle afterwards because the mediator's performance in the mediation made us hate each other too much

---

<sup>115</sup> Assume, for purposes of illustration, that the originally mediated case was between plaintiff *P*, and defendant *D*. Assume also that, in the case against the mediator, *P* believed—and could prove—that a competent mediator would have produced a settlement in which *D* paid *P* \$100,000. In the absence of a settlement, however, *P* litigated the case and won a judgment of only \$10,000. In a claim against the mediator, *P* could claim that the appropriate measure of damages would be *P*'s litigation costs plus the difference between the expected settlement and the actual trial outcome—in this case \$90,000 (\$100,000 - \$10,000). Even assuming for the moment that the plaintiff could overcome the extraordinary proof problems here, the damage amounts would be so highly speculative that it is unlikely any court would award the plaintiff such damages.

even to see that there were grounds upon which to agree.” If an unhappy disputant were able to prove such an effect, it might address the mitigation problem mentioned above. Again, however, these claims of injury are so extraordinarily speculative that it is not surprising that no mediation parties have been successful in suing for non-settlement injuries.

## 2. Unfavorable Settlement Terms as Injury

In some cases, a party will revisit with remorse an agreement he struck as part of a mediation. If a party were sufficiently unhappy with the arrangement upon further examination, the party might seek to have the mediator provide compensation for the injuries caused by the unfavorable agreement. Essentially, a plaintiff in such a case would allege: “The mediator’s actions inappropriately caused me to settle for X, when I could have, and should have, received Y.” Each part of this assertion creates significant, if not insurmountable legal difficulty. It is no surprise, then, that such claims are almost unheard of.

Causation, of course, presents significant challenges for a plaintiff claiming that he was injured by an unfavorable settlement. In particular, the fact that each mediation party consented to the terms of the original agreement will make it difficult for one of the parties subsequently to declare the mediator responsible for the substance of the agreement. A hallmark of mediation is that the mediator cannot impose terms on the parties. Instead, mediation parties retain the ultimate say on whether the settlement terms are acceptable.<sup>116</sup> A party who is unhappy, after the fact, with the terms of a mediation agreement has few options for attributing his injury to the mediator’s behavior. Conceivably, if the mediator engaged in “persuasion” tantamount to coercion, the party could recover following the unfavorable settlement. Similarly, if a party can demonstrate that the mediator engaged in some type of fraud, then standard remedies would be available. In typical cases, however, the now-unhappy disputant suffered from no known mental deficiency and was not the victim of fraud or coercion. In the absence of such factors, a complaining party would bear the burden of establishing that the mediator owed a duty of some sort to assure a different distributive bargain. The party might assert, for example, that the mediator owed a duty to protect him from making a bad deal. At a minimum, such an argument would face tremendous legal obstacles, as any construction of impartiality or neutrality would recognize some tension between the interests of varying parties.<sup>117</sup>

---

<sup>116</sup> While there is great debate within the mediation community about almost all aspects of mediation practice, the proposition that mediation parties retain final authority regarding settlement holds general—if not universal—acceptance. *See, e.g.,* GOLDBERG ET AL., *supra* note 90, at 123 (“The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.”).

<sup>117</sup> Certain conceptions of mediation suggest that the mediator owes a duty to protect the parties’ interests and to gauge the fairness of the outcome to each of the parties. *See* Carrie



Even if a mediator held a duty to prevent a distributively imbalanced outcome, a complaining party would face the significant obstacle of establishing a benchmark against which to measure the mediation outcome. Recovery on any of these theories requires that the complaining party establish not only that, but for the mediator's conduct, the parties would have settled, but also that the parties would have settled on agreement terms quantifiably more favorable to the complaining party than the non-settlement outcome. If we could go back and cleanse the mediation of the mediator's transgressions, what would the terms of an agreement have been? Even to begin to answer that question requires an extraordinary willingness to engage in speculation. Yet, establishing damages requires such speculation in this circumstance.

Reference to "fairness" or other benchmarking principles does not remove speculation from the damage inquiry. Some may assert that we need not establish with precision what the parties would have agreed to in order to fix a measure of damages in a case of inappropriate settlement. Instead, they may suggest that the appropriate measure of damages would be the difference between the actual outcome and a "fair" resolution of the dispute. While this demands slightly less speculation than a measure of the parties' decisions, it requires even more subjective assessment of the substantive dispute. At most, fairness may establish a range of possible outcomes, but the range would surely be a broad one and would still face considerable hurdles. How can one measure the fairness of a deal without constraining oneself to the information available to the parties at the time of the deal—even if the information is now known to be incomplete or inaccurate?<sup>118</sup> How can one measure the fairness of a deal that incorporates terms that would be unavailable in an adjudicative determination?<sup>119</sup> Mediation agreements often include terms that the parties

---

Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 444 (1997) ("Where some mediators insist on withholding approval of an unfair or 'unlawful' settlement, the neutral's role may be transformed from simple facilitator to 'judge' of the parties' agreement."). Other commentators have argued that saddling an intervener with responsibility to police the fairness of agreements is unwise and unworkable while still referring to the intervener as a mediator. *E.g.*, Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86 (1981) ("It is precisely a mediator's commitment to neutrality which ensures responsible actions on the part of the mediator and permits mediation to be an effective, principled dispute settlement procedure.").

<sup>118</sup> Fairness cannot be measured by examining a deal *ex post*, with the eyes of one who knows how things turn out. Many deals can be consummated by capitalizing on parties' differing predictions about what will happen in the future. *See* MNOOKIN ET AL., *supra* note 112, at 14. At the very most, a deal would be substantively unfair if it failed to meet some measure of reasonableness at the time it was struck, with all of the legitimate information asymmetries and uncertainties existing at that time.

<sup>119</sup> For example, how does a deal that includes a public apology, an agreed-upon change in corporate policy and a contingent medical monitoring arrangement with term insurance

consider important and valuable, even though a court would lack the authority to mandate such terms. Where a mediation agreement includes an apology or other terms regarding an issue falling outside of the technical boundaries of the legal dispute in question, comparisons between a mediation outcome and a hypothetical adjudicative outcome would be extraordinarily difficult. Indeed, unless the unhappy party can demonstrate some reason to set aside his consent to the original agreement—for example, fraud, lack of capacity, or coercion—the fact that the party agreed to it at the time is powerful evidence that he considered the outcome fair under the relevant conditions. “Fairness” in the resolution of a dispute is so elusive a principle that it is difficult to imagine a court permitting a complaining party to use fairness in a measure of damages.

### 3. Settlement Terms Injuring Non-Parties

Some mediation outcomes will affect parties who are absent from the mediation process. If a mediation creates a negative impact on a non-party, that non-party could theoretically seek damages from the mediator who facilitated the agreement.<sup>120</sup> Such a claim, however, would demand extraordinary legal creativity in demonstrating the existence of a mediator duty to non-parties, a breach of that duty and injury stemming from that breach. As a result, the prospects of claims by nonparties against mediators are severely limited.

To the extent that mediators owe duties to any parties, such duties are almost always limited to those disputants engaged in the mediation itself. Only in narrow circumstances would mediators be duty-bound to consider interests beyond those of the mediation parties. Two specific examples illustrate conditions under which a mediator may arguably have some obligation to consider the interests of parties absent from the mediation. First, a mediator tackling a public dispute may be charged with protecting against externalizations onto non-parties. For example, a mediator attempting to resolve issues surrounding the management of a river system could arguably be charged also with assuring that the eventual resolution does not merely shift the harms onto people excluded from the mediation process.<sup>121</sup> Second, some mediators may be charged with protecting the interests of absent parties incapable of representing themselves. An easy illustration of such a

---

compare with a flat payment of \$50,000? Both the plaintiff and defendant may conceivably view the former as superior to the latter, even though a court would not have the authority to impose some or all of its terms.

<sup>120</sup> It is perhaps more likely that a party injured by an agreement between the two parties would pursue action against the opposing party, rather than against the mediator. Such actions are beyond the scope of this Article.

<sup>121</sup> To the extent that the mediator in question is “charged” with any particular tasks or duties, the charging party is likely to be governmental in this context. This raises the specter of immunity attaching to the mediator who performs these duties. For more on the question of mediator immunity, see Part III.E.

circumstance would be a divorce mediator charged with considering the interests of the children who will be affected by the terms of the divorce agreement.<sup>122</sup> In some circumstances, therefore, it is at least arguable that a mediator holds an obligation to non-parties.<sup>123</sup>

Even if a mediator holds such a duty, pointing to the terms of the settlement as a means of establishing a breach of that duty is extraordinarily difficult. What recourse does a mediator have during the course of the mediation if she believes the parties are heading toward a resolution that may injure absent parties' interests? Unless the mediator occupies some official position, or wields some quasi-coercive power, her choices are limited to persuasion or withdrawal. Subtle questioning or issue framing may persuade the parties to rethink their settlement in light of the interests of non-parties. If indirect persuasion fails to accomplish a change in settlement terms, a mediator could consider active persuasive techniques, but the obligations to impartiality or neutrality, sometimes carrying contractual force,<sup>124</sup> may limit the fervor with which a mediator can make such an argument. Absent persuasion, a mediator's sole recourse is withdrawal from the mediation. In most circumstances, however, withdrawal produces little deterrent effect on mediation parties. As a general matter, disputants do not require the mediator's consent in order to arrive at a resolution. If they reached agreement on a particular set of terms and the mediator withdrew, nothing would stop them from subsequently privately agreeing to settle on the same set of terms.

---

<sup>122</sup> See KAN. STAT. ANN. § 23-604(b) (1995) (requiring a mediator to terminate a mediation if its continuation "would harm or prejudice one or more of the parties or the children" in a family mediation context); COLE ET AL., *supra* note 18, § 12.2 ("Some states have provided further protection in the form of mediator duties to raise the children's concerns or protect their interests or have given the mediator authority to appoint representation for the children.").

<sup>123</sup> A third example of a condition in which a mediator may hold an obligation to a nonparty would be a so-called *Tarasoff* circumstance. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976). In *Tarasoff*, a psychologist learned that his patient intended to murder a woman, Tatiana Tarasoff, in whom the patient was romantically interested. The psychologist upheld patient confidentiality and said nothing to Tarasoff. The patient subsequently murdered Tarasoff, and her family brought suit against the psychologist and his employer. The California Supreme Court held that the psychologist had a duty to prevent harm to the outside party, even if that meant breaching patient confidentiality. *Tarasoff* obligations have been extended to some professions, though not to all. See Timothy E. Gammon & John K. Hulston, *The Duty of Mental Health Care Providers to Restrain Their Patients or Warn Third Parties*, 60 MO. L. REV. 749, 751 (1995) (listing various states' responses to *Tarasoff*). The UMA addresses the *Tarasoff* situation by providing an exception to mediation confidentiality privileges in cases of "a threat or statement of a plan to inflict bodily injury or commit a crime of violence." UNIF. MEDIATION ACT § 6(a)(3) (2002). The *Tarasoff* circumstance falls outside the focus of this section because its obligations stem not from the terms of settlement, but from information learned during the course of the otherwise confidential conversations.

<sup>124</sup> See *supra* note 63 and accompanying text.

This limits a mediator's ability to shape a deal in a way that protects nonparties' interests. Unless an aggrieved non-party can demonstrate that the injury would not have occurred but for the mediator's acts or omissions, it is difficult to imagine a mediator being held accountable for a non-party's injury.<sup>125</sup>

The difficulty of identifying quantifiable injury stemming from the mediator's breached duty presents a final hurdle to recovery in the context of injuries to non-parties. Assuming the agreement is not void for conflict with public policy, remedies such as rescission would be anomalous, given that none of the parties to the agreement contests it. Absent rescission, the only potential remedy would be monetary damages against the mediator, yet these are unlikely to be available. The difference between the agreement reached in mediation and the resolution that would have been reached—either consensually or judicially—is the kind of speculative endeavor unlikely to enjoy much favor among adjudicators. In the end, the speculative nature of the breach and injuries claimed will prevent almost all mediation non-parties from holding mediators liable for the injuries created by mediated agreements.

#### 4. Injuries not Reflected in the Mediation Outcome

In certain circumstances, a mediation party could claim that a mediator's inappropriate actions caused an injury that is not reflected in the substantive outcome of the mediation. An example of such a claim is a party who claims to have suffered emotional damage stemming from intentional and tortious mediator behaviors. Conceivably, the injured party could claim that the infliction of emotional damage had no effect on the outcome of the mediation. The party may be entirely happy with the settlement reached in mediation, but may still claim to have suffered compensable injury at the hand of the mediator. Therefore, damages in a case like this would not depend on the terms of the settlement. Instead, as described in Part I.B above, the plaintiff would need to engage in the often-difficult process of establishing injury from outrageous conduct. Because the injury is often highly speculative and because proving causation is difficult in light of the parties' opportunity simply to leave the mediation session, mediation parties are unlikely frequently to assert damages lying of the substantive mediated outcome.

---

<sup>125</sup> Commentators have suggested several mechanisms beyond private civil liability for holding mediators accountable to non-parties and the public. See Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 39, 40-46 (1981) (noting the possibility of regulatory bodies and public education as means of increasing mediator accountability in the arena of public disputes); Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991) (encouraging amendments to ethical standards and calling for public review of private settlements as a means to assure accountability for the substance of mediated resolutions).

## II. MEDIATORS' LIMITED AND UNCERTAIN EXPOSURE TO LIABILITY COMES WITH COSTS

The uncertainty and difficulty of establishing mediator liability poorly serve parties, mediators and the public. First, the unavailability of compensation harms genuinely injured parties. Second, mediators have few opportunities to learn of the appropriate boundaries of their practice, while nevertheless operating under an ambiguous threat of liability. Finally, the public has only sporadic insight into the state of mediation practice and the impacts of the current liability system.

### A. *Compensation to Victims is Often Unavailable*

The fact that mediation parties have a difficult time establishing a legal claim for compensation based on mediator behavior is *not* evidence that mediation parties are never injured by unfortunate mediation practices. The quality of mediation services, or even the satisfaction of mediation parties, should not be measured by reference to a lack of lawsuits.<sup>126</sup> While mediation services may be of generally high quality, too many mediators practice in too many contexts, adopting too many different approaches, for us reasonably to believe that no mediation parties are made worse off because of their participation in mediation. In some cases, participants in a badly conducted mediation will have lost nothing more than the time they invested in the mediation and whatever fees they have paid to the mediator. In less fortunate circumstances, however, participation in a failed mediation may cost disputants psychologically, strategically and financially. The lack of lawsuits against mediators reflects not a lack of injury, but a lack of legally cognizable and recoverable injury.

Because the current system of mediator liability makes recovery against mediators extraordinarily difficult, a party injured by an inappropriate mediator action or omission has little realistic opportunity to make himself whole. To illustrate the effects of the current system of mediator liability, consider a case in which a mediator convenes a meeting between the plaintiff and the defendant, asks a few opening questions, and promptly drifts into a lengthy catnap. Surprised, the disputants make a good faith effort to hammer out a resolution without significant intervention from the mediator. On occasion, the slumbering mediator awakes momentarily to interject an unrelated, open-ended question or a substantive suggestion without serious foundation. The disputants work for the balance of the day, growing increasingly frustrated both with each other and with the mediator. At the close of the day, the mediator jolts out of her seat, announces regrets that the mediation failed to produce a settlement, and informs the parties that they will receive an invoice for the mediation services. This mediator's behavior is shockingly bad and

---

<sup>126</sup> *But see* Schultz, *supra* note 5, at 271 (“Disputants are generally satisfied with mediation services, and thus, as lawsuits are the result of dissatisfaction, claims against mediators are almost non-existent.”).

difficult to imagine. Still, it is not clear that the parties would be successful in a suit against the mediator. Most likely, nothing in the mediator behavior described here would violate an explicit term of the mediation contract. Absent breach of a specific term, the parties would need to demonstrate either negligence or breach of an implied contract term. Both of these claims would typically require a demonstration that the mediator behavior in question fell below customary standards—a potentially difficult undertaking in almost any case.<sup>127</sup> Even assuming the parties were successful in demonstrating causation, the measure of damages in this case would be quite limited. The parties may be able to recover the costs of the mediation services.<sup>128</sup> At the margins, they may be able to recover for the transaction costs associated with participation in the mediation. The mediator's fees and the transaction costs involved in participation would rarely be significant enough to warrant the costs of filing the claim. It is extraordinarily unlikely that a court would entertain damages as speculative as an assertion that the mediation prevented a subsequent, favorable resolution to the case. Absent such damages, the relatively low recovery possibility makes it economically unlikely that a party will pursue an action against the mediator. Instead, the injured parties will essentially leave the injuries to lie where they have fallen. If recovery is uncertain and impractical in a case as clear as this one, it is no surprise that the current liability regime effectively denies compensation to almost all victims of unfortunate mediation.

B. *The Boundaries of Mediation Practice Remain Poorly Articulated*

Mediation practitioners demonstrate an extraordinary diversity of approaches to mediation. As mediators continue to adapt, refine, and experiment with mediation techniques and models, generating a precise and narrow definition of "Mediation" (with a capital M) is at least difficult, and perhaps unwise. The practice of mediation is staggeringly and wonderfully complex and varied. For many reasons, this diversity is at the heart of mediation's strength and value.<sup>129</sup> At the same time, the diversity of mediation

---

<sup>127</sup> In certain cases of obvious misconduct, expert testimony regarding customary practice may not be necessary. See 1 DOBBS, *supra* note 20, § 248, at 648-49 ("In a few cases, courts have considered the negligence of a physician or surgeon to be so obvious or gross that a jury should be allowed to find negligence even without expert medical testimony . . ."). The example of the sleeping mediator may constitute just such a case. If we remove the question of the mediator's naps from the hypothetical and leave in place all of the unhelpful interventions and decisions, however, a dissatisfied party would still face considerable obstacles in demonstrating the legal inadequacy of the mediator's services.

<sup>128</sup> Most likely, in a case such as this, the parties would simply refuse to pay the mediator's fees. If the mediator subsequently brought a suit to recover fees, the parties would use evidence of the mediator's slumbering as a defense, arguing that she failed to provide adequate services under the contract.

<sup>129</sup> Not all professions or occupations benefit from broad experimentation by their practitioners. Creativity and diversity of practice among, for example, accountants

practice comes with costs. Consumers may have a difficult time understanding the services a particular mediator will or will not provide. Policymakers and academics have a difficult time finding sufficiently comparable practices in order to conduct legitimate evaluative research. Regulators have difficulty crafting rules that have acceptable breadth without undermining the flexibility that is so vital to mediation's success. Finally, and most relevant to this Article's inquiry, the diversity of mediation practice has meant that the boundaries of acceptable mediator behavior are not clearly defined. Absent clear boundaries of acceptable practice, the task of defining appropriate and customary practice is more difficult both for mediators and for dissatisfied parties.

Many theories of liability require that a complaining party demonstrate that the mediator engaged in behavior that fell below acceptable standards of practice, as defined by customary practice among mediators. As described in Part I.B, the lack of "customary" practices in the mediation field creates a significant obstacle to parties seeking to prove malpractice, professional negligence, or a breach of an implied duty of due care. Incapable of proving that a mediator's behavior fell out-of-bounds, an injured party faces little prospect of recovery on these claims.

Perhaps ironically, poorly defined boundaries or limitations create difficulties for practicing mediators as well. Many within the mediation community have expressed concern over the prospect of being sued, despite the historical rarity of such suits.<sup>130</sup> Some have gone so far as to declare the

---

undermines an aspect of their practice. In contrast, even those of us who have devoted our professional lives to questions of mediation practice and policy are essentially unable to prescribe a rigid set of universally applicable practices. An authoritative imposition of a particular, inflexible practice method would serve neither mediators nor mediation consumers. We understand more now about mediation processes and their effects on complex human disputes than we once did, largely because of the broad level of mediator experimentation. Provided that this experimentation does not cease, mediation practitioners and scholars will understand more in fifty years than we understand today. Were mediation a more precise science and the universe of mediation settings more restricted, experimentation might be irrelevant. No observer of the current state of mediation, however, would credibly assert that we now know enough about mediation that we need only to implement it. Instead, the most powerful examples of mediation illustrate ingenuity stemming not only from disputants, but also from the mediators who must create and adapt processes aimed at addressing the specific needs of the disputants.

<sup>130</sup> JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 281 (1984) (suggesting that the lack of lawsuits against mediators is a product of the relatively short history of mediation as a distinct practice); David Bristow & Jesmond Parke, *The Gathering Storm of Mediator & Arbitrator Liability*, *DISP. RESOL. J.*, Aug.-Oct. 2000, at 14. My anecdotal experience also suggests that mediators are increasingly concerned about liability. In mediation trainings, for example, participants demand to spend an increasing percentage of time considering the possibility of liability. This interest in liability is even more pronounced among experienced practitioners.

existence of a “gathering storm” of lawsuits against mediators, asserting that mediators already “expose themselves to great risk of liability.”<sup>131</sup> Mediators’ fear of liability is generalized, in my observation, rather than focused on a specific set of behaviors they believe are likely to create liability.<sup>132</sup> Rather than fearing that practice X will get them in trouble, many mediators have the sense that something about the way they mediate may get them into trouble, but they are not certain which of their practices are the dangerous ones. Mediators’ generalized fear of liability serves no useful policy, since a generalized fear of liability does not deter particularly harmful mediation practices.<sup>133</sup>

Under the current system, with its uncertain and unlikely prospect of mediator liability, an individual mediator also has little opportunity to learn about the particulars of parties’ dissatisfaction with the mediator’s services. Unless the parties in the case described above confront the slumbering mediator about her behavior, the mediator may not easily learn about the deficiencies in her practice.<sup>134</sup> The parties would almost certainly not retain

---

<sup>131</sup> Bristow & Parke, *supra* note 130, at 19; *see also id.* at 16 (“As lawyers, doctors, and indeed all professionals stood for so long seemingly immune from blame and liability, before the harsh winds of change struck them, so now our arbitrators and mediators carry on from day to day while the barometer is falling.”).

<sup>132</sup> Several mediators with whom I have spoken recently have described increased concern about the prospect of being held liable for mediation practices. Importantly, however, mediators still seem to experience the prospect of liability more as a terrible lottery than a specific deterrent.

<sup>133</sup> If mediators had reason to believe that sleeping during a mediation risked significant liability, then we might expect to see mediators amending their behavior to assure themselves that they did not fall asleep on the job—for example, by making caffeine a centerpiece of their pre-mediation routines. In practice, most mediator behaviors are not so easily isolated as suspect. The way a mediator frames a question or structures discussion is the product of at least dozens of separate decisions, some of which are likely unconscious. Perhaps some mediator practices, such as the binary decision on whether or not to provide a formal case evaluation, would lend themselves to a liability risk analysis. However, most mediator decisions fall, at most, only vaguely under the shadow of liability. As a result, mediators may be lining up to purchase liability insurance, but there is no evidence that they are altering their practices in any meaningful way.

<sup>134</sup> The perhaps hyperbolic nature of the illustration of the sleeping mediator may cloud the concern about the learning process of the specific mediator. We might reasonably attribute less than ideal motives—or intelligence, or training—to a mediator who would be surprised to learn that sleeping was unacceptable. If we simply remove the sleeping from the hypothetical, however, the mediator’s difficulty in learning becomes clearer. If a dissatisfied party indicates general dissatisfaction, absent any specific feedback, should the mediator believe that everything she did was unacceptable? Clearly not. Isolating the offending practice, however, is a difficult task even in the most controlled of circumstances. Of course, the question of learning is irrelevant if we assume that the mediator in question intentionally engaged in misconduct. Still, mediation policies should not reflect an assumption that mediators aim consciously to sacrifice the interests of disputants. Such an



the mediator again,<sup>135</sup> but the withdrawal of prospective business is so indirect and temporally removed from the first mediation that few mediators could accurately learn appropriate lessons from it. A party might choose not to hire a mediator for a variety of reasons, only some of which relate to the mediator's ability or practice decisions. Even if the mediator knew that the party was dissatisfied with her services, she would be hard-pressed to discern which of the hundreds or thousands of decisions she made during the mediation were unsatisfactory to the party. Furthermore, a mediator quite legitimately may not view one party's dissatisfaction with a practice method as evidence that the method is out-of-bounds. Some mediators might discount the party's assessment, reasoning that parties cannot accurately evaluate the utility of all mediator actions.<sup>136</sup> Others may view the party's objection as a contextual, rather than categorical critique. What works in one mediation context may not be well-suited to another. A mediator might judge that the party's dissatisfaction merely signals that the practice *might* not have been the best choice for that particular situation. The uncertainty and scarcity of post-mediation legal complaints perpetuates mediators' difficulties in discerning the boundaries of acceptable behavior.

### C. *The Public Learns Little About Current Practices*

A final cost of the current system of mediator liability is that mediation practices remain hidden from the larger public. As described above, two important functions of lawsuits are compensating victims and deterring specific practices. A third function, perhaps less immediately visible, is public education. Because legal proceedings are almost always a matter of public record, the litigation process can serve to inform observers about the status of current practices and about the effects of current legal regimes. A series of lawsuits challenging particular behaviors would educate the non-mediation public about the current status of mediation practices as well as incrementally answer questions about the practices' acceptability. One of the effects of public adjudication is the opportunity for aggrieved parties to get their stories in front of those who hold no immediate connection to the case. In many cases, wholesale changes to something as complex as a liability regime come

---

assumption is surely unwarranted both as a descriptive matter and as a basis for policy formation generally. However, the current system of liability leaves mediators largely uneducated about the impacts of their behaviors, regardless of the motivation for their practice.

<sup>135</sup> Potentially, the parties will be so unhappy with the mediator's services that they will share their impressions with other mediation consumers. Still, the possibility of the information wrapping back around to the mediator as a means of education are slim. Aside from anecdotal exceptions, reputational markets for mediators function sporadically, locally, and with questionable reliability.

<sup>136</sup> Parties have a particularly difficult time assessing the propriety of a mediator's actions when the mediator is practicing in a non-transparent fashion. For more on mediator transparency, see Moffitt, *supra* note 15.

about only with sufficiently broad public demand for a change. Given the rarity and uncertainty of lawsuits against individual mediators, observers outside of a particular mediation have little opportunity to learn about or to assess mediation behaviors. No public outrage currently exists, and because the education function of lawsuits is essentially absent from mediation, this lack of public scrutiny is almost certain to persist.

### III. MEDIATION IS A UNIQUE PRACTICE, DEMANDING UNIQUE LIABILITY TREATMENT

Mediation parties, mediators and the public would benefit from revisions to the current mediator liability system. Rather than make a clumsy attempt to wedge the question of mediator liability into frameworks crafted for non-mediators, we should recognize at least two factors that separate mediation from other practices in ways relevant to the question of liability. First, mediation parties, rather than outside observers, occupy the best position to judge the effectiveness of a mediator's services. Second, mediation parties dissatisfied with the quality of a mediator's services retain a no-cost or low-cost, unilateral option of terminating the unsatisfactory mediation. Neither of these aspects of mediation exists in most other professional or quasi-professional settings, and their combined effect demands that mediator liability be treated differently than liability in other contexts.

#### A. *Mediation Parties are Best Able to Assess the Effectiveness of Mediators' Actions*

Mediation parties, as the targets of mediators' actions, are uniquely positioned to judge the quality of a mediator's subjective judgments. Mediation is not formulaic when practiced effectively. A mediator must be responsive to the particular needs of the circumstance. The shifting contexts in which mediation occurs and the variations among parties demand that an effective mediator adapt her approach from mediation to mediation, or even during a single mediation.<sup>137</sup> Mediation scholars have yet to articulate a persuasive taxonomy sufficiently thorough or reliable to remove contextual, subjective assessment from the practice of mediation. In this sense, mediation is—and likely will forever remain—an art, at least in part. The mediator's art, however, aims to create certain effects on the mediation parties, on their perceptions, on their thinking, on their analysis of the issues that brought them

---

<sup>137</sup> Mediation is not alone in demanding contextual, subjective judgment. The exercise of informed discretion is one of the hallmarks of practice in all professions. Whatever other professional trappings mediation may possess or lack, few would question that mediators exercise discretionary judgment in dispensing their services. At this time, I do not intend to enter the debate over whether mediation is or should be considered a profession. For a brief introduction to the question of mediation's profession-hood, see Nolan-Haley, *supra* note 22, at 243-45.

to mediation in the first place.<sup>138</sup> Examining the quality of a mediator's decisions, therefore, demands an inquiry into the effects of the mediator's actions. What effects did the mediator's questions have on the parties' thinking? What changes in the bargaining dynamic occurred following the mediator's intervention? What changes in communication stemmed from the mediator's agenda or discussion structure? What was the impact of the mediator's effort to demonstrate empathy, or to push the parties' thinking about non-settlement alternatives, or to suggest possible settlement terms, or to invite problem definition, or to reframe the parties' comments? The impact of a mediator's actions on one or more of the parties determines its effectiveness. Outside observers hold a comparatively limited perspective, one which lacks the parties' individual experiences of the mediator's actions. As a result, those outside a mediation have a comparatively limited capacity to assess the effects of particular mediator behaviors. A mediator's actions exclusively target a mediation party, making the party uniquely expert in judging the effectiveness of those actions.

The ability to judge contemporaneously the effectiveness of the mediator's services makes a mediation party different from the clients of other professionals or practitioners. A lawyer's client does not occupy the best position to gauge the effectiveness of the lawyer's discretionary behavior both because of the technical inaccessibility of the behavior—the client may not even know what a peremptory challenge is, for example—and because the lawyer's behavior is typically aimed ultimately at a target other than the client—litigators design a closing argument to persuade the jury, not the client, for example. Similarly, patients do not occupy the best position to judge the quality of most forms of subjective judgment involved in medical care. A patient can only assess the effectiveness of the decision to prescribe a new drug or adopt a particular surgical technique indirectly, based on the decision's eventual effects on an illness. In law, medicine, and most other professional practices, those with similar professional training can best judge the propriety of a particular action and are appropriately called on to do so as expert witnesses.<sup>139</sup> Experts, called to testify about the propriety of various professional behaviors, are all appropriately drawn from outside of the professional-client relationship in question because they can best assess the propriety of the actions. In mediation, however, because the behaviors specifically target the parties, and because their effects on the parties are the unique determinant of effectiveness, mediation parties themselves occupy the

---

<sup>138</sup> In a different context, I have suggested that mediators' actions might have effects alternately on an individual party's behavior, analysis, or assumptions. Furthermore, a mediator's actions might affect the dynamic between the parties. See Moffitt, *supra* note 15.

<sup>139</sup> See 2 DOBBS, *supra* note 20, § 485, at 1388-89 (noting the use of expert witnesses in legal malpractice claims); *id.* § 246, at 639 (noting the use of expert testimony in medical malpractice cases).

best position to assess the quality of a mediator's services.

Mediation parties' ability to judge the effectiveness of mediators' action is not perfect—it is simply better than any other party's ability to judge mediators' actions. Mediation parties, like any other consumer of professional services, suffer from some degree of information asymmetry in considering the actions of mediators. Even mediation parties who are repeat consumers of mediation services have a limited set of experiences against which to measure a mediator's conduct. Importantly, however, the relevant consideration for a mediation party's assessment of a mediator is not how well the mediator's conduct compares with the conduct of mediators generally. Instead, the most important consideration is whether the mediator's conduct is helpful *to that party*. A party sitting through a mediation conducted by a brilliant practitioner may nonetheless find the mediation unhelpful in a given context. Whether the party is able to identify the unhelpful mediation as better or worse than other mediations is essentially irrelevant to his decision regarding its effectiveness. Therefore, while outside mediation experts may be best at assessing whether a mediator is following customary mediation practices, the disputants themselves can best judge the effectiveness of the mediator's actions in their context.

B. *Dissatisfied Mediation Parties can Vote With Their Feet*

If, in assessing the impacts of a mediator's actions, a mediation party determines that the mediator's interventions are unhelpful, the party can simply terminate the mediation. Even those with different conceptions of mediation universally embrace the notion of party autonomy. One aspect of party autonomy or self-determination is each party's right to decide for himself the acceptability of a particular settlement.<sup>140</sup> The right of each party also to decide whether to continue participation in the mediation is necessarily joined with the right of autonomy. Even in so-called mandatory mediation contexts, a

---

<sup>140</sup> Even among different conceptions of mediation, the preservation of parties' capacity ultimately to decide for themselves is central to mediation. Commentators have noted that:

A critical distinguishing factor among the third-party processes [of dispute resolution] is whether the neutral has power to impose a solution or simply to assist the disputants in arriving at their own solution. The most common example of the latter is mediation; the former is commonly called adjudication, whether performed by a court or by a private adjudicator known as an arbitrator.

GOLDBERG ET AL., *supra* note 90, at 3; *see also* Robert A. Baruch Bush, *Ethical Dilemmas*, in *MEDIATING LEGAL DISPUTES*, *supra* note 30, § 14.3.4, at 402 (noting that “[m]ediation is by definition a consensual process, in which both parties must consent to any proposed settlement,” and that “[i]n order for meaningful consent to exist, there must be an opportunity for free and informed choice by both parties regarding any options for settlement”); Robert A. Baruch Bush & Joseph Folger, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263 (1996) (referring to “leaving responsibility for outcomes with the parties” as a hallmark of “transformative” mediation).

mediation party can refuse to agree to a particular set of terms.<sup>141</sup> A party can, subject only to the requirement of good-faith participation in some jurisdictions,<sup>142</sup> terminate any mediation he finds unhelpful.

This aspect of autonomy functions differently in mediation than in most professional-client settings, even those that also embrace the basic notion of party autonomy. A patient can discontinue the services of a physician with whom the patient is dissatisfied, but the opportunities for doing so are structurally limited. Part-way through a surgical procedure, a patient has no opportunity to observe, evaluate, and terminate a surgeon's services. Doctors are responsible for securing informed consent from their patients for any procedures, but the informed consent is typically secured entirely before the services are rendered, with few opportunities to revisit the consent mid-service. The same, to a more limited extent, is true of attorneys' clients. A client may theoretically maintain the ability to terminate an attorney's services, but only rarely would a party be willing to undergo the considerable transaction costs involved in terminating the services of a lawyer part-way through an engagement. In mediation, on the other hand, only in exceptional circumstances would parties be unable easily and cheaply to terminate the services of an unhelpful mediator.

Only a mediation party competent to judge the quality of the mediator's actions, of course, can exercise fully his right to terminate an unhelpful mediation. Competence to judge a mediator's actions, in turn, depends both on the ability to judge information and on access to the relevant information. A mediation party suffering from a mental impairment cannot effectively judge the quality of mediator services. Similarly, if a mediator has hidden some aspect of her service from the mediation parties through fraud, for example, the missing information may render critical assessment of the mediator's services impossible for mediation parties. The true exercise of autonomy depends on competence and access to information.

Similarly, autonomy functions legitimately in mediation only with the freedom to discontinue participation in the mediation. If, for some reason, a party does not know of his right to terminate participation in the mediation, his exercise of autonomy in arriving at a mediated outcome is impaired. Likewise, if a mediator somehow impairs a party's ability to walk away from the mediation, her actions unacceptably constrain the party's autonomy. This conception of autonomy does not suggest that any party with a weak non-

---

<sup>141</sup> See COLE ET AL., *supra* note 18, § 7:1 (noting that even parties to mandatory mediation "may ultimately refuse to settle in mediation").

<sup>142</sup> For more on the question of "good-faith" participation in mediation, see *id.* § 7:6; Maureen Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L. J. 591 (2001) (examining situations in which ADR participants misuse the process, act in bad faith, or otherwise engage in improper conduct, and proposing a standard for a good-faith-participation requirement in private ADR, while balancing the competing policy concerns attending such an obligation).

settlement alternative lacks autonomy in a mediation.<sup>143</sup> Often, one or more of the parties to a mediation will perceive their non-settlement alternatives as unattractive and will, therefore, prefer to avoid terminating the mediation without a settlement. Self-interested assessment, comparing the possible benefits and risks of a mediation against the possible benefits and risks available in actions outside of a mediation, is at the very heart of autonomy. Having an unattractive non-settlement alternative does not strip one of autonomy. Rather, autonomy is impaired when a party—either mistakenly or correctly—perceives that he does not have a choice between mediation and non-mediation.

Autonomy assumes that each party has both the ability to judge competently whether the mediation is helpful and the ability to walk away from an unhelpful mediation. To assume that parties are, as a general matter, incompetent or constrained in their ability to choose is both disrespectful of mediation parties and descriptively inaccurate. At the same time, prudence demands that we guard against mediations taking place in the absence of competence and autonomy. Accordingly, mediation safeguards such as ethical standards, consent forms and statutory regulation routinely reinforce both the notion that parties must be legally competent and able to terminate the mediation.<sup>144</sup> These safeguards make it appropriate to assume—subject to rebuttal with contrary information—that a party's continued participation is the product of an autonomous choice.

---

<sup>143</sup> Similarly, whatever the elusive concept of “power imbalance” means in the context of mediation, it cannot responsibly refer to the relative strength or weakness of a party's non-settlement alternative.

<sup>144</sup> Hawaii's model standards state that:

A mediator shall inform the participants of their right to withdraw from mediation at any time and for any reason. If a mediator believes the participants are unable to participate meaningfully in the process . . . a mediator may suspend or terminate mediation and encourage the parties to seek other forms of assistance for the resolution of their dispute.

Program on Alternative Dispute Resolution, *Standards for Private and Public Mediators in the State of Hawaii* § X(2) (1986), quoted in Margaret Shaw et al., *National Standards for Court-Connected Mediation Programs*, 31 FAMILY AND CONCILIATION COURTS REV. 156, 200 (1993); see also Shaw et al., *supra*, Standard 4.2(c) (avoiding referrals to mediation of cases in which parties lack the ability effectively to negotiate); MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI cmt. (1994) (requiring a mediator to guard against party incapacity). But see Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1 (naming the recognition of incompetence as a common ethical dilemma for mediators); Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 779 (1999) (outlining consent-acquiring mechanisms commonly used in mediation, but arguing that procedural mechanisms such as consent forms guarantee only a “thin” conception of the principle of informed consent”).

C. *Four Different Mediation Scenarios Demand Different Liability Treatment*

Actions against a mediator alleging inappropriate mediation conduct demand an inquiry consistent with the unique nature of mediation. First, mediation parties are best able to assess the effectiveness of a mediator's services and are able to vote with their feet. As a result, complaints against mediators should be treated differently if the parties terminate the mediation than if the parties carry the mediation through to its conclusion.<sup>145</sup>

Second, appropriate mediator liability should depend on whether the demonstration of mediation misconduct demands reference to customary mediation practice. Certain claims against mediators allege professional negligence or malpractice in ways that require a comparison of the mediator's actions with the actions of other practitioners within the mediation community. These claims include the full range of allegations that the mediator's strategic decisions during a mediation failed to live up to appropriate standards within the mediation community. For example, a party may allege that the mediator failed to ask appropriate questions, constructed a useless agenda, wasted time on irrelevant matters, made unhelpful interventions, appeared biased, offered unhelpful suggestions, took lengthy catnaps and so on. Assessing whether the mediator's actions in any of these circumstances constitutes professional negligence or malpractice would require, in part, an inquiry about customary practices within mediation.<sup>146</sup> I therefore label these claims "Custom-Based claims."<sup>147</sup> Other claims of mediator misconduct may be demonstrated by reference to contractual, statutory, constitutional or tort standards not dependent on customary or reasonable mediation practice. Claims of egregious conduct such as intentional infliction of emotional distress, breach of confidentiality, failure to disclose a conflict of interest, or fraud, for example, fall within this category. I label these claims "Custom-Independent claims"

---

<sup>145</sup> Parties may cease participation in a mediation for a variety of reasons, many of which have nothing to do with the quality of the services the mediator is providing. Other reasons may relate to the mediator, without necessarily signaling the party's dissatisfaction with the mediator's services. For example, a party might terminate a mediation because he has found a cheaper mediator, or one with greater experience in a particular field. In none of these circumstances should the fact of termination reflect unfavorably on the mediator. However, in certain circumstances, overt mediator misconduct or incompetence may prompt parties to terminate the mediation.

<sup>146</sup> In the context of medical malpractice, it has been suggested that in some jurisdictions, a plaintiff need not refer to customary practice in order to establish professional medical negligence. See Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163 (2000). For the sake of convenient labeling in this Article, even if the same were true for mediators, I would nevertheless categorize as "Custom-Based" all professional negligence actions not falling into one of the categories described in my definition of Custom-Independent claims.

<sup>147</sup> I am indebted to Professor Dom Vetri for suggesting the applicability of this distinction among claims.

because they do not demand reference to the potentially shifting standards of customary practice. Custom-Independent claims demand different treatment in the context of mediation than do Custom-Based claims.

The circumstances in which a party may bring an action against a mediator, therefore, should be divided into four separate categories, reflecting the unique mediation-specific factors described above.<sup>148</sup> Table 1 and the text following describe each type of claim, along with the special obstacles appropriate for liability claims in the context of mediation.

**Table 1**  
**Appropriate Mediator Exposure to Liability**

	<b>Custom-Based Claims (Professional negligence, malpractice)</b>	<b>Custom-Independent Claims (Breach of confidentiality, conflict of interest, infliction of emotional distress, fraud, breach of explicit contractual term, etc.)</b>
<b>Party Withdrew from the Mediation</b>	<p><b>Liability:</b> Traditional elements of a Custom-Based claim.</p> <p><b>Damages:</b> Insignificant because withdrawal likely causes the injury to cease.</p>	<p><b>Liability:</b> Traditional elements of the specific Custom-Independent claim in question.</p> <p><b>Damages:</b> Full traditional damages available under relevant claim, since withdrawal would not necessarily cure the injury from these claims.</p>
<b>Party Remained in the Mediation</b>	<p><b>Liability:</b> Traditional elements, plus the complaining party's continued participation demands that the party demonstrate his incompetence, an inability to perceive the negligence, or a denial of autonomy that prevented the party's withdrawal.</p> <p><b>Damages:</b> Traditional measures available in Custom-Based claims.</p>	<p><b>Liability:</b> Traditional elements of the specific Custom-Independent claim in question.</p> <p><b>Damages:</b> Full traditional damages available under relevant claim, except that failure to withdraw should prevent complete recovery if misconduct was visible, party was competent, withdrawal option was not impaired, and withdrawal would have mitigated damages.</p>

<sup>148</sup> A single set of mediator actions could give rise both to a Custom-Based claim and to a Custom-Independent claim. The possibility of simultaneous claims in each category, arising from the same mediator conduct, raises the question of duplicative claims. For more on the appropriate treatment of duplicative claims in the context of mediator liability, see Part III.D.



### 1. A Custom-Based Claim When the Party Walked

A mediation party who terminated the mediation prior to its completion should be permitted to maintain a professional negligence claim against a mediator by alleging that the mediator's conduct fell below appropriate standards. The fact that the party withdrew from the mediation may evidence dissatisfaction with the mediator's services.<sup>149</sup> The leap between a party finding the services unsatisfactory and a court finding the mediator's services to be negligently substandard, however, is significant. A party can best determine whether a practice is helpful, but only a subset of unhelpful mediator actions should be deemed negligently deficient according to the standards of practice within the mediation community. Because mediation is a subjective enterprise without guarantee of success, it follows necessarily that some mediator practices will be consistent with customary and reasonable practice *and* will not prove effective in the particular context of a given dispute. Accordingly, a dissatisfied party should have a difficult time sustaining a Custom-Based professional negligence claim.

Even if a party who withdrew from the mediation can demonstrate that a mediator's conduct was negligent, the complaining party should generally recover only limited damages. The impacts of Custom-Based negligence in mediation are necessarily narrow in scope. In general, incompetent mediating can, at most, cause injury during the course of the poorly conducted mediation.<sup>150</sup> As a result, terminating the mediation, while supportive of a claim for negligence, effectively limits the damages available to injured mediation parties. At most, a mediator will be liable for the value of the time her negligence caused the complaining party to waste. Any prospective injury, however, should almost certainly be barred in a claim based solely on negligent failure to adhere to the customary standards of mediation practice. As a result, even though liability under a negligence theory should be more easily established when a party withdraws from the mediation, a claim of Custom-Based professional negligence or malpractice will be unlikely to produce significant recovery.

### 2. A Custom-Independent Claim When the Party Withdrew

A party who terminated a mediation and who now claims that the mediator violated a Custom-Independent duty, as defined above, should face no obstacles beyond those present in a Custom-Independent claim in any other context. A claim of mediator fraud, therefore, should require no more than a claim of fraud against any other person in any other context. Similarly, an allegation by a party who walked out on a mediation in which the mediator breached confidentiality, failed to disclose a conflict of interest, intentionally

---

<sup>149</sup> Recall also that a party may terminate a mediation for a variety of reasons unrelated to the quality of the mediator's services.

<sup>150</sup> See *supra* Part I.B.1. In contrast, for the reasons described in Parts III.C.2 and III.C.4, the damages available in a Custom-Independent claim are less limited.

inflicted emotional distress, or tortiously interfered with contractual relations should face only those obstacles inherent in the elements of the claims themselves. For the reasons described in Part I, none of these claims is easily maintained against a mediator, just as none of these claims is easily maintained in any other context. Their potential availability, however, would serve appropriately to deter the most egregious of mediator conduct.

The fact that the party in this type of claim walked from the mediation should not necessarily limit the damages available in an action against the mediator. Unlike injuries stemming from Custom-Based negligence, the termination of the mediation does not necessarily cure injuries caused by more egregious conduct violating duties defined beyond customary practice. If a mediator harmfully breaches confidentiality, the fact that the mediation has ended does not cleanse the effects of the breach of confidentiality. The disclosed information remains disclosed. Ceasing harassment does not necessarily cure emotional distress. Similarly, a party may not be able to cap the harm caused by fraud, tortious interference with contractual relations, or failure to disclose conflicts of interest merely by ceasing participation in the mediation. With many possible mediator Custom-Independent violations, the injury occurs at the time the action takes place, and no subsequent actions can keep the parties from feeling the behaviors' ill effects. As a result, a party's decision to terminate the mediation should not often limit significantly his Custom-Independent claims against a mediator.

### 3. A Custom-Based Claim When the Party Remained in the Mediation

A party who remained through the completion of the mediation and who subsequently complains of Custom-Based professional negligence or malpractice should face a considerable challenge in establishing liability. Typically, mediation parties can best assess whether a mediator is providing satisfactory service. While not all unsatisfactory mediation services are negligent, it is difficult to imagine a satisfactory service being negligent. The fact that a party remained in the mediation signals that the party deemed the mediator's conduct to be satisfactory—a contemporaneous judgment inconsistent with a subsequent assertion of negligence. In order to maintain an action for negligence in this circumstance, therefore, the complaining party should have to demonstrate one of three things: (1) the mediator's negligence was not perceivable at the time of the mediation, (2) the party's ability competently to assess the mediator's actions was somehow impaired, or (3) the mediator denied the party the ability to walk away from the mediation. Absent one of these factors, a party who remained in the mediation should be precluded from recovering on a Custom-Based negligence claim against the mediator.

If a party who remained through the completion of the mediation can establish a Custom-Based negligence claim, the damages available to the party may be more significant than if the party had withdrawn from the mediation at the outset of the negligent behavior. Still, the sums available to parties

alleging negligence should be considerably limited. Conceivably, the complaining party may recover for the time he lost in the unsatisfactory mediation, and in this circumstance, lost time could amount to *all* of the time spent in the mediation. Recovery beyond lost time, however, requires such extraordinary speculation that courts should hesitate to allow claims to proceed on theories that attempt to link a mediator's negligent failure to adhere to customary practice with injuries beyond the mediation itself. Accordingly, as with the circumstance in which the party terminated the mediation, Custom-Based professional negligence claims stemming from cases in which the parties remained in the mediation to its completion should be appropriately unattractive liability vehicles for dissatisfied mediation parties.

4. A Custom-Independent Claim When the Party Remained in the Mediation

A party who remained in the mediation should subsequently be able to bring an action alleging a violation of a right established outside of customary practice. Establishing mediator liability in a Custom-Independent claim should be difficult, for the reasons described above, though not impossible. The fact that a party remained in the mediation may not pose any additional obstacle to the party seeking subsequently to establish a Custom-Independent claim against a mediator. Any allegation of fraud, breach of confidentiality, breach of impartiality, or intentional tort poses considerable evidentiary challenges, but these causes of action appropriately remain available in the context of mediation without additional impediments to a finding of liability.

The fact that the party now complaining of Custom-Independent misconduct chose to remain in the mediation should serve to limit the damages available in certain circumstances. The party's potential recovery in this circumstance should be limited if (1) the mediator conduct of which the party now complains was readily visible to the party, (2) the party's competence to assess the action was not impaired, (3) the party's ability to terminate the mediation was not impaired, and (4) termination would have prevented further injury. A party reasonably should be required to take steps to mitigate damages by avoiding injury or continued injury when such steps readily present themselves.<sup>151</sup> In

---

<sup>151</sup> The so-called "avoidable consequences" or mitigation doctrine is typically applied to tort claims, but courts generally have not extended the doctrine to include claims of infliction of emotional distress. See Eugene Kontorovich, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491 (2001) (finding that courts have failed to apply the mitigation doctrine to emotional distress, and suggesting ways courts can reduce the moral hazard inherent in emotional distress damages without such a mitigation rule). Most considerations of mitigation in the context of emotional distress, however, assume that the mitigating action is temporally disconnected from the conduct creating emotional distress. Seeing a therapist or taking medication, for example, are common methods of mitigating emotional damages. The mitigation required by the framework described above, instead, examines the contemporaneous behavior of the party subjected to the offensive behavior in question. Most notably, it asks whether the party took steps to end his or her exposure to the

the case of a mediator behavior violating a Custom-Independent duty, mediation parties could reasonably mitigate many injuries by terminating the mediation. If a party can demonstrate, for one of the reasons listed above, that termination was unavailable or ineffective as a mitigating device, then the damages should not be limited.

The liability system I describe serves several important policy considerations. The risk of genuine exposure to Custom-Independent claims would deter the most egregious mediator actions. Similarly, the availability of Custom-Independent claims against mediators will help to assure that those mediation parties most seriously injured by mediator misconduct would have access to compensation. At the same time, the relative difficulty of mounting a successful Custom-Based claim should give mediators appropriate repose in making legitimate discretionary decisions. Furthermore, because Custom-Based claims are unattractive, we can reasonably expect few Custom-Based claims to be brought against mediators. This, in turn, will helpfully forestall the ad hoc development of an inappropriately rigid conception of discretionary mediation practice. Mediation should remain a highly flexible and diverse set of processes, free from the kinds of formulaic constraints on practice that might develop under rigid Custom-Based scrutiny. Finally, the distinction between parties who terminate the mediation and those who remain in a mediation appropriately requires a party to protect his own interests within a mediation. With the inclusion of safeguards protecting those who could not or could not know to walk out, the joint ideals of party autonomy and mediator responsibility are best preserved in a system such as the one described above.

D. *Custom-Independent Claims Against Mediators Should not be Dismissed as Duplicative of Malpractice Claims*

Courts should not strike as duplicative counts within a complaint alleging both Custom-Based and Custom-Independent claims stemming from the same set of mediator actions. In some jurisdictions, when a plaintiff asserts a claim of malpractice along with certain other theories of recovery arising from the same set of conduct, courts may dismiss the non-malpractice claims. For example, in a claim against an attorney asserting legal malpractice and a second count such as breach of contract, fraud, or breach of fiduciary duty, some courts may strike the second count as duplicative.<sup>152</sup> The same can occur

---

offensive behaviors, if such steps were available. In the case of emotional distress, the distress itself may be significant enough in some circumstances to deprive a party of the capacity to exercise such autonomy. In other examples of Custom-Independent claims, however, terminating the mediation will often cease the accumulation of injury.

<sup>152</sup> Mecca v. Shang, 685 N.Y.S.2d 458 (N.Y. App. Div. 1999) (striking breach of fiduciary duty, fraud, gross negligence, and negligent misrepresentation claims as duplicative of legal malpractice); Brownell v. Garber, 503 N.W.2d 81 (Mich. Ct. App. 1993) (striking contract-based claim as duplicative of legal malpractice claim, but allowing a fraud claim to proceed as non-duplicative); Calhoun v. Rane, 599 N.E.2d 1318 (Ill. App. Ct.

with claims accompanying medical malpractice.<sup>153</sup> In these contexts, courts treat the notion of malpractice essentially as an umbrella, under which the other claims naturally fall. In jurisdictions in which such claim-striking occurs, courts aim to prevent a plaintiff from “fractur[ing] what is essentially a . . . malpractice claim into several causes of action.”<sup>154</sup>

Mediator liability will function appropriately, however, only if courts refrain from dismissing Custom-Independent claims as duplicative of a Custom-Based malpractice claim. While other professions’ liability systems may consider certain Custom-Independent claims as mere subsets of a larger umbrella claim of malpractice, such an arrangement would put an inappropriate burden on plaintiffs bringing claims against mediators.<sup>155</sup> A plaintiff asserting legal malpractice faces relatively few hurdles in establishing that an attorney’s conduct fell below professional standards. Because of mediation’s unique combination of practice variation, confidentiality shields and lack of accepted practice standards, a claim of mediator malpractice poses far more significant challenges than do Custom-Based malpractice claims in other professions.<sup>156</sup> In a mediation context, therefore, the Custom-Based claim of malpractice does not properly serve as an umbrella encompassing Custom-Independent claims. Because of the difficulty of establishing a breach of customary mediation practice, courts should not strike Custom-Independent claims as duplicative of Custom-Based claims, even if the claims arise out of the same set of mediator actions.<sup>157</sup>

---

1992) (striking count alleging breach of fiduciary duty as duplicative of legal malpractice claim, while acknowledging the possibility of maintaining the two as separate claims in certain circumstances).

<sup>153</sup> See, e.g., *Neade v. Portes*, 739 N.E.2d 496, 501 (Ill. 2000) (reviewing four jurisdictions beyond Illinois in which breach of fiduciary duty claims are dismissed as duplicative of medical malpractice claims).

<sup>154</sup> *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App. 1998) (striking “breach of fiduciary duty, breach of the duty of good faith and fair dealing, fraud, [Deceptive Trade Practices Act] violations, breach of contract, and breach of express and implied warranties” as duplicative of a legal malpractice claim).

<sup>155</sup> For a useful summary of the potential distinction between lawyer malpractice and a legitimately separate claim of breach of fiduciary obligation, see Christopher Brian Little, *Breach of Fiduciary Duty in The Lawyer’s Professional Liability Claim*, COLO. LAWYER, Nov. 2000, at 101-02.

<sup>156</sup> For more discussion on the difficulty of establishing professional negligence in the context of mediation, see *supra* Part I.B.1.

<sup>157</sup> Courts could easily permit the separate claims to proceed, ultimately disallowing damage recovery on more than one claim. See JACK FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 275 (3d ed. 1999) (discussing the general availability of alternative pleadings and theories of recovery, including assurances that plaintiffs cannot double-recover for the same injury). Alternatively, if a court must dismiss one or the other, it should dismiss the Custom-Based professional negligence claim. In the face of a legitimate Custom-Independent claim, the Custom-Based claim is the lesser of the claims in the context of mediation.

Certain claims against mediators should, however, continue properly to be considered duplicative of a Custom-Based claim of professional negligence. For example, a claim asserting a breach of an implied contractual promise of due care may be duplicative of a claim of malpractice because both demand the same reference to the appropriate level of care established by customary practice.<sup>158</sup> Such a contract claim is, itself, a Custom-Based claim. A breach of an explicit contractual term, however, would not be Custom-Based, and therefore should survive a motion to strike or to dismiss on the ground that it is subsumed by a malpractice claim.<sup>159</sup> An appropriate mediator liability system demands careful delineation between Custom-Based and Custom-Independent claims, allowing Custom-Independent claims to survive independent of Custom-Based claims.

E. *Mediators Should Enjoy no Immunity Shield Against Custom-Independent Claims*

For the system of liability described above to function properly, mediators must not enjoy absolute immunity from suit. Quasi-judicial immunity may legitimately protect some court-connected officials, but its breadth of coverage makes quasi-judicial immunity inappropriate in the context of mediation. The absolute protections of quasi-judicial immunity not only block harassing lawsuits, but also preclude legitimate and important lawsuits stemming from egregious mediator misconduct. Precluding legitimate lawsuits costs too much as a policy matter, particularly in the absence of significant offsetting policy benefits. Furthermore, despite the D.C. Circuit's extension of quasi-judicial immunity to a case evaluator in *Wagshal v. Foster*,<sup>160</sup> and the same court's further extension of that ruling to include mediators, common law constructions of immunity do not warrant its general extension to mediators. If any degree of mediator immunity is warranted, statutory qualified immunity better protects the legitimate interests of court systems, mediators, mediation parties and the public.

The decision in *Wagshal*, described in Part I.B, overextended the common law concept of quasi-judicial immunity by shielding a neutral case evaluator

---

<sup>158</sup> See, e.g., *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376 (S.D.N.Y. 2000) (striking a breach of implied contractual promise to exercise due care as duplicative of an action in malpractice).

<sup>159</sup> In some circumstances, a professional may provide specific contractual promises regarding the services to be rendered. In such cases, even in jurisdictions that typically strike contractual claims as duplicative of malpractice claims, these contract-based claims are allowed to stand. Compare *Brownell v. Garber*, 503 N.W.2d 81, 84 (Mich. Ct. App. 1993) (disallowing a contract action separate from a legal malpractice claim because the plaintiff merely alleged that the lawyer promised to "render competent tax advice"), with *Stewart v. Rudner*, 84 N.W.2d 816 (Mich. 1957) (allowing a contract claim to proceed separately from a medical malpractice claim in a case in which a doctor promised that he would deliver a baby via caesarian section but failed to do so).

<sup>160</sup> 28 F.3d 1249 (D.C. Cir. 1994).

from a lawsuit. While the *Wagshal* court cited correctly the Supreme Court's *Butz v. Economou* test,<sup>161</sup> the *Butz* test does not properly support extending quasi-judicial immunity to cover the functions of a neutral case evaluator. The first component of the *Butz* test requires that the actions in question be sufficiently judicial in nature. Case evaluators share some aspects of their practice with judges. For example, both may inquire about the facts underlying a case, assess legal and factual arguments, and arrive at independent judgments. However, case evaluators' procedural powers and ultimate products are sufficiently distinct from those of a judge that case evaluators' actions should not be labeled judicial. In *Butz*, the Supreme Court considered the nature of hearings examiners and administrative law judges, describing their work as "functionally comparable" to that of a judge. "[They] may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions."<sup>162</sup> A case evaluator performs none of those functions, with the possible exception of regulating the course of a hearing, but then only to the extent that a case evaluation session is considered a hearing. Judges vary in their willingness to engage in less traditional<sup>163</sup> settlement-promoting activities during settlement conferences.<sup>164</sup> Current visions of case management grant judges broad, but not unbounded, discretion in seeking to secure a settlement of the matters pending before them.<sup>165</sup> However, the *Wagshal* court generalized the fact that some judges

---

<sup>161</sup> *Id.* at 1252 (citing *Butz v. Economou*, 438 U.S. 478 (1978)).

<sup>162</sup> *Butz*, 438 U.S. at 513 (finding that defendant federal officials were entitled only to the qualified immunity available to their counterparts in state government, and not absolute immunity).

<sup>163</sup> At least one scholar argues that the trend away from "traditional" judicial roles and toward judicial "management" in the United States is a product of the late twentieth century. See Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing the new "managerial" role of judges as providers of informal dispute resolution and case management, and criticizing this role as a form of judicial activism that threatens to redefine long-held standards of what constitutes rational, fair, and impartial adjudication).

<sup>164</sup> See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985) (exploring theories of the advantages and disadvantages of mandatory settlement conferences; discussing how such conferences can be conducted to maximize their usefulness without seriously threatening the appropriate role of judges in formal adjudication; and reviewing the history and current practice of settlement conferences).

<sup>165</sup> As a general matter, "it is not a mark of improper bias for a judge to make comments regarding the court proceedings before him or her, unless the comments are so extreme that they show the judge is unwilling to consider further evidence or legal arguments." SHAMAN ET AL., *supra* note 60, at § 4.07. The challenge for courts has been to articulate more precisely the boundaries of proper judicial settlement conduct. See, e.g., *Dodds v. Comm'n on Judicial Performance*, 906 P.2d 1260 (Cal. 1995) (criticizing as coercive and unjudicial, but declining to censure judge for, securing settlements by means of an "assertive" judicial style that included interruptions and yelling); *In re Mertens*, 392 N.Y.S.2d 860 (N.Y. App. Div. 1977) (censuring a judge for failing to maintain impartiality when the judge threatened

have “intensive involvement in settlement” to suggest that any activity undertaken to facilitate settlement is sufficiently judicial in nature to warrant immunity.<sup>166</sup> A judge performing his or her judicial function in conducting a settlement conference would be shielded from personal liability by judicial immunity, even in cases of extraordinary misbehavior. Such is the nature of judicial immunity. The fact that a judge would receive immunity, however, does not then mean that anyone doing anything for which a judge would be immune should also enjoy immunity.<sup>167</sup> Instead, the proper inquiry is whether the behavior is sufficiently central to the judicial function. In *Wagshal*, the case evaluator’s behavior was sufficiently distinct from any judicial function to preclude satisfaction of the first prong of the *Butz* test.

Similarly, the circumstances in *Wagshal* did not clearly satisfy the second requirement of *Butz* regarding the extension of quasi-judicial immunity. According to the second prong of the *Butz* test, quasi-judicial immunity should extend only when a threat of future harassment or intimidation by litigants jeopardizes the independence of the actor in question.<sup>168</sup> Because a case evaluator makes an essentially singular judgment at the conclusion of her service, she might arguably be susceptible to intimidation. A party who successfully intimidates a case evaluator might receive a more favorable evaluation at the close of the evaluator’s service. Therefore, if a threat of litigation existed, a case evaluator’s independence would be compromised.

---

to report parties and attorneys the judge believed were not bargaining in good faith). In one interesting case, a trial court judge threatened parties during a settlement conference that if they refused to settle prior to trial but subsequently settled for essentially the same amount suggested in conference after trial had begun, he would sanction the dilatory party. The parties failed to settle in the conference, proceeded to trial, and settled after the first day. On appeal, the trial court judge’s sanction was reversed as improperly coercive. *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985); *cf.* *Resnick*, *supra* note 163, at 430 (arguing broadly against judges’ role in the “management” of cases, and arguing that “[h]aving supervised case preparation and pressed for settlement, judges can hardly be considered untainted if they are ultimately asked to find the facts and adjudicate the merits of a dispute” (citation omitted)).

<sup>166</sup> *Wagshal*, 28 F.3d at 1253.

<sup>167</sup> For example, in *Mireles v. Waco*, 502 U.S. 9 (1991), the Supreme Court extended judicial immunity to cover the actions of a judge who allegedly ordered an attorney to be brought before the court “with excessive force.” These actions, taken by a private citizen would amount to battery. *Cf. id.* at 14 (Stevens, J., dissenting) (finding that “ordering a battery has no relation to a function normally performed by a judge”). No one would seriously argue that anyone ordering a battery should be entitled to quasi-judicial immunity merely because a judge might be shielded from immunity for ordering a battery from the bench.

<sup>168</sup> The Supreme Court’s interest in precluding lawsuits against judges is to avoid a situation in which lawsuits “would contribute not to principled and fearless decision-making but to intimidation.” *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (finding that the common law immunities given to judges and police officers are available against an action under 42 U.S.C. § 1983).



The *Wagshal* court assumed the existence of such a threat, asserting that disappointed litigants are “likely” to seek to “recoup their losses, or at any rate harass” a case evaluator following an unfavorable case evaluation.<sup>169</sup> Despite this assertion about the likelihood of litigation, even in jurisdictions without immunity protections for case evaluators, no reported lawsuits exist against case evaluators or others lacking the capacity to render binding decisions.<sup>170</sup> To declare the second prong of the *Butz* test satisfied on an asserted but empirically unwarranted fear of harassing lawsuits does not warrant extension of the Supreme Court’s quasi-judicial immunity framework.

Finally, the procedural protections in place to guard against case evaluators’ misconduct do not satisfy the third prong of the *Butz* test. The third prong of the *Butz* test asks “whether the system contains safeguards which are adequate to justify dispensing with private damages suits to control unconstitutional conduct.”<sup>171</sup> The D.C. Circuit pointed to the opportunity for *Wagshal* to seek the judge’s recusal as evidence that sufficient protections exist. This misreads the requirement for procedural protections and focuses too narrowly on the specific facts in the *Wagshal* case.<sup>172</sup> *Wagshal* asserted that Foster’s disclosure created injurious bias in the trial judge. The D.C. Circuit appropriately noted that a request for recusal could at least theoretically cure this particular injury.<sup>173</sup> The *Butz* test does not demand an inquiry about the specific injury,

---

<sup>169</sup> *Wagshal*, 28 F.3d at 1253. The *Wagshal* court acknowledges that a “case evaluator makes no final adjudication,” but asserts that the case evaluator’s role as “the bearer of unpleasant news” will make him or her the target of litigation. *Id.* The D.C. Circuit treats the second prong of the *Butz* test as an entirely theoretical matter, rather than demanding an empirical foundation. Many actors, both official and unofficial, may bear bad news to litigants regarding their legal prospects. Even if case evaluators were the only link in the chain of actors delivering bad news to a disappointed litigant, given the nature of non-binding dispute resolution, the *Wagshal* court assumes too much in asserting that case evaluators would face harassing and intimidating exposure to lawsuits.

<sup>170</sup> *Wagshal*’s lawsuit, the only lawsuit on record, cannot stand as evidence that a risk of lawsuits exists. If the very lawsuit that gives rise to the *Butz* inquiry is sufficient to satisfy the second prong of the *Butz* test, then the test itself becomes bizarrely circular. More likely, the D.C. Circuit intended to dispense with any empirical examination of the likelihood of litigation. Certainly, one need not demonstrate a historical pattern of litigation in order to establish the likelihood of a prejudicial fear of litigation. Still, in the face of an utter lack of post-evaluation litigation, the court should not have hinged its extension of immunity on its own bold assertion that such litigation was “likely.”

<sup>171</sup> *Wagshal*, 28 F.3d at 1252.

<sup>172</sup> At a minimum, the D.C. Circuit’s reading of the third prong of the *Butz* test is too narrowly tailored to support the court’s sweeping conclusion regarding the extension of quasi-judicial immunity to all case evaluators and mediators within their court system.

<sup>173</sup> It is not clear that the judge in this case would have recused himself, if such a request had been made. Judge Levie asserted, “I don’t know what [Foster’s] opinions are,” even in the face of a communication from Foster to Levie strongly hinting that *Wagshal* was to blame for non-settlement. *Id.* at 1251 (describing a telephone conference between Judge Levie and *Wagshal*’s counsel). If Judge Levie indeed believed that he knew nothing of

however, but rather an inquiry about the availability of protection against misconduct from one performing the function in question.<sup>174</sup> If Foster had breached confidentiality in a public statement, rather than in communication with the judge, for example, judicial recusal would do nothing to cure the injury to Wagshal.<sup>175</sup> Short of civil damages or a creative form of injunctive relief, nothing would compensate Wagshal for, or protect Wagshal from, Foster's injurious public disclosure. The *Butz* test requires that all three prongs be satisfied before quasi-judicial immunity will be extended. In *Wagshal*, none of the three prongs was satisfied appropriately. Both policy and common law interpretation, therefore, place the D.C. Circuit's blanket application of quasi-judicial immunity to case evaluators under suspicion.

Even if quasi-judicial immunity extended properly to cover the functions of case evaluators, neither the circumstances nor the relevant policy considerations warranted the D.C. Circuit's extension of those protections to include mediators. Mediators' actions, to the extent that they differ from a case evaluator's actions, are even less judicial. Mediation typically builds on an inquiry into a party's interests underlying the complaint; traditional adjudication does not. Facilitating open, interactive, unstructured dialogue forms the basis of solid mediation; this is reversible error when performed from the bench. Demonstrating empathy for the plight of a disputant, addressing his emotional needs, and helping to craft creative solutions that go beyond the narrow boundaries of the legal dispute all form a part of mediation practice; none of this constitutes a classically-defined judicial function.<sup>176</sup> The first prong of the *Butz* test, therefore, weighs against extending quasi-judicial immunity to mediators.

Similarly, the nature of current mediation practice makes quasi-judicial immunity inappropriate under the second prong of *Butz*. As with case evaluators, no current evidence supports the proposition that mediators will

---

Foster's beliefs, then he would not see grounds for recusal.

<sup>174</sup> See *Butz v. Economou*, 438 U.S. 478, 514 (1978) (cataloguing a variety of procedural protections aimed at preserving the independence of an administrative hearings officer and noting the availability of "agency or judicial review" as a remedy for addressing errors).

<sup>175</sup> The same would hold true if Foster had committed fraud against Wagshal, or if Foster had leaked information to Wagshal's opposing party, or if Foster inflicted emotional distress upon Wagshal. Recusal stands as a procedural protection only when the injurious act affects solely the impartiality of the trial judge.

<sup>176</sup> In fact, a judge engaged in some of these behaviors risks violating the judicial ethics proscription against showing bias. The Model Code of Judicial Conduct states that:

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

MODEL CODE OF JUDICIAL CONDUCT, Canon 3(B)(5) cmt. (1990).

face a tidal wave of harassing lawsuits in a way that would risk jeopardizing their independence or deter practitioners from offering their services. Even in jurisdictions that have not extended immunity to mediators, no cases have been filed against mediators, and the mediation rosters are easily filled.<sup>177</sup> Harassment and the concomitant risk of intimidation support the policy of inquiring into the risk of subsequent litigation. Intimidating lawsuits pose a greater risk in the context of judicial deliberations than in the context of mediation. Few mediation decisions lend themselves well to the influence of improper threats.<sup>178</sup> Mediators make no final, binding determination at the close of the mediation, and intimidation will influence only a mediator's interim mediation conduct. Furthermore, mediators can easily terminate their participation in a mediation, rendering any threat essentially un-intimidating. At most, therefore, a party's intimidation might produce the cessation of a mediation, a result the party could obtain on his own simply by terminating participation. Therefore, judges face a greater risk of intimidating harassment than mediators. Correspondingly, the second prong of the *Butz* test should demand a greater likelihood of lawsuits for mediators than for judges.

Finally, the procedural safeguards demanded by the third prong of the *Butz* test are notably absent in most examples of mediator misconduct. Mediators render no official decisions subject to review by a court. In fact, aside from the indirect evidence of the binary submission either of an agreement reached in mediation or of a notice of failure to settle, most courts know nothing at all about what a mediator does. In all but the most extraordinary circumstances, confidentiality shields a court from knowing anything about specific mediator conduct. If a mediator commits fraud or breaches confidentiality, no court will stand as protection *unless* the mediator is subject to suit. While a party may, of course, terminate the mediation, no procedural mechanisms protect the party who cannot cure an injury through termination. Courts should decline, therefore, to extend quasi-judicial immunity to mediators.

If any form of immunity is justified for mediators,<sup>179</sup> it is qualified

---

<sup>177</sup> Indeed, my anecdotal impression of mediation rosters is that they are typically easily filled, with the availability of mediation providers outpacing the demand for mediation in many contexts.

<sup>178</sup> Surely not all threats of litigation are improper, either legally or from a policy perspective. A mediation party might say to a mediator, "I consider your proposed press conference to be a breach of our confidentiality agreement, and if you go forward with it, I will bring a lawsuit against you." Discouraging such threats would serve little policy purpose. In contrast, a party who asserts something like, "I'll sue you if you refuse to follow the agenda I have proposed," would be making a harassing threat. However, the baselessness of the threat—under any liability regime—would strip it of almost all of its potential for intimidation.

<sup>179</sup> I leave for another inquiry the question of whether qualified immunity is justified in various mediation contexts. Jurisdictional variation on this matter may be the best outcome, as it will allow us more and better information about the effects of different mediator liability regimes.

immunity. A well-crafted qualified immunity statute could effectively bar only Custom-Based suits against mediators. Such qualified immunity would prevent harassing litigation alleging that the mediator failed to perform her job to the standard reasonably expected from or typically demonstrated by other mediators. This would allow mediators to exercise relatively unconstrained judgment on those matters most appropriately within their discretion. Parties would retain, however, the ability to seek civil redress against mediators who violate rights articulated beyond custom. Courts should allow allegations of egregious mediator behavior or of violations of statutory or contractual obligations to proceed. Under the liability system I propose above, the basic elements of these claims would present sufficiently high burdens to preclude recovery in all but the most offensive cases of mediator misconduct. In this way, if any immunity is extended to mediators, it should preclude only those cases based on allegations of professional negligence or malpractice. Mediators should enjoy no immunity from Custom-Independent causes of action.

#### CONCLUSION

Former mediation parties are not currently using private litigation as a means to address dissatisfaction with mediators' practices. The fact that there have been no successful lawsuits against mediators for their mediation conduct should not be mistaken as evidence that mediators are not making mistakes during their service. Instead, the lack of post-mediation legal activity is principally a product of the extraordinary legal obstacles facing any prospective plaintiff. Some mediators enjoy immunity from suits. The difficulty of establishing liability and damages protect mediators who do not enjoy immunity. The challenge of accessing information related to mediations further complicates matters. No traditional basis of recovery is readily available to unhappy mediation consumers and, as a result, lawsuits against mediators are rare.

The uncertainty and rarity of lawsuits against mediators is, in some ways, costly. Victims of substandard mediation practices remain uncompensated for their injuries. Mediators who adopt offensive or harmful approaches to mediation may never be educated about, much less deterred from, those practices. Furthermore, the public—including prospective mediation consumers, potential regulators, and other practitioners—may never learn about the current state of mediation practice in any meaningful way.

The solution to the lack of lawsuits, however, is not a wholesale broadening of liability exposure for all mediators. Instead, appropriate liability treatment demands recognition of some of the unique aspects of mediation practice. Mediation has very few, if any, practices so universally embraced that they would be considered customary. As a result, mediators should face significant exposure only to suits alleging a breach of a duty articulated or established by something other than customary practice. This would shield mediators from excessive second-guessing of those mediation decisions that are fundamentally

2003]

*SUING MEDIATORS*

207

discretionary judgments. At the same time, shielding mediators from liability in cases in which they breach a duty articulated outside of customary practice serves no persuasive policy. A mediator who engages in egregious behavior, violates contractual or statutory obligations, or breaches separately articulated duties should enjoy no legal or de facto immunity from lawsuits. Simultaneously, courts should favor lawsuits from parties who exercised their judgment in terminating an inadequate mediation. Wise policy and respect for autonomy demand deference both to mediators' subjective judgments and to parties' decisions regarding their continued participation in mediations.