

## Ethics Codes for Mediator Conduct: Necessary but Still Insufficient

### INTRODUCTION

In July of 1995, a police officer fatally shot 17-year old Travis Allen in Bellaire, Texas.<sup>1</sup> Alleging an intentional deprivation of their son's constitutional rights pursuant to 42 U.S.C. § 1983, Allen's parents filed suit against the city and the three police officers who were involved.<sup>2</sup> On July 25, 1998, the parties voluntarily attended mediation.<sup>3</sup> After a full day of mediation, they agreed to settle all claims for \$90,000.<sup>4</sup> However, on July 27, 1998, the plaintiffs informed the defendants of their desire to withdraw consent to the agreement.<sup>5</sup>

On August 5, 1998, the Allens informed the court that they wished to proceed to trial.<sup>6</sup> Expressing concerns about the manner in which the mediation was conducted, Mrs. Allen stated that the mediator had "forced" her and her husband into settling the case. Their counsel recounted the final hours of the mediation:

[E]verything he [the mediator] said to them was, "Your family is going to be destroyed in this case . . . you got zero chance of success on this and your family is just going to be destroyed" – and he really harped on that. [When the mediator returned with an offer that was \$10,000 less than the Allens' demand] [h]e said, "This is a take it or leave it. You got the 90 and that's it. And you better do this because you got zero chance of success and this will destroy your family." Mr. and Mrs. Allen were very distressed, but ultimately . . . authorized me to tell him yes. I went out. I told him how they felt, that they hated it but they would agree. [When the Allens' attorney returned with a written agreement,] [Mr. and Mrs. Allen] were standing up saying, "We thought about it and we just can't do this." They said, "This is bad. This is wrong. We can't do this." That was just before 5:00 o'clock in the afternoon; and [the mediator] sat

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1. See Randall Patterson, *Two Bullets in the Back*, HOUSTON PRESS, July 09, 1998.
  2. *Allen v. Leal*, 27 F. Supp. 2d 945, 946 (S.D. Tex. 1998) (the lawsuit was originally brought in state court and later removed to federal district court).
  3. *Id.*
  4. *Id.*
  5. *Id.* at 947.
  6. *Id.*

there and harangued them for an hour and half . . . Finally, they signed it; and you could see that Mr. Allen was – when he tells you that he felt shamed, it was visible. That’s what transpired.<sup>7</sup>

For procedural reasons, the district court in *Allen v. Leal* never reached the question of whether to enforce the settlement agreement.<sup>8</sup> Nonetheless, the court criticized the statement of a prominent Houston mediator that “[w]hat some people might consider a little bullying is really just part of how mediation works.”<sup>9</sup> Further, the court noted that under standards governing mediator conduct in Texas, “[a] person appointed to facilitate an alternative dispute resolution procedure . . . shall encourage and assist the parties in reaching a settlement of their dispute, *but may not compel or coerce the parties to enter into a settlement agreement.*”<sup>10</sup> The court concluded that the mediator’s ‘bullying’ in the Allens’ case was “clearly” unacceptable conduct for securing a settlement.<sup>11</sup>

*Allen v. Leal* matters. First, it illustrates that mediation sessions can fall far short of the theoretical ideal. Mediation – a voluntary, non-binding process that uses a neutral third party to help parties resolve disputes in mutually beneficial ways<sup>12</sup> – was conceived as a “disputant-centered, disputant-dominated process.”<sup>13</sup> Most fundamentally, mediation enhances parties’ “self-determination,” or the capacity to set terms for discussion, create options for settlement, and control the final mediation outcome.<sup>14</sup> Rather than “facilitat[e] communication, promot[e]

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7. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 12 (2001) (quoting Transcript of Settlement Hearing at 29-30, *Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998) (No. H-96-CV-30)).

8. *Allen*, 27 F. Supp. 2d at 949 (declining to exercise supplemental jurisdiction over the defendants’ breach of contract counterclaim).

9. *Id.* at 947-48.

10. *Id.* at 948 (citing TEX. CIV. PRAC. & REM. CODE § 154.053(a) (1997)).

11. *Id.*

12. JAMS, Mediator Ethics Guidelines, [http://www.jamsadr.com/mediation/ethics\\_print.asp](http://www.jamsadr.com/mediation/ethics_print.asp) (last visited Mar. 31, 2009).

13. Welsh, *supra* note 7, at 16.

14. *Id.* at 17-18. Scholars have also identified the “transformative” nature of mediation, as the process “allow[s] disputing parties to understand themselves and relate to one another *through and within conflict.*” ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 4 (1994).

understanding,” and “explor[e] issues, interests, and possible bases for agreement,”<sup>15</sup> the mediator in *Allen* generated fear (“zero chance of success”) and false choice (“take it or leave it”) for the Allens.<sup>16</sup>

Second, by invoking the Texas standards governing mediator conduct, *Allen* showed the ability of codes to lay ethical parameters in mediation. Over the past two decades, professional organizations and alternative dispute resolution (ADR) practitioners have developed sets of ethical standards for mediation.<sup>17</sup> For example, the American Arbitration Association, the American Bar Association (ABA), and the Society of Professionals in Dispute Resolution (SPIDR) jointly drafted the *Model Standards of Conduct for Mediators (Model Standards)*, which describe “the standards of conduct for mediators of all types of mediations.”<sup>18</sup> Similar efforts by others produced the Uniform Mediation Act, the CPR-Georgetown Commission Model Rules for the Lawyer as Third-Party Neutral, and state-wide standards in at least thirty-six states.<sup>19</sup> These standards reflect core concerns in mediation about self-determination, impartiality, confidentiality, and informed consent.<sup>20</sup>

This essay questions the capacity of ethics codes for mediators to define the ethical parameters of mediator conduct. Similar to codes of professional or judicial responsibility, mediator codes are framed as broad statements of principle.<sup>21</sup> But where various boards and

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15. JAMS, *supra* note 12.

16. Welsh, *supra* note 7, at 12.

17. Leda M. Cooks & Claudia L. Hale, *The Construction of Ethics in Mediation*, 12 MEDIATION Q. 1, 60 (1994); James J. Alfini, *Mediation as a Calling: Addressing the Disconnect Between Mediation Ethics and the Practices of Lawyer Mediators*, 49 S. TEX. L. REV. 829, 829 (2008).

18. See Cooks & Hale, *supra* note 17, at 60; John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 458 (1997).

19. Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387, 395 (2006).

20. See, e.g., Cooks & Hale, *supra* note 17, at 61.

21. See Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 87 (1997) (arguing that the *Model Standards* do not inform mediation consumers and mediators because they provide “only broad guidance with no source for interpretation, no recognition of difficult ethical dilemmas, and no enforcement mechanism”).

courts provide specific guidance for attorneys, few interpretation and enforcement mechanisms exist for mediators, some of whom are not attorneys.<sup>22</sup> For this and other reasons, the responsibilities of mediators remain hotly contested, and they differ tremendously by state.<sup>23</sup>

Part I presents ethical concerns about mediator bias and coercion, as well as responses of judges and mediators to such issues. Part I also considers several challenges faced by parties who sue mediators for malpractice. Part II explores how general mediator standards, such as the *Model Standards*, tend to inform core ethical issues ineffectively. Part III shows that existing state codes for mediators vary in utility, where some have expanded upon the *Model Standards*' template and substance commendably. Part IV observes that ethics codes can set minimum expectations for mediator conduct, but alone cannot ensure ethical mediation practices. Thus, Part IV recommends continual and practical training that stresses the uniqueness of mediation and mediator ethics, a more stringent evaluation system of mediators and mediation sessions, and greater implementation of ADR ethics boards and grievance procedures.

## I. ETHICAL ISSUES IN MEDIATION AND PARTY CHALLENGES

Courts have institutionalized mediation successfully as a legitimate means of dispute resolution,<sup>24</sup> but ethical questions that arise during this confidential process still abound.<sup>25</sup> Researchers have attempted to recreate what happens during mediation sessions by surveying

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22. *Id.* at 97-99.

23. See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 90 (2006) (noting that the regulatory process for mediation "is just beginning to develop norms for expected behavior").

24. *Id.* at 45.

25. *Id.*; see Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 297 (2003) (finding it "shocking how little we actually know about what disputants want, and what they perceive to be fair").

and interviewing participants afterward.<sup>26</sup> However, their findings comprise a small sample of the mediation experience, and they are filtered through the researchers' subjective perceptions.<sup>27</sup>

Scholars recently combed the reported federal and state court decisions on legal disputes stemming from mediation.<sup>28</sup> Although judicial opinions incompletely illustrate party interactions and conflicts during mediations, they illuminate issues about mediator conduct that parties have felt compelled to litigate.<sup>29</sup> Consistently, litigation has involved (A) mediator misconduct as a party defense in settlement enforcement actions, and (B) malpractice suits against the mediator.<sup>30</sup>

#### A. MEDIATOR MISCONDUCT AS DEFENSE IN ENFORCEMENT ACTIONS

As a defense in settlement enforcement disputes, parties often allege mediator misconduct, specifically bias and coercion.<sup>31</sup> In at least twelve opinions, a party urged some form of bias or conflict of interest on the part of the mediator.<sup>32</sup> For instance, the plaintiff in *Fishov v. Grajower* alleged that the mediator had a conflict of interest because he had loaned funds to the defendant for purchasing a house.<sup>33</sup> However, knowledge or disclosure may cure such conflicts of interest.<sup>34</sup> The *Fishov* court concluded that the mediator did not have an undisclosed interest causing him to favor the defendant, because the plaintiff admitted prior knowledge that the mediator intended to loan the defendant.<sup>35</sup> The plaintiff also knew that the defendant had acquired legal title to the new house.<sup>36</sup>

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26. Coben & Thompson, *supra* note 23, at 45.

27. *Id.* at 46.

28. *Id.*

29. *See id.* at 47.

30. *Id.* at 90.

31. *See id.* at 91.

32. *Id.* at 95.

33. *Fishov v. Grajower*, 691 N.Y.S.2d 507, 507 (N.Y. App. Div. 1999).

34. *Id.* at 508; *Lehrer v. Zwernemann*, 14 S.W.3d 775, 777-78 (Tex. Crim. App. 2000) (“[K]nowledge or notice to an attorney, acquired during the existence of the attorney-client relationship and while acting within the scope of his authority, is imputed to the client.”).

35. *Fishov*, 691 N.Y.S.2d at 508.

36. *Id.*

In at least ten decisions, a party claimed that the mediator coerced her to settle.<sup>37</sup> “Coercion” often took the form of the mediator reciting a parade of ‘horribles’ that the party would face if she decided not to settle.<sup>38</sup> In *Estate of Skalka v. Skalka*, the plaintiffs alleged mediator coercion where the mediator said, “You are going to go through the cost of this thing. It’s going to be financially draining and I can tell you you’re going to wind up losing the property.”<sup>39</sup> Similarly, in *Golden v. Hood*, the plaintiff alleged undue pressure where the mediator told him that a jury would not award him his medical expenses in full.<sup>40</sup> In a different approach to arguing mediator coercion, the plaintiff in *Patterson v. Taylor* alleged that the mediator forced him into settlement by repeatedly emphasizing that if he “didn’t sign the agreement, [the plaintiff] would ruin [the mediator’s] record of being always able to settle the case.”<sup>41</sup>

What parties interpret as mediator coercion often contrasts with the perspectives of judges and mediators, who tend to find the “reality check” technique of *Skalka* and *Golden* permissible.<sup>42</sup> Additionally, rather than evaluate plaintiffs’ theories of mediator misconduct, most courts have focused on typical contractual issues, such as claims of failure to have meeting of the minds, fraud, changed circumstances, and mistake.<sup>43</sup> Traditional contract defenses, however, may not protect parties adequately in mediation.<sup>44</sup> For example, in *Vitakis-Valchine v. Valchine*, traditional contract defenses were unavailable to the plaintiff, because they required

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37. See, e.g., *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 705 (E.D. Mo. 2002) (rejecting claim that the mediator “strong-armed” class counsel, because the plaintiffs “were not bound by any suggestions . . . made by the mediator, but instead freely chose to enter the proposed settlement agreement.” Additionally, the court observed that “mediators utilize different tactics to bring the parties to compromise”).

38. Coben & Thompson, *supra* note 23, at 96.

39. *Estate of Skalka v. Skalka*, 751 N.E.2d 769, 772 (Ind. Ct. App. 2001).

40. *Golden v. Hood*, No. E1999-02443-COA-MR3-CV, 1-2 (Tenn. Ct. App. 2000) (“In the absence of fraud or mistake, an agreement reached in mediation to settle litigation is conclusive against a party seeking to void it.”).

41. *Patterson v. Taylor*, 969 P.2d 1106, 1110 (Wash. Ct. App. 1999) (rejecting the plaintiff’s claim of mediator coercion because no other evidence was offered to support his allegation, and because the plaintiff had decided to comply with the agreement terms “in a good faith effort to resolve the matter”).

42. Coben & Thompson, *supra* note 23, at 95.

43. *Id.* at 49.

44. *Id.*

coercion from the adverse party and not the mediator.<sup>45</sup> Fortunately for the plaintiff, the court recognized some of her claims for relief based on a theory of mediator coercion under Florida's ethics code for mediators.<sup>46</sup>

## B. MALPRACTICE SUITS AGAINST THE MEDIATOR

The empirical evidence suggests that mediators have dodged lawsuits alleging mediator malpractice.<sup>47</sup> Over the five-year period of one study, the only four reported cases naming mediators as defendants were dismissed on the pleadings or by summary judgment in the mediator's favor.<sup>48</sup> For one case in which the trial court found the mediator liable to a party for mediation conduct, the defendant mediator successfully appealed the \$74,000 jury award; judgment was reversed.<sup>49</sup>

The dearth of successful suits against mediators does not mean that mediators never engage in substandard mediation practices.<sup>50</sup> Rather, scholars have stressed the difficulty of establishing mediator liability.<sup>51</sup> Without specific statutes or court rules, defining a mediator's duty of care is

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45. *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1097 (Fla. Dist. Ct. App. 2001) (noting the plaintiff's feeling of 'time pressure' when the mediator, whose daughter was leaving for law school, gave the plaintiff "five minutes to hurry up and get out of here").

46. *See id.* at 1099-1100 (citing FLA. R. MED. 10.310(b) and 10.370(c) (2006) (protecting a party's right to self-determination and "prohibit[ing] a mediator from offering a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue").

47. Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 150 (2003).

48. Coben & Thompson, *supra* note 23, at 98 (citing *Lehrer v. Zwernemann*, 14 S.W.3d 775, 777-78 (Tex. Crim. App. 2000) (concluding that failure by the mediator to affirmatively disclose relationship with opposing counsel and to inform the party in mediation that his lawyer had failed to conduct discovery could not be a basis for negligence or legal malpractice, breach of contract, breach of fiduciary duty, or fraud, where the complaining party had "constructive knowledge" of the prior relationship between the mediator and opposing counsel, and could not articulate any damages from the alleged impropriety)).

49. *Lange v. Marshall*, 622 S.W.2d 237, 239 (Mo. Ct. App. 1981); *see* Moffitt, *supra* note 47, at 150 (considering that although there may be unreported, successful cases against mediators, mediation association newsletters, academic journals, and online resources do not reveal any such cases).

50. Moffitt, *supra* note 47, at 150-51 (noting that where "[t]here are no licensure systems, no stringent barriers to entry into the practice, and little public insight into the mediation process . . . [w]e must assume that some mediators are making mistakes").

51. *Id.* at 153. One factor, at least with regard to court-appointed mediators, is their immunity from suit in several jurisdictions. *See, e.g., Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (affirming the trial court's holding that absolute quasi-judicial immunity extends to mediators and case evaluators when performing official duties). Jurisdictions acknowledging *Wagshal v. Foster* include the District of Columbia, the Northern District of Indiana, the Eastern District of Missouri, and the Southern District of Ohio. ELIZABETH PLAPINGER & DONNA STIENSTRA,

challenging.<sup>52</sup> As the court observed in *Chang's Imports, Inc. v. Srader*, “[t]here is almost no law on what the appropriate standard of care is, if any, for a mediator who helps negotiate a settlement between parties.”<sup>53</sup> Moreover, many of the existing standards pose internally inconsistent terms.<sup>54</sup> For instance, standards in Illinois, Indiana, Massachusetts, and West Virginia require the mediator to ensure a fair result while remaining impartial,<sup>55</sup> despite the possibility that ensuring fairness will make her appear as if she is helping one party to the other’s disadvantage.<sup>56</sup>

Finally, establishing a breach of those standards is difficult because a mediator “can do few things that will constitute a clear breach of all conceptions of acceptable mediator practice.”<sup>57</sup> Under one of the many competing theories of mediation practice, mediators can keep parties separated or always together,<sup>58</sup> actively structure conversation between parties or leave such procedural decisions to the parties,<sup>59</sup> and offer suggestions or evaluate the merits of the disputants’ claims.<sup>60</sup> Accordingly, establishing mediator liability presents an uphill battle.<sup>61</sup>

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FED. JUDICIAL CTR., *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS*, 114-15, 136-37, 170, 224 (1996) (presenting a detailed program description for each federal district court that has an alternative dispute resolution program). Additionally, some jurisdictions’ local rules provide immunity for court-affiliated mediators. *See, e.g.*, OR. LOCAL RULE 240-2 (1987) (“During their service, mediators act as officer of the court and are clothed with judicial immunity.”), *available at* <http://www.fjc.gov/public/home.nsf/pages/768>; N.J. GENERAL RULE 49A.3 (1991) (“Each mediator shall, for the purpose of performing his or her duties, be deemed a quasi-judge of the Court.”), *available at* <http://www.fjc.gov/public/home.nsf/pages/752>.

52. Coben & Thompson, *supra* note 23, at 99.

53. *Chang’s Imports, Inc. v. Srader*, 216 F. Supp. 2d 325, 332 (S.D.N.Y. 2002) (granting summary judgment for the defendant in a claim that the attorney/mediator was negligent and had conflicts of interest in mediating a dispute between a former client and former acquaintance).

54. Exon, *supra* note 19, at 417.

55. *Id.*

56. *See infra* Part II(B).

57. Moffitt, *supra* note 47, at 157.

58. *See* Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 327-29 (1994) (arguing in favor of caucus-based mediation).

59. *See, e.g.*, BUSH & FOLGER, *supra* note 14, at 195-96 (arguing that mediators should leave process decisions to disputants).

60. *See* Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23-24 (1996) (organizing variation among practitioner styles along a facilitative-evaluative continuum).

## II. THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS

This Part uses the *Model Standards* as a lens to consider how general ethics codes for mediators fail to inform ethical issues that arise in practice. The *Model Standards* are representative guidelines because the drafters considered several states' existing codes of ethics for mediators.<sup>62</sup> Conversely, other states referred to the *Model Standards* in creating their own mediator codes.<sup>63</sup> Further, the *Model Standards*, implemented in 1994 and revised in 2005, indicate possible directions that such codes may take or are taking.<sup>64</sup> Many arguments for and against the *Model Standards* also apply to other ethics codes for mediators.

### A. COMMENDING THE MODEL STANDARDS

From the beginning, the *Model Standards* sought to “serve as a guide for the conduct of mediators,” “inform the mediating parties,” and “promote public confidence in mediation as a process for resolving disputes.”<sup>65</sup> Divided into nine sections, the body of the *Model Standards* covered self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of the process, advertisements and solicitation, fees, and obligations to the mediation process.<sup>66</sup> Every standard presented “a broad principle so as to encompass varying situations”<sup>67</sup>

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61. See Moffitt, *supra* note 47, at 159.

62. Laura E. Weidner, *Model Standards of Conduct for Mediators*, 21 OHIO ST. J. ON DISP. RESOL. 547, 550 (2006); Feerick, *supra* note 18, at 459 (noting that the AAA-ABA-SPIDR considered ethics codes from Colorado, Florida, Hawaii, Oregon, and Texas).

63. See, e.g., MISS. STANDARDS OF CONDUCT FOR MEDIATORS (2002); WASH. MEDIATION ASS'N STANDARDS OF PRACTICE FOR MEDIATORS (1997); N.J. ASS'N OF PROF'L MEDIATORS STANDARDS OF CONDUCT FOR MEDIATORS (2007).

64. See Weidner, *supra* note 62, at 549.

65. AAA-ABA-SPIDR, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994) and (2005) [hereinafter 1994 MODEL STANDARDS and 2005 MODEL STANDARDS] Preface, available at <http://www.abanet.org/dispute/news/comparison1994vaugust2005.pdf>.

66. 1994 MODEL STANDARDS; see also Feerick, *supra* note 18, at 460 (analyzing the 1994 *Model Standards* in depth).

67. Feerick, *supra* note 18, at 460; Weidner, *supra* note 62, at 550.

and intended to apply to “all types of mediation.”<sup>68</sup> Some descriptive comments followed each standard.<sup>69</sup>

True to its recognition that the 1994 *Model Standards* were “a beginning, not an end,” representatives from the American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution re-assessed the *Model Standards* and issued revisions in 2005.<sup>70</sup> This committee chose to preserve the original tri-fold purpose and framework of the *Model Standards*, modifying concepts “only to ‘correct, clarify, or respond to new developments.’”<sup>71</sup> With “fresher and more up-to-date substance,” the 2005 *Model Standards* earned praise in several ways.<sup>72</sup> First, the revised version applies specifically to mediators, rather than to all participants in mediation.<sup>73</sup> Second, the 2005 *Model Standards* are “more user-friendly,” in part due to the Standards’ clear-cut organization, shorter titles, and differentiation between what a mediator ‘shall’ and ‘should’ do.<sup>74</sup> Third, they better acknowledge the increasing diversity in mediation.<sup>75</sup> Fourth, the Standards appear “more attuned to the commercial nature of a mediator’s practice” than in 1994.<sup>76</sup>

## B. CRITICIZING THE MODEL STANDARDS

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68. 1994 MODEL STANDARDS Introductory Note.

69. 1994 MODEL STANDARDS; Weidner, *supra* note 62, at 550.

70. 1994 MODEL STANDARDS Introductory Note.

71. Weidner, *supra* note 62, at 552.

72. See, e.g., Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 APPALACHIAN J.L. 195, 195 (appreciating a “revised set of mediator ethics standards that should inspire our practice, guide our thoughtful behavior, prove the durability of our values, and better ensure their expression in the many moments of mediation”).

73. Weidner, *supra* note 62, at 565; Joseph B. Stulberg, *The Model Standards of Conduct: A Reply to Professor Moffitt*, DISP. RESOL. MAG., Spring 2006, at 35.

74. Weidner, *supra* note 62, at 565.

75. For instance, the AAA-ABA-SPIDR added “cultural understandings” as an “often necessary element of mediator competency,” under which a mediator may accept de minimis gifts or incidental items out of respect for cultural traditions, provided that they do not raise questions about the mediator’s actual or perceived impartiality. 2005 MODEL STANDARDS Standard II(B)(3); see Catherine Morris, *The Trusted Mediator: Ethics and Interaction in Mediation*, in RETHINKING DISPUTES: THE MEDIATION ALTERNATIVE, 308 (1997) (describing the increasing recognition “that mediation must be culturally sensitive . . . in a multicultural society”).

76. Exon, *supra* note 19, at 392.

Most criticism of the *Model Standards* focused on the substantive provisions' vagueness.<sup>77</sup> Professor Carrie Menkel-Meadow found the provisions "too broad and ambiguous in . . . areas which need texture and detail, by virtue of the complexity of the tasks involved."<sup>78</sup> For example, Standard VI provides that a mediator "should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation."<sup>79</sup> Scholars noted that the vagueness of "promote" does not indicate whether the mediator ought simply to suggest that parties be forthcoming during mediation, or that she more forcefully insist on candor and honesty.<sup>80</sup> Further, the undefined term "material" requires each mediator to decide whether a statement or action is actually material.<sup>81</sup> Concerns also arise if the mediator tries to clarify the term by analogizing to other professional ethics codes, whose versions of "material" may permit intentionally deceitful conduct under certain circumstances.<sup>82</sup>

Less criticism targeted the *Model Standards*' framework, as one scholar colorfully urged that "the devil is not in the details [of the provisions]."<sup>83</sup> For him, the *Model Standards* problematically parallel ethics rules for the legal profession, despite significant differences between the contexts in which mediators and attorneys practice.<sup>84</sup> For instance, entry into the legal profession is strictly regulated, but mediators do not need formal endorsement from an

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77. *See id.* at 416.

78. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 451 (1997).

79. 2005 MODEL STANDARDS Standard VI.

80. Kimberlee K. Kovach, *Musing on Idea(l)s in the Ethical Regulation of Mediators: Honesty, Enforcement, and Education*, 21 OHIO ST. J. ON DISP. RESOL. 123, 135 (2005).

81. *Id.* at 136.

82. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 (2008) ("In the course of representing a client a lawyer shall not knowingly . . . fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."); Kovach, *supra* note 80, at 136.

83. Michael L. Moffitt, *The Wrong Model, Again: Why the Devil is Not in the Details of the New Model Standards of Conduct for Mediators*, DISP. RESOL. MAG., Spring 2006, at 31.

84. Henikoff & Moffitt, *supra* note 21, at 95-96 (describing how the structure of the rules of professional conduct governing attorneys and the *Model Standards* "moves from general statements of principle to a discussion of more specific obligations").

organization to mediate.<sup>85</sup> Additionally, the field of mediation lacks binding interpretation mechanisms that exist in the legal profession.<sup>86</sup> Whereas courts give specific meaning to broad statements of duties in the legal profession by creating case law, mediators lack such institutions to interpret and enforce vague principles.<sup>87</sup> Moreover, mediators and litigators approach their respective goals with entirely different philosophies.<sup>88</sup> What is ethically appropriate for the litigator's adversarial representation may not hold true for the mediator's cooperative problem-solving task.<sup>89</sup> Consequently, simply mirroring provisions for the legal profession in the *Model Standards* insufficiently guides mediator conduct.<sup>90</sup>

Critics continue that the *Model Standards* ignore the prospect of ethical tensions in mediation.<sup>91</sup> Given that two or more competing values regularly arise in the practice of mediation, merely prescribing absolute principles for mediators to uphold simultaneously is unhelpful.<sup>92</sup> For instance, if a mediator values self-determination and informed consent, he will feel concerned if a plaintiff, ignorant of the relief otherwise afforded by the law, settles a claim.<sup>93</sup> However, under the standard of impartiality, the mediator cannot intervene and appear to favor the plaintiff over the defendant.<sup>94</sup> Although the *Model Standards* provide that "a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices,"<sup>95</sup> the act of doing so, especially if immediately before settlement, will

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85. *Id.* at 96.

86. *Id.* at 97.

87. *Id.*

88. Menkel-Meadow, *supra* note 78, at 410.

89. *See id.*

90. *Id.*; Henikoff & Moffitt, *supra* note 21, at 96.

91. Moffitt, *supra* note 83, at 31.

92. *Id.* at 32.

93. *Id.* at 31.

94. *Id.*

95. 2005 MODEL STANDARDS Standard I.

reasonably create the appearance of partiality.<sup>96</sup> On these grounds, scholars argue that the *Model Standards*' framework inaccurately captures the ethical landscape for mediators.<sup>97</sup>

Others press that the *Model Standards* fail to guide practitioners because they do not create a hierarchy of ethical concerns.<sup>98</sup> Lawyers' ethics, for example, prioritize an attorney's duty to provide competent service to existing clients over his duty to provide pro bono services; or similarly, an attorney's duty of candor to the court over the duty of client loyalty.<sup>99</sup> In contrast, the *Model Standards* do not articulate an overarching ethic to mediation, instead loosely stating that the standards "are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear."<sup>100</sup> As a result, mediators wonder if mediator impartiality trumps party self-determination, informed consent, or procedural fairness when situations require them to juggle multiple principles at once.<sup>101</sup>

Lastly, because the *Model Standards* may establish a standard of care, they become potential grounds for a malpractice action against a mediator.<sup>102</sup> The Note on Construction reads in relevant part:

These Standards, unless and until adopted by a court or other regulatory authority, do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.<sup>103</sup>

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96. Moffitt, *supra* note 83, at 31-32.

97. *Id.* at 32.

98. *Id.* at 32-33; *see* Exon, *supra* note 19, at 421. *But see* Stulberg, *supra* note 73, at 34 (interpreting Standard III as prioritizing a mediator's obligations to be impartial and to conduct a quality mediation process over her duty to promote party self-determination as to mediator selection).

99. Moffitt, *supra* note 83, at 32.

100. 2005 MODEL STANDARDS Note on Construction.

101. Moffitt, *supra* note 83, at 32.

102. *Id.*

103. 2005 MODEL STANDARDS Note on Construction. *Compare* MODEL RULES OF PROF'L CONDUCT Scope (2008) ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached . . . [The Rules] are not designed to be a basis for civil liability . . . Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.").

Scholars have found this possibility most troubling.<sup>104</sup> Although malpractice liability may check mediator misconduct, the *Model Standards* need more interpretive guidance before crossing the threshold from being a set of aspirational ideals to a potential source of liability.<sup>105</sup> These critics worry that general codes for mediators are currently unprepared to set an enforceable standard for mediator conduct.<sup>106</sup>

### III. STATE ETHICS CODES FOR MEDIATORS

Of states that have developed local ethics codes for mediators,<sup>107</sup> some recognize more than others the inadequacy of general guidelines like the *Model Standards*. States that substantially adopted the *Model Standards*<sup>108</sup> offer limited guidance.<sup>109</sup> A minority of local codes are even less helpful than the *Model Standards*, because they strip each standard of crucial commentary.<sup>110</sup> However, multiple states at the forefront of the dispute resolution movement have extensive standards that effectively instruct mediators.<sup>111</sup>

Certain states improved the *Model Standards* by adding important principles to their local codes.<sup>112</sup> For example, Illinois set a separate standard for “Informed Decisions,” requiring mediators to ensure that

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104. Moffitt, *supra* note 83, at 33.

105. *Id.* at 33-34.

106. *Id.*

107. Multiple states have yet to develop standards of conduct for mediators, including Alaska, Arizona, Connecticut, Delaware, Louisiana, Nevada, New Hampshire, North Dakota, Rhode Island, Utah, and Wyoming.

108. *See, e.g.*, MISS. STANDARDS OF CONDUCT FOR MEDIATORS (2002); WASH. MEDIATION ASS’N STANDARDS OF PRACTICE FOR MEDIATORS (1997); N.J. ASS’N OF PROF’L MEDIATORS STANDARDS OF CONDUCT FOR MEDIATORS (2007); ETHICAL GUIDELINES FOR LAWYER-MEDIATORS IN W. VA. (1998).

109. *See supra* Part II.

110. *See, e.g.*, MICH. STANDARDS OF CONDUCT FOR MEDIATORS (2001); D.C. CODE OF ETHICAL STANDARDS FOR MEDIATORS (2006).

111. *See* Exon, *supra* note 19, at 408 (focusing specifically on the standards of conduct for mediators in California, Florida, Georgia, and Illinois). Some of these standards informed the drafters of the *Model Standards*. Feerick, *supra* note 18, at 459 (noting that the AAA-ABA-SPIDR considered ethics codes from states including Colorado, Florida, Hawaii, Oregon, and Texas).

112. *See, e.g.*, MEDIATION COUNCIL OF ILL. PROF’L STANDARDS OF PRACTICE FOR MEDIATORS (2003); ARK. REQUIREMENTS FOR THE CONDUCT OF MEDIATION AND MEDIATORS (2004); N.C. STANDARDS OF PROF’L CONDUCT FOR MEDIATORS (1998); GA. ETHICAL STANDARDS FOR MEDIATORS (2000).

parties have been advised to obtain legal counsel and a sufficient understanding of relevant statutory and case law, as well as local judicial traditions, to make an informed consent on the issue involved . . . that each of the participants has an understanding of, as well as a reasonable opportunity to weigh, the application of appropriate legal information to his or her situation before reaching an understanding . . . [and] that the understanding of each of the parties with respect to the relevant information is adequate to allow balanced negotiation.<sup>113</sup>

Other significant concepts standardized by states include informed consent,<sup>114</sup> responsibility to non-participating parties,<sup>115</sup> welfare of clients,<sup>116</sup> responsibility to courts,<sup>117</sup> and the mediation process.<sup>118</sup>

Select states also infused the *Model Standards*' original principles with greater detail.<sup>119</sup> For instance, Alabama's ethics code for mediators offers a more concrete approach to discerning potential conflicts of interest.<sup>120</sup> Whereas the *Model Standards* broadly state that "[a] conflict of interest can arise from involvement by a mediator . . . from any relationship between a mediator and any mediation participant, whether past or present, personal or professional,"<sup>121</sup> Alabama's

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113. MEDIATION COUNCIL OF ILL. PROF'L STANDARDS OF PRACTICE FOR MEDIATORS Standard VI (2003). Additionally, Illinois included separate standards for Welfare of Clients, Professional Relationships, Research, and Unethical Conduct.

114. MD. STANDARDS OF CONDUCT FOR MEDIATORS, ARBITRATORS, AND OTHER ADR PRACTITIONERS R. 9(c) (2005) ("[T]he neutral shall make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) in consensual processes, understands and voluntarily consents to any agreement reached in the process.").

115. MD. STANDARDS OF CONDUCT FOR MEDIATORS, ARBITRATORS, AND OTHER ADR PRACTITIONERS R. 9(f) (2005) ("[A] neutral should consider, and where appropriate, encourage the parties to consider, the interests of persons affected by actual or potential agreements and not participating or represented in the process.").

116. MEDIATION COUNCIL OF ILL. PROF'L STANDARDS OF PRACTICE FOR MEDIATORS Standard III (2003) ("Mediators respect the integrity and protect the welfare of the families and individuals with whom they work . . . [R]easonable efforts to ensure that their services are used appropriately . . . include fully informing potential clients of the purpose and nature of the mediation process.").

117. See, e.g., ARK. REQUIREMENTS FOR THE CONDUCT OF MEDIATION AND MEDIATORS Standard 2 (2004); MEDIATION COUNCIL OF ILL. PROF'L STANDARDS OF PRACTICE FOR MEDIATORS Standard II (2003) ("A mediator shall be candid, accurate, and fully responsive to a court concerning the mediator's qualifications, availability, and other matters pertinent to his or her being selected to mediate.").

118. See, e.g., ARK. REQUIREMENTS FOR THE CONDUCT OF MEDIATION AND MEDIATORS Standard 3 (2004) (describing components of the mediator's explanation at the beginning of a session, conditions for continuing mediation, and duty to "perform services in a timely and expeditious fashion").

119. See, e.g., ALA. CODE OF ETHICS FOR MEDIATORS (1997); GA. ETHICAL STANDARDS FOR MEDIATORS (2000); STANDARDS OF PRACTICE FOR CAL. MEDIATORS (2000); ARK. REQUIREMENTS FOR THE CONDUCT OF MEDIATION AND MEDIATORS (2004); MEDIATION COUNCIL OF ILL. PROF'L STANDARDS OF PRACTICE FOR MEDIATORS (2003).

120. See ALA. CODE OF ETHICS FOR MEDIATORS (1997).

121. 2005 MODEL STANDARDS Standard III.

standard on impartiality and conflict of interest specifically elaborates in subsection (b)(1) what a mediator must disclose to the disputing parties:

- (A) Any current or past representation of or consulting relationship with any party or the attorney of any party involved in the mediation.
- (B) Any pecuniary interest the mediator may have in common with any of the parties or that may be affected by the outcome of the mediation process.
- (C) Known potential conflicts, including membership on a board of directors, full or part time service as a representative or advocate, consultation work performed for a fee, current stock or bond ownership other than mutual fund shares or appropriate trust arrangements, or any other form of managerial, financial, or immediate family interest with respect to a party involved. A mediator who is a member of a law firm is obliged to disclose any representation of any of the disputing parties by the mediator's firm or a member of that firm of which the mediator is aware.
- (D) Any close personal relationship or circumstances, in addition to those specifically mentioned in this Standard that might reasonably raise a question as to the mediator's impartiality.<sup>122</sup>

Such details, even if not precisely on point for every relationship, offer the mediator a clearer sense of what might constitute a conflict of interest.

Finally, at least one state reorganized the *Model Standards'* principles, supplementing them with rich commentary, examples, and recommendations.<sup>123</sup> Georgia's mediator standards use but contextualize the *Model Standards'* dictionary definition of impartiality ("freedom from favoritism, bias, or prejudice")<sup>124</sup> by including one mediator's personal experience in Example 1:

"I had a big case once upon a time where I thought the plaintiffs, who were represented by three attorneys, had made a very poor presentation of their case . . . I felt like they did not present their case in as strong a form as they could have . . . In caucus I just did some coaching. They went back and made a more forceful, more cogent presentation and I think were able to move things along better . . . it was a matter of helping the other side see the strengths of the plaintiff's case that they had not been able to see through the original presentation."<sup>125</sup>

A recommendation to Example 1 follows:

Helping a party to present his or her needs and interests in a way that can be heard by the other side is not a breach of neutrality but is, rather, an important part of the mediator's role. When

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122. ALA. CODE OF ETHICS FOR MEDIATORS Standard 5 (1997).

123. GA. ETHICAL STANDARDS FOR MEDIATORS (2000). Additionally, scholars have appreciated that supplementary information in codes more realistically conveys the competing principles with which mediators grapple and the challenge of upholding them all. Exon, *supra* note 19, at 411.

124. 2005 MODEL STANDARDS Standard II.

125. GA. ETHICAL STANDARDS FOR MEDIATORS Standard III (2000).

the mediator helps each side . . . communicate effectively, the mediator is assisting the parties in establishing the common ground upon which a solid agreement can be based.<sup>126</sup>

Consequently, the baffled mediator can see instances in which helping a party does not violate the impartiality standard. At the very least, she has more realistic situations from which to analogize her own circumstances, than from the *Model Standards'* generalizations.

#### IV. RECOMMENDATIONS

Ethics codes for mediators set minimum expectations for mediator conduct, but even the most detailed standards, commentary, examples, and recommendations cannot ensure ethical mediation practices. Accordingly, this part recommends (A) continual and practical training that emphasizes the uniqueness of mediation and mediator ethics, (B) more stringent evaluation of mediators and mediation sessions, and (C) greater use of ADR ethics boards and grievance procedures.<sup>127</sup>

##### A. MEDIATOR TRAINING

First, mediator trainings must go beyond teaching process<sup>128</sup> to underscore the unique nature of mediation and mediator ethics. Unlike adjudication, neither procedural rules governing process nor substantive rules determining outcome constrain the mediator.<sup>129</sup> Parties, too, enjoy considerable flexibility in generating settlement options that are unavailable from the court

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126. GA. ETHICAL STANDARDS FOR MEDIATORS Standard III (2000).

127. These recommendations, while certainly relevant for solo mediation practitioners, can be implemented more feasibly by existing and developing mediation programs.

128. Current mediator trainings sponsored by the American Arbitration Association emphasize process, or the essential steps that occur in each mediation regardless of the mediation subject. E-mail from The Honorable John Simko, Magistrate Judge, U.S. Dist. Court for the Dist. of S.D., to author (Mar. 9, 2009, 10:09 EST) (on file with author).

129. Julie Macfarlane, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, 40 OSGOODE HALL L.J. 49, 51 (2002). For instance, mediators frequently change their role with the parties, shifting from a broad-facilitative mode to a more evaluative approach over the course of individual sessions. Dwight Golann, *Variations in Mediation: How – and Why – Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 42 (2000).

system.<sup>130</sup> Although mediation's strength lies in its flexibility,<sup>131</sup> this flexibility also creates more room for ethical ambiguity. Mediators-in-training, especially if experienced in litigation,<sup>132</sup> need to be sensitive to the breadth of ethical issues that may arise in mediation but not in litigation. They must also grasp the fundamentally different natures of mediation and adjudication. Former or current judges who are training to become mediators should take special care not to adopt their adjudicatory personas or tendencies in mediations.<sup>133</sup>

Second, mediator trainings should occur continually.<sup>134</sup> New mediators would benefit from refresher skills courses when they begin applying what they learn from simulation exercises to actual mediations, as would veteran mediators who may mediate only occasionally. Additionally, as mediation continues to develop, its applicability to different subject areas will evolve. Mediators would gain from learning about mediation trends that are emerging in contemporary fields, such as intellectual property.<sup>135</sup> Trainings organized by subject matter would help mediators stay current on the intersections between mediation and substantive areas of dispute.

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130. Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 720 (1997).

131. Karen L. Henry, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 OHIO ST. J. ON DISP. RESOL. 385, 387 (1988); Kentra, *supra* note 130, at 756.

132. See generally PLAPINGER & STIENSTRA, *supra* note 51 (identifying common qualifications for mediator certification in federal district courts with ADR programs, such as membership in the state bar and several years of legal practice).

133. Magistrate judges may be requested to mediate cases that come through federal courts. Interview with Amy E. Wind, Chief Circuit Mediator, U.S. Court of Appeals for the D.C. Circuit, in Wash., D.C. (Mar. 5, 2009).

134. *Id.* (approximating that the most recent training for D.C. mediators in the district court and appellate mediation programs was in 2004 or 2005).

135. See Nancy Neal Yeend & Cathy E. Rincon, *ADR and Intellectual Property: A Prudent Option*, 36 IDEA 601, 603 (1996) ("Mediation is appropriate for most intellectual property cases[,] especially those where benefits for maintaining ongoing business relationships are important, such as in most licensing situations.").

Third, mentored trainings based on the co-mediation model<sup>136</sup> would allow inexperienced mediators with “sufficient classroom learning . . . to actually use the learning and develop practical skills.”<sup>137</sup> Although co-mediation has gained favor in the areas of family dispute resolution, medical malpractice, and complex commercial disputes, it is used less as a teaching method.<sup>138</sup> By pairing seasoned mediators with new mediators, the inexperienced mediator can observe different mediation styles to determine what works most naturally for her and most beneficially for parties. She can also receive prompt and extensive feedback on her performance from the more experienced mediator.<sup>139</sup>

#### B. STRINGENT EVALUATION OF MEDIATORS AND MEDIATIONS

Mediation participants and mediators would benefit from evaluating mediators and mediation sessions more stringently. Some jurisdictions already solicit feedback from mediators and attorneys.<sup>140</sup> The district court and appellate mediation programs in the District of Columbia, for example, provide mediator reports and attorney surveys.<sup>141</sup> The mediator report primarily asks administrative questions,<sup>142</sup> and the mediator may also evaluate the mediation.<sup>143</sup> Similarly, attorney surveys include objective and subjective questions.<sup>144</sup> Of particular value are the

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136. Co-mediation involves the use of two mediators from different disciplines who work together as a team. Lee A. Rosengard, *Learning from Law Firms: Using Co-Mediation to Train New Mediators*, 59 J. DISP. RESOL. 16, 18 (2004).

137. M. Jerry McHale, et al., *Building a Child Protection Mediation Program in British Columbia*, 47 FAM. CT. REV 86, 89 n.20 (2009).

138. Rosengard, *supra* note 136, at 18.

139. Advantages incidental to mediator training include diversification of the mediation team, greater dialogue on strategic decision making, and sharper perception of the parties' verbal and nonverbal cues. *Id.*

140. Interview with Amy E. Wind, *supra* note 133.

141. *Id.*

142. U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, MEDIATOR'S REPORT FORM (2009). Administrative questions address whether an agreement was reached, begin and end dates of mediation, persons in participation, and how mediation was conducted (in-person, telephone, e-mail, or internet). If the parties settled, the form asks if any elements in the settlement “could not have been obtained through judicial disposition.” *Id.*

143. *Id.* Prompting questions for the mediator include: “Was mediation appropriate? Were the techniques you used effective? Did the mediation present any unusual problems? If the case settled, what did you do to achieve that result? In hindsight, would you do anything differently?”

144. U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, APPELLATE MEDIATION PROGRAM ATTORNEY SURVEY (2009). Objective questions include: “Was an agreement reached through mediation?” “Did you request mediation

mediator skills that attorneys rate on a scale of 1 (poor) to 5 (excellent).<sup>145</sup> These include the mediator's "explanation of the mediation process," "willingness to listen to your client's side of the case," understanding of the factual and legal issues involved in the case, "use of appropriate questions to determine facts of the case," "ability to clarify the key issues and interests of each party," "ability to help the parties generate realistic settlement options," "ability to move the parties toward consensus," "ability to resolve impasses between the parties," and her "tone, body language, and demeanor."<sup>146</sup>

Such evaluations facilitate record-keeping. First, if parties allege mediator misconduct, mediation programs can retrace former impressions of mediators and parties from shortly after the mediation's conclusion. Responses from mediators and parties reveal areas of consensus and disagreement with respect to complaints. Second, mediation programs can develop track records for individual mediators. Mediator records allow mediation programs to offer positive feedback or constructive criticism to mediators. Also, these programs can determine if a complaint is consistent with the mediator's other evaluations, or if it represents an anomaly for an otherwise well-received mediator.

With a few minor changes, the District of Columbia's court-affiliated evaluation system of mediators and mediation is a viable model to adopt. Most importantly, mediation programs should require both mediator reports and attorney surveys.<sup>147</sup> Additionally, the attorney surveys should provide comment space after each 1 to 5 rating, so that lawyers can explain their

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in this case?" "Did your client attend any of the mediation sessions?" Subjective questions include: "Did the mediator help you to better evaluate the merits of your appeal?" "Did the mediator help you narrow and/or clarify the issues?"

145. U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, MEDIATION USER SURVEY FORM (2009).

146. *Id.*

147. Currently, for the mediation programs in Washington, D.C.'s federal district and appellate courts, mediator reports are required but attorney surveys are simply requested. Interview with Amy E. Wind, *supra* note 133.

numerical evaluations. Finally, mediation programs should offer user survey forms to parties, in order to appreciate the responses of those whose interests are most affected by the mediation.

### C. ADR ETHICS BOARDS AND GRIEVANCE PROCEDURES

Because fewer interpretation and enforcement mechanisms exist for mediation than for the legal profession, ethics codes for mediators alone are of limited value.<sup>148</sup> However, ADR ethics boards<sup>149</sup> can interpret mediator standards by fielding mediator inquiries over the phone or through advisory opinions.<sup>150</sup> Additionally, they can review complaints and sanction mediators when necessary.<sup>151</sup> To illustrate, parties in Minnesota may file a complaint with the ADR Ethics Board against mediators who are on the ADR Roster<sup>152</sup> or court-appointed.<sup>153</sup> If sanctioned, Minnesota mediators may receive a private reprimand by the Board.<sup>154</sup> The Board may also “notify the appointing court and any professional licensing authority with which the neutral is affiliated of the complaint and its disposition,” “publish the neutral’s name, a summary of the

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148. See *supra* Part II(B).

149. See, e.g., Minnesota Judicial Branch, ADR Ethics Board, <http://www.courts.state.mn.us/?page=1121> (last visited Mar. 31, 2009) (introducing the ADR Ethics Board as a group of “judges, court administration staff, and ADR professionals” who are “appointed by the MN Supreme Court to promote the ethical use of ADR in the court system”).

150. See Interview with Amy E. Wind, *supra* note 133; Florida State Courts, Alternative Dispute Resolution, [http://www.flcourts.org/gen\\_public/adr/brochure.shtml](http://www.flcourts.org/gen_public/adr/brochure.shtml) (last visited Mar. 31, 2009) (describing Florida’s Mediator Ethics Advisory Committee’s function in issuing advisory opinions on the state rules for mediators).

151. See Minnesota Judicial Branch, *supra* note 149.

152. To become a qualified neutral on the ADR Roster, individuals “must take an ADR course certified through State Court Administration.” To stay on the roster, qualified neutrals must complete eighteen hours of “ADR related continuing education within a three year reporting period.” Minnesota Judicial Branch, Frequently Asked Questions, <http://www.courts.state.mn.us/?page=662> (last visited Mar. 31, 2009).

153. Minnesota Judicial Branch, Complaint Process, <http://www.courts.state.mn.us/?page=547> (last visited Mar. 31, 2009) (“Subsequently, the ADR Ethics Board will review the complaint at their next scheduled Board meeting. If the Board does not find the facts of the complaint state a violation of the Code of Ethics, the complaint is dismissed. If the Board agrees the facts of the complaint state a violation of the Code of Ethics, court staff and designated Board member will investigate the complaint. The investigation starts by notifying the neutral of the allegation. The neutral has thirty days to respond after receiving notification. After the investigation is completed, the investigation team will give their findings and proposed recommendation to the Board. The Board may issue a public or private sanction, dismiss the complaint, or suggest mediation between the neutral and complainant.”).

154. MINN. CODE OF ETHICS ENFORCEMENT PROCEDURE R. III pt. A.

violation, and any sanctions imposed,” “remove the neutral from the roster of qualified neutrals, and set conditions for reinstatement if appropriate.”<sup>155</sup>

The point, of course, is not to punish mediators, but rather to inform them of ethical conduct and to deter the unethical.<sup>156</sup> Indeed, documents from Minnesota’s ADR Ethics Board show that since it began reviewing complaints in 1998, the Board has removed only one mediator from the roster.<sup>157</sup> It explicitly “prefer[s] to educate neutrals . . . [in] the form of a letter to the neutral outlining the issue and how it can be corrected,” or by suggesting more training.<sup>158</sup> Only when “the infraction . . . cannot be corrected by education of the neutral” does the Board issue sanctions.<sup>159</sup> For this education process to occur, however, a grievance procedure that enables parties to voice their mediator concerns must exist, as must an ADR ethics board to interpret standards of conduct for mediators.

#### CONCLUSION

Despite party concerns with mediator bias, coercion, and malpractice, few litigated cases establish liability for violating mediator ethics. Evidently, what parties view as bias or coercion often contrasts with the perspectives of mediators and judges. For many reasons, parties, mediators, and judges have struggled to articulate a workable standard of care for mediators.

Ethics codes for mediators theoretically define necessary ethical parameters. They set minimum expectations for mediator conduct, prohibiting the most egregious instances of mediator misconduct, as in *Allen v. Leal*. But because general codes like the *Model Standards* reduce the mediator’s ethical landscape to generic and commonly undisputed principles, they

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155. *Id.*

156. E-mail from Eduardo Wolle, Chair, Minn. Supreme Court ADR Review Board, to author (Mar. 9, 2009, 18:27 EST) (on file with author).

157. *Id.*

158. *Id.*

159. *Id.*

poorly inform the more common and difficult mediator choices. Provisions are substantively vague, and the framework is arguably problematic.

Where fewer interpretation and enforcement mechanisms exist for mediation than the legal profession, even detailed standards with thorough commentary, examples, and recommendations cannot ensure ethical mediation practices. The field requires more mediator training that emphasizes mediation's uniquely flexible and problem-solving nature, as well as the mediator's frequently nuanced ethical dilemmas. Refresher skills courses would perfect and maintain mediator techniques; subject matter-oriented trainings would keep mediators apprised of contemporary developments in areas of mediated disputes; and trainings based on the co-mediation model would enable new mediators to learn practical skills from seasoned mediators. Further, mediation programs should require mediators, attorneys, and parties to evaluate their mediations, in order to develop mediator records and to offer constructive criticism. Finally, the field would benefit from more ADR ethics boards. These boards provide interpretive meaning to existing mediator standards, and they can review and respond to complaints of questionable mediator conduct. With these changes, standards of conduct for mediators will contextualize and guide challenges that are arising in mediation more effectively.