THE MAYHEW-HITE REPORT

ON DISPUTE RESOLUTION AND THE COURTS

Created by the Ohio State Journal on Dispute Resolution at the Moritz College of Law at The Ohio State University for the Alternative Dispute Resolution Community and made possible by a deferred gift from Harold E. and Betty W. Hite in honor of Kimberly Hite Mayhew.

VOLUME 5, ISSUE 3

WELCOME

The *Ohio State Journal on Dispute Resolution* is pleased to bring you Volume 5, Issue 3 of the Mayhew-Hite Report on Dispute Resolution and the Courts.

LEAD ARTICLE

For the lead feature of Volume 5, Issue 3, the Editor of the Mayhew Hite Report interviewed Dale A. Crawford, a former judge on the Franklin County Ohio Common Pleas Court and a current partner at the law firm of Shumaker, Loop & Kendrick LLP. As a private practitioner, Mr. Crawford has frequently served as a mediator and an arbitrator, and during his time on the bench, he was able to gain a unique perspective on the factors that prompted litigants to settle cases or embrace Alternative Dispute Resolution. Crawford's insights concerning ADR are sure to be of interest for students and practicing attorneys alike. The full-text of the interview can be accessed here.

ARTICLE SUMMARY

In *Mediation in the Health Care System: Creative Problem Solving*, Sheea Sybblis analyzes how a mediation system could improve upon the current practice of settling medical malpractice disputes. The author begins her article by providing an overview of mediation, and then gives readers some background information on medical malpractice and medical error in the United States. She highlights many of the shortcomings associated with resolving medical malpractice disputes through litigation, and in Part II of the article, explores the transformative potential of mediation in the health care system. Sybblis uses Part III of the article to discuss institutionalization and uniformity in mediation, as well as current ADR programs being used in the health care system. She argues that health care mediation should be a voluntary and flexible process, and suggests that even if mediation cannot resolve a malpractice dispute before litigation ensues, the mediation process itself makes pre-trial settlement more probable. The author does not claim that mediation will cure all of the problems that ail the American health care system, but does make a forceful argument in favor of the mediation of medical malpractice disputes. The full text of this article summary can be accessed here.

CASE SUMMARY

In February of this year, the United States Court of Appeals for the Second Circuit announced its decision in *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007). At issue in *Ross* was whether a non-signatory to a written arbitration agreement could, under Section 16 of the Federal Arbitration Act, lodge an interlocutory appeal from the trial court's denial of a motion to compel arbitration against a signatory to the agreement at issue. The Second Circuit held that when a district court finds that a signatory to a written arbitration agreement is required to arbitrate with a non-signatory under principles of equitable estoppel, the writing requirement of Section 16 of the Federal Arbitration Act is satisfied. The Ross decision has created a circuit split on whether equitable estoppel can satisfy the FAA's writing requirement, a necessary condition for bringing an interlocutory appeal following denial of a motion to compel arbitration. A detailed summary of this case can be

accessed here.

STUDENT SPOTLIGHT

In *Solving the Nonlawyer Mediator Dilemma: The Need for Flexible Unauthorized Practice Standards*, Seth Linnick discusses the current uncertainty regarding nonlawyer mediators and what constitutes unauthorized practice of law. The author argues that individual nonlawyers possess unique skill sets, and often charge lower fees, making them extremely effective mediators for certain disputes. Linnick notes that several states have drafted firmer guidelines for nonlawyer mediators to follow, but he argues that these new guidelines are far from optimal. The author asserts that future standards governing nonlawyer mediators should be flexible, recognizing that mediation arises in various contexts, and also clearly discernible so that nonlawyer mediators know where they stand. Seth Linnick is a 2008 J.D. candidate at the Ohio State University Moritz College of Law where he has taken courses in mediation and negotiation. He is working as a summer associate at Jones Day in Cleveland, Ohio. The full-text of this paper can be accessed here.

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An Interview with Dale A. Crawford

DALE A. CRAWFORD is a partner in the Columbus, Ohio office of Shumaker, Loop & Kendrick, LLP. He specializes in litigation, litigation consulting, arbitration, mediation, and private judging. Mr. Crawford has over 30 years of litigation experience, including 24 years as a judge in the Franklin County Ohio Common Pleas Court and three years as judge of the Franklin County Municipal Court. Mr. Crawford has presided over 800 jury trials (civil and criminal), 15,000 felony cases, and 10,000 civil cases. Prior to Mr. Crawford's election to the bench, he was in private practice and was also the Personnel Director for the City of Columbus Civil Service department. He was a professor at Virginia Tech and has taught at Ohio State University Moritz College of Law, Capital University, Ohio Dominican College, the Ohio Judicial College, and the National Judicial College. Mr. Crawford has also lectured at more than 50 legal and judicial continuing education conferences. Mr. Crawford has served as Senior Assistant City Attorney for the City of Columbus. As lead counsel, Mr. Crawford has appeared before the United States Supreme Court, the Sixth Circuit Court of Appeals, the United States District Court, the Ohio Supreme Court, and local Common Pleas Courts and Courts of Appeal. Mr. Crawford has received many awards from the Ohio Supreme Court for Superior Judicial Service, and was appointed by the Chief Justice of the Ohio Supreme Court to represent the State of Ohio as a delegate to the American Bar Association Judicial Conference. In addition to his litigation schedule, Mr. Crawford is the Chief Legal Correspondent for WTVN radio in central Ohio, and his website articles for the station can be accessed at www.wtvn.com.

Mr. Crawford wrote an article for Shumaker, Loop & Kendrick's *Insights* publication titled "Is ADR a Panacea?" In a recent interview with the Editor of the Mayhew-Hite Report, he shared his insights on many aspects of Alternative Dispute Resolution.

Judge Dan Aaron Polster of the United States District Court for the Northern District of Ohio wrote an article that appeared in the Mayhew-Hite Report earlier this year in which he argued that trial judges can be extremely effective mediators if they adhere to some ethical ground rules (including that the judge obtain the consent of both parties). Do you think that judges can effectively facilitate settlement between parties, or do you believe that a judge should stay removed from settlement discussions and leave the parties to deal with ADR professionals?

I believe that a judge certainly has a role to play in the settlement process. The extent of the role played by a judge varies on a case-by-case basis. However, any judge who actively gets involved in settlement to the extent that he/she mediate the dispute could have difficulty being a fair and impartial jurist if the case ever goes to trial. It remains an unresolved issue where the line should be drawn for judges and what conduct will prohibit a judge from being impartial at trial. I believe that if a judge does not make recommendations about the case and is only a facilitator of discussion, then there is no problem with judges getting actively involved with settlement. Whenever a judge moves beyond facilitating a dialogue between the parties, it would be more prudent to involve a magistrate or other Alternative Dispute Resolution personnel connected to the court.

During your time as a judge, did parties ever want you to provide that extra push that would lead to settlement?

It happened in almost every case - the parties seek resolution of their dispute and look to the judge to provide the extra push that will avoid trial. Clients typically place more confidence in a judge's view of the case rather than that of their attorney, and talking to a judge can provide the parties with a more realistic perspective than they had before hearing from

the judge. Another important consideration is that attorneys very rarely want to try a case. Of the thousands of civil cases that I presided over as a judge, 85% of them were resolved by the parties prior to the trial date. Of the remaining 15% of civil cases, 95% of them were resolved by the parties on the day that trial was scheduled to begin, mainly with my help. The remaining cases went to trial because a settlement was virtually impossible without the intervention of a judicial factfinder.

As part of your practice, you also serve as a mediator and an arbitrator. In your article "ADR as a Panacea," you note the difficulties associated with the use of binding arbitration to resolve consumer disputes. When you mediate or arbitrate, are there any steps that you take to maintain a balance of power between the parties? Do you feel like mediators and arbitrators have a responsibility to protect the more vulnerable party in the proceeding?

I think that one of the main problems associated with arbitrating consumer disputes is that consumers can feel that they are owed more by a company than what would make them whole under a legal standard. In a dispute involving a consumer, the arbitrator has to be careful to explain his/her decision in a way that the consumer can understand, and one way to achieve this could be through the submission of a written decision rather than an oral one. Oftentimes lawyers also have an unrealistic view of what their case is worth, and this belief is often conveyed to the client and the client then becomes unhappy with a verdict that is reasonable in the eyes of the law, but that does not match up to their expectations. When attorneys lose in court or in an ADR process like arbitration, they often point the finger at the factfinder instead of examining their own case. This can create great problems for the credibility of the process used to resolve the dispute.

When you serve as a mediator or an arbitrator, do you try to consult with the parties to determine the best format and rules to follow to lead to an effective resolution of the dispute, or do you see your role as implementing a design that the parties have reached themselves?

Generally speaking, mediators and especially arbitrators have set processes that they follow in handling a dispute. Parties want the mediator or arbitrator to follow his/her typical process because they have determined that independent help is needed to settle their dispute. In many cases, if the parties themselves control the ADR process, it may be less effective. As far as mediation is concerned, if the parties specify certain aspects of the process, then the mediator should certainly try to accommodate them. For instance, parties may specify whether the mediator should talk to the parties jointly or privately, whether the mediator should suggest results, if a written report should be issued, and if *ex parte* communications with the parties after the mediation are to be permitted.

During your time as a judge, did you notice a resistance to mediation or arbitration from any identifiable category of people? For instance, did plaintiffs resist ADR on the grounds that they had been "wronged" and deserved a day in court, or because they felt that ADR could result in a lower settlement than could be achieved through trial?

In cases where plaintiffs did not expect a large monetary settlement, I often noticed a resistance to using a form of ADR due to a concern that the costs involved would be subtracted from their settlement. In cases where plaintiffs expected a large monetary settlement, like when medical malpractice had been alleged and when there appears to be a good chance that the defendant would be found liable, the plaintiffs' attorneys almost always feel that a jury would award more money than they could obtain in a settlement reached through ADR. On the other hand, defendants, especially insurance companies, almost always want to pursue mediation or arbitration. They feel the ADR verdicts will be lower than jury verdicts. In disputes between businesses where large sums of money are at issue, most parties should seek to resolve their dispute through some form of ADR because of the high cost of litigation.

In your private practice, is ADR something that clients are already familiar with and want to learn more about from their attorney, or is it more likely that the attorney first informs the client of the possibility of resolving their dispute through ADR?

ADR is well known in the business community, and larger companies, both public and private, are very familiar with ADR. As far as small businesses are concerned, the attorney typically has to inform the client about formal ADR options. Lawyers involved in small business disputes usually don't get together in advance of litigation to suggest a resolution of their dispute through binding arbitration, which would avoid litigation entirely. ADR can be very expensive, especially when it is used in a case that is already in litigation and binding arbitration is not used appropriately to avoid litigation. Prior to any form of litigation, large or small, ADR should be discussed among the attorneys and with the clients.

Given that parties can use a contract to designate who will arbitrate their disputes, the rules to be followed, and almost every other feature of the process, are there situations when business disputes should not be resolved by arbitration?

In most situations where parties are involved in arbitration, there is no contract governing the arbitration. This is especially true in personal injury and medical malpractice cases. Only in large industries like construction and securities is arbitration

contracted for in advance of a dispute. That being said, in disputes where one party is totally opposed to any settlement or payment and feel they have not done anything wrong, arbitration or mediation would be a waste of time and money. Arbitration works well when the parties are disposed to resolving their dispute and a large amount of give and take is involved.

The Federal Arbitration Act (FAA) makes it very difficult to overturn an arbitration award. Is this something that makes clients reluctant to enter into arbitration, or do they feel like they know what they are going to get with arbitration as much as with a trial? Does the Supreme Court's precedent on the FAA push clients towards non-binding arbitration rather than binding arbitration?

The beauty of arbitration is its finality. In contrast, a material problem with litigation is that it never seems to end. Knowing in advance that there is no appeal in arbitration is a double-edged sword. If you feel the arbitrator has got it wrong, then there is no appeal and you are upset with the lack of review. However, arbitration is great when you feel that the arbitrator has got it right. Business people who are involved in multiple drawn-out disputes will typically be very pleased with the overall results of ADR. They realize that you can't win them all and oftentimes in the court system, there are no real winners. The economic and time efficiencies of ADR can be extremely beneficial to all involved. ADR can also benefit the country as a whole by allowing the courts to hear more pressing criminal and civil cases.

A topic of debate for many ADR scholars is whether non-lawyers should be permitted to act as mediators. In your experience, do clients and parties to lawsuits want someone with legal expertise to serve as their mediator, or is it more important to them to have an experienced mediator regardless of whether that individual is a lawyer?

I'll address arbitration as well as mediation in my response. Many arbitrations are performed by more than one person; a three person panel of arbitrators is fairly typical. In complex business disputes, nonlawyer arbitrators who have expertise in the field can be very useful, especially when lawyer arbitrators don't really understand the fact of the dispute. In mediation, when the dispute does not involve legal complexities, I don't believe it is necessary for the mediator to be a lawyer, but the individual should have mediation training. Just because someone is a lawyer doesn't necessarily mean that they will be a good mediator. Lawyers often get involved with mediation because they are lawyers and not because they have any formal mediation training. Generally speaking, if a dispute primarily involves a disagreement on facts, I don't see a problem with nonlawyers serving as mediators or arbitrators so long as the individuals are suitably trained.

An oft-touted benefit of ADR is that it preserves relationships that can be irreparably damaged by litigation. In your experience, do parties who mediate or arbitrate contentious disputes manage to work together after their dispute has been resolved, or does resolution of the dispute through ADR have the same effect on a relationship as decisions made by judges or juries?

To use divorce as an example, mediation is an extremely effective dispute resolution tool. When divorce issues are resolved by a factfinder, this can cause an incurable friction between the parties and anyone connected to the parties, especially the children who have to deal with a strained relationship forever. Resolution of business disputes through mediation, as opposed to arbitration, has the ability to maintain relationships over time, and this is a factor that parties should take into consideration when looking for a way to resolve their disputes. If the relationship will potentially lead to more disputes in the future, and if the relationship will be ongoing, then some form of ADR is probably the best option to resolve the dispute.

Many people who are engaged in disputes want their attorneys to be "pit-bulls" who will aggressively defend their interests, filing every motion possible and challenging their opponent's every move. How does a lawyer convince a client that mediation, a process that is supposed to be facilitative and for the benefit of both parties, is right for them? Is the cost savings often the primary motivation, or is it necessary to convince the client that their case is not a "sure shot" winner, as they would likely want to believe?

I find that some lawyers don't sit down with their clients and discuss the economics of filing a lawsuit. By economics, I mean the financial costs involved with filing motions, taking multiple depositions, retaining experts, and appealing, as well as the time that it takes for lawyers to prepare a case and go through trial. At the end of the day, very few clients are happy with their legal bills and don't believe that the costs associated with litigation are reasonable. If lawyers would spend more time explaining to their clients all the costs connected with litigation as opposed to ADR, then ADR would be used much more frequently.

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Mediation in the Health Care System: Creative Problem Solving [1]

Sybblis begins *Mediation in the Health Care System* by providing a brief overview of mediation, and then contrasts mediation with negotiation in the health care context. She explains that unlike negotiation where adversaries see their dispute as "primarily a distributive contest over who gets the largest piece of the targeted resource[,]" [2] mediation aims to empower parties, employ creative problem-solving techniques, and maintain preexisting relationships. Adversarial negotiation is often a feature of, or a prelude to, resolving a dispute in litigation. The author argues that mediation can be much more effective than litigation in resolving claims of medical negligence because mediation is less expensive and more efficient, it can take into account monetary and non-monetary values, and it facilitates communication between the parties.

In Part I of her article, the author gives readers some background on medical malpractice and the nature of medical error. In the United States, it is estimated that 150,000 deaths are caused each year by physician and hospital negligence, while medical error is thought to be responsible for approximately 98,000 inpatient deaths annually. Medical error is defined as "'a mistake, inadvertent occurrence, or unintended event in health care delivery which may, or may not, result in patient injury.'" [3] Sybblis notes that the health care system is extremely complex and as a result, has a high potential for failure and error.

The author calls attention to many of the criticisms leveled against the use of tort litigation to resolve health care disputes, in particular the claims that litigation does not provide injured patients with an appropriate remedy and its failure to advance any useful public policy objectives. A further criticism of health care litigation is that it does not achieve the primary goal of the health care system: healing. Litigation severs previously fractured relationships and makes reconciliation difficult. In contrast, mediation, through its emphasis on cooperation and communication, has the capacity to salvage relationships. Moreover, mediation can promote dialogue about system wide failures and the steps necessary to avoid repetition of problems in the future whereas in litigation, "fear of punishment simply does not promote error elimination nor does it maximize system performance[.]" [4] By advancing communication between the parties, Sybblis believes that mediation promotes better quality healthcare. From an efficiency standpoint, even if mediation does not result in the definitive settlement of a dispute, the parties have had the opportunity to narrow down issues in dispute for any ensuing litigation.

Part II of the article consists of an exploration of the transformative potential of mediation in the health care system, examined in the context of (1) the parties' interpersonal relationships and conflict management; and (2) efficiency-related enhancements. As far as the first context is concerned, Sybblis posits that mediation is an appropriate dispute resolution mechanism when parties have an ongoing relationship that needs to be salvaged, when the dispute is complex and would benefit from creative solutions, and when a failure in communication between the parties is the cause of the dispute. In particular, the author explains that medical malpractice claims often deal with personal and sensitive subject matters and she suggests that the flexibility of mediation will allow the parties to create a process tailored to be effective in solving their dispute, unlike litigation with its one-size-fits-all approach. Moreover, Sybblis recognizes that mediation emphasizes party participation and self-expression, making it more likely that parties will be satisfied with, and accepting of, a settlement achieved through mediation rather than one stemming from litigation. Perhaps most importantly, mediation is able to address the emotional needs of parties to a health care dispute. Mediation opens channels of communications and allows doctors to "freely discuss why certain treatment options were selected," [5] counteracting the impressions of patients and family members who may see doctors as uncaring. In addition to doctor-patient disputes, Sybblis suggests that mediation can be effective in bioethics consultations, the result being "bioethics mediation" which "combines the clinical substance and perspective of bioethics consultation with the tools of the mediation process[.]" [6]

Efficiency related enhancements provide the second context for Sybblis' examination of the transformative potential of mediation. As is well documented, mediation can eliminate many of the high transaction fees associated with settling a dispute through litigation. A consequence of the high cost of litigation is that many patients who have small malpractice claims avoid bringing cases as costs are prohibitive. The author believes that the availability of mediation as a dispute resolution mechanism would encourage patients with small malpractice claims to resolve their cases. From the perspective of the health care provider, mediation would normally be preferred over litigation because the transaction costs are lower and also because mediation allows disputes to remain private, protecting the provider's reputation with the public. Even if the monetary return from a mediated settlement would be less than what a party could achieve through litigation, Sybblis argues that parties to a mediated settlement "find value in the process itself" [7] through self expression and having control over the process.

In Section C of Part II, Sybblis addresses potential obstacles to using mediation to resolve health care disputes as well as misconceptions about the practice. One significant obstacle "involves uncertainty concerning confidentiality and privilege in some jurisdictions." [8] The natural fear of patients and health care providers is that statements and disclosures made in mediation could potentially be used against them in any ensuing litigation. Such fears would chill communication in any mediation session. A particular concern for health care providers is whether they would be required to report settlement payments from mediation to the National Practitioner Data Bank, a requirement that would almost certainly discourage doctor participation. Several of the misconceptions about mediation in the health care field identified by the author stem from mediation confidentiality. There exists a worry that mediation confidentiality would allow incompetent doctors to remain undetected and that mediation does not establish a precedent to guide future claimants. Moreover, from a patient perspective, concern exists that mediation does not account for power imbalances and that it results in lower settlements than could be achieved through litigation. Sybblis counters these misconceptions about mediation in the health care field by arguing that mediation benefits the public interest by facilitating patient-doctor communication and by enabling patients with smaller injuries to bring claims. The author also addresses the problem of potential power imbalance and says that the aim of mediation is to achieve balance between the parties and promote a creative approach to problem solving, but urges that "[m]ediators must be trained to spot and neutralize power imbalances." [9]

The author uses Part III of the article to discuss institutionalization and uniformity in mediation, and also current ADR programs in the health care system and the future of health care mediation. Sybblis points to a number of benefits that result from institutionalization of a mediation program. Instituted mediation is gives the process an air of legitimacy that may elude an ad hoc process and institutional mediation also provides a structured forum for patients and doctors to frankly exchange their views. From a patient perspective, one of the foremost benefits of institutional mediation is that health care providers are well positioned to address recurring problems and make new policy decisions. Less positively for patients, institutional mediation programs may be seen as biased towards the sponsoring institution and the author thus urges that "emphasis has to be placed on the need for impartiality in establishing institutionally sponsored mediation programs." [10] Sybblis cites to research showing that a decline in public trust of health care institutions is potentially damaging to public health as people who trust their health care providers are much more likely to seek treatment when sick and follow a doctor's orders. Recognizing that past examples of institutional health care mediation did not achieve the necessary patient-doctor communication to arrive at the goal of mutual understanding; Sybblis suggests that the institutional mediation programs could be "assessed in terms of 'quantifiable increases in medical trust generated by these programs.'" [11]

Concerns about uniformity of institutionalized mediation programs, including the necessity of uniformity and the impact that uniformity would have on the mediation process, are briefly discussed by Sybblis in Section B of Part III. The author notes that the Uniform Mediation Act (UMA) could impact the functioning of institutional mediation programs and that it includes provisions addressing mediation confidentiality, disclosure of conflicts of interest, admissibility of statements made during mediation, and the disclosure of mediator qualifications. The author, in Section C, analyzes ADR programs currently in use in the health care system. Sybblis explains that the standards and requirements for mediation programs vary from state to state, particularly when a number of states have not ratified the UMA. The author calls attention to a mandated mediation program used in Michigan where a panel is charged with mediating disputes arising in the health care system. In the Michigan program, the parties are free to nominate health care professionals to serve on the panel, but otherwise, a five member panel "'made up of lawyers and health care professionals, [hears] 15 minutes of testimony from the plaintiff's and defendant's attorneys and . . . determine[s] the amount of recovery, if any. If both parties accept the mediation evaluation, the case is settled by mediation.'" [12] Sybblis is skeptical about the Michigan process, noting that it is not typical of the classic or traditional mediation process, and suggesting that even though the system is efficient, the parties are not realizing the true benefits of mediation. She reiterates that mandatory mediation programs should take advantage of opportunities to facilitate communication and collaboration between the parties. To this end, Sybblis urges that "the criteria for assessing which cases may be resolved by mediation needs to be critically assessed." [13] In Section D, the author argues that mediation should be used as a first step in resolving medical malpractices claims, as mediation empowers parties to resolve their own dispute. Numerous benefits would flow from using mediation as a litigation gatekeeper, namely streamlining

dockets, saving money, and allowing injured patients to quickly recover. Moreover, even if a dispute moves to litigation, Sybblis believes that mediation opens up the lines of communication, making a pre-trial settlement more likely. In spite of the benefits that mediation can offer, the author believes that mediation should "remain a voluntary and flexible system to ensure that disputants feel free to communicate and explore options." [14] She believes that mandatory mediation programs in the health care field should be of limited duration, and that mandatory programs should remain faithful to the principles of classical mediation, with a view to achieving long term policy change.

In her conclusion, the author explains that a mediation system employed in the health care field should achieve four goals, to wit: (1) compensating patients injured by negligence; (2) motivating doctors to improve the quality of care provided and reduce negligence; (3) preserving the doctor-patient relationship; and (4) achieving optimal cost efficiency. Although she recognizes that mediation cannot be a panacea for all of the problems facing the health care system, Sybblis suggests that mediation may allow individuals to resolve disputes and move on with their lives. Anyone who regularly reads the newspaper or follows political campaigns is well aware that many predict a difficult future for American health care. In her article, Sybblis identifies how mediation could be used to improve upon the current system of settling medical malpractice disputes, one of the most serious problems impacting our ailing health care system.

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[1] Sheea Sybblis, *Mediation in the Health Care System: Creative Problem Solving*, 6 Pepp. Disp. Resol. L.J. 493 (2006).

[2] *Id.*at 494.

[3] *Id.* at 495 (citing Bryan A. Liang & Steven D. Small, *Communicating About Care: Addressing Federal-State Issues in Peer Review and Mediation to Promote Patient Safety*, 3 Hous. J. Health L. & Pol'y 219, 222 (2003)).

[4] *Id.* at 498.

[5] *Id.* at 501.

[6] *Id.* at 501-502.

[7] *Id.* at 504.

[8] *Id.* at 505.

[9] *Id.* at 508.

[10] *Id.* at 509.

[11] *Id.* at 511 (citing Robert Gatter, *Institutionally Sponsored Mediation and the Emerging Medical Trust Movement in the U.S.*, 23 Med. & L. 201, 208-209 (2004)).

[12] *Id.* at 513-514 (citing Walter Orlando Simmons, *An Economic Analysis of Mandatory Mediation and the Disposition of Medical Malpractice Claims*, 6 J. Legal Econ. 41, 41 (Fall 1996)).

[13] *Id.* at 514.

[14] *Id.* at 516.

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Case Summary: *Ross v. Am. Express Co.*, 478 F.3d 96 (2d Cir. 2007))

Issue: The Second Circuit was faced with the question of whether a non-signatory to a written arbitration agreement could, under Section 16 of the Federal Arbitration Act, lodge an interlocutory appeal from the District Court's denial of a motion to compel arbitration against a signatory to the agreement.

Rule: When a district court finds that a signatory to a written arbitration agreement is required to arbitrate with a non-signatory under principles of equitable estoppel, the writing requirement of Section 16 of the Federal Arbitration Act is satisfied.

Facts: This case stems from a group of class action complaints filed against Visa, MasterCard, and their member banks (referred to as the "MDL defendants"), alleging a conspiracy to fix fees for conversion of foreign currency in violation of the Sherman Act. Those cases were consolidated in the Southern District of New York. [1] The district court granted in part defendants' motion to compel arbitration and held that (1) claims of cardholders whose cardholder agreements included arbitration clauses on the date they became putative class members were subject to arbitration; (2) equitable estoppel principles required such cardholders to arbitrate claims against non-signatory banks; and (3) the cardholders' claim that the arbitration agreement was unenforceable as part of an illegal conspiracy could not overcome a motion to compel arbitration where the complaint did not allege an antirust claim on those grounds.

The class action plaintiffs subsequently filed a class action complaint against American Express, making the same claims as against the MDL defendants regarding fixed currency conversion fees, and also alleging that American Express conspired with the other defendants to impose compulsory arbitration clauses on cardholders. American Express moved under 9 U.S.C. §§ 3, 4 to dismiss the complaint and compel arbitration, or to stay the proceedings pending arbitration. Although American Express was not a signatory to the written arbitration agreements with the class action plaintiffs, it argued that the arbitration clauses in the cardholder agreements concluded with the MDL defendants bound the plaintiffs to resolve their dispute with American Express in conformity with the arbitration clauses under equitable estoppel principles. The district court held that because plaintiffs' antitrust claims stemmed from the same agreements as the arbitration clauses, equitable estoppel allowed defendants to invoke the arbitration clauses if they were applicable. However, the district court did not compel arbitration or stay proceedings believing that, as plaintiffs had made an antitrust claim questioning the validity of the arbitration clauses, a jury would have to determine the validity of the arbitration clauses before they could be enforced. Relying on Section 16 of the Sherman Act [2] which grants the courts of appeal jurisdiction over interlocutory appeals from refusals to stay proceedings under 9 U.S.C. § 3 and denials of petitions to compel arbitration under 9 U.S.C. § 4, American Express appealed to the Second Circuit. In response, plaintiffs filed a motion to dismiss arguing that there was no Section 16 jurisdiction in the case because the obligation to arbitrate was the result of principles of equitable estoppel and because 9 U.S.C. §§ 3, 4 are only applicable when there is a written agreement to arbitrate.

Discussion: To resolve this jurisdictional issue on appeal, the panel was required to determine whether the appellants were entitled to the benefit of a written arbitration agreement. The district court found the claims against the American Express defendants to be "'inextricably intertwined' with the cardholder agreements," [3] such that the written arbitration agreements should be held to cover them. In examining the district court's holding that principles of equitable estoppel allowed American Express to take advantage of the written arbitration agreements, the panel noted that "'[a]rbitration is strictly a matter of contract'" [4] and that ordinary principles of contract law are consequently applicable. The panel also recognized that

equitable estoppel is one of the common law principles that can permit a non-signatory to enforce an arbitration agreement. Based on the district court's holding that "it would be inequitable for parties who have signed a written arbitration agreement — appellees — not to abide by that agreement with regard to a non-signatory to the agreement — appellants," [5] the panel found that the Federal Arbitration Act's writing requirement was satisfied such that it had jurisdiction under Section 16 to hear the appeal.

After finding that it had Section 16 jurisdiction, the panel stated that "[t]o hold otherwise would depart from the language and policies of the FAA and quite possibly lead to perverse and unnecessary complexities in cases involving arbitration agreements." [6] In the panel's opinion, the language of the FAA requiring a written agreement to arbitrate, and the supporting policy reasons, were satisfied in this case. If the court had accepted the arguments advanced by the appellees, then a precedent would have been set denying the courts of appeal interlocutory jurisdiction over equitable estoppel cases. In addition, if the panel found in favor of the appellees, then district courts in the future would not have the authority to stay proceedings or compel arbitration, under Sections 3 and 4 of the FAA respectively, when parties are bound by principles of equitable estoppel to arbitrate pursuant to a written arbitration agreement. The panel also called attention to complications that could arise from adopting the appellees' reasoning when signatories to a written agreement are bound to arbitrate with some parties as a result of the agreement and with other parties due to equitable estoppel principles and suggested that "parties seeking to delay arbitration or to introduce mischievous complexities that would be grounds for judicial appeals, would have ample opportunity to do so[.]" [7] A further important consideration for the panel was that "to hold the writing requirement unfulfilled would be contrary to the case law in this and several other circuits where courts have frequently stayed proceedings and compelled arbitration under the FAA on equitable estoppel grounds." [8] In spite of the panel's assertion that its holding was in conformity with the law of several other circuits, *Ross* has created a circuit split on whether equitable estoppel can satisfy the FAA's writing requirement, a necessary condition for bringing an interlocutory appeal. [9]

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[1] *See In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp.2d 385 (S.D.N.Y. 2003).

[2] Section 16 of the Federal Arbitration Act provides in relevant part that "(a) An appeal may be taken from —
(1) an order —
(A) refusing a stay of any action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed[.]"

[3] *Ross v. Am. Express Co.*, 478 F.3d 96, 99 (2007) (internal citation omitted).

[4] *Id.*(quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995)).

[5] *Ross,* 478 F.3d at 99.

[6] *Id.*

[7] *Id.* at 99-100.

[8] *Id.* at 100.

[9] *See* Justin Kelly, *Ruling Creates Circuit Split Over FAA Appellate Jurisdiction*, ADRWorld.com (last visited Feb. 20, 2007).

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Solving the Nonlawyer Mediator Dilemma: The Need for Flexible Unauthorized Practice Standards

by Seth Linnick

This article evaluates the ethical and legal boundaries constraining the conduct of nonlawyers [1] who serve as third-party mediators. More specifically, it addresses the considerable uncertainty surrounding nonlawyer mediators and the unauthorized practice of law ("UPL"). After surveying the modern landscape of UPL jurisprudence, it becomes apparent that the underlying cause of the uncertainty is widespread reliance on a rigid legal distinction that is far more effective in theory than in practice. Thus, in order to achieve clarity in the rules governing nonlawyer mediators, it is necessary to adopt a new philosophy which embraces more flexible UPL standards that naturally accommodate the unique circumstances surrounding each individual mediation.

This assessment begins by examining the reasons that nonlawyers should be allowed to serve as mediators. It is important to establish this justification before considering the particular mediation practices in which nonlawyers should be permitted to engage. Second, the article addresses the unavoidable questions raised by the presence of nonlawyers in mediations, specifically in regard to UPL. It considers some prevailing trends in UPL jurisprudence and looks at some of the penalties levied against nonlawyers for violating various UPL statutes and ethical codes. Next, it evaluates and summarizes five traditional UPL tests and discusses why these tests provide insufficient guidance for nonlawyer-mediators. Then, the analysis turns to two recently enacted sets of guidelines from North Carolina and Virginia that were drafted specifically to govern mediation. These guidelines illustrate a growing movement in UPL governance and highlight the common ambiguity that will continue to limit the effectiveness of UPL statutes in the future. Finally, the article prescribes a significant philosophical change that should be incorporated into any future UPL regulations.

I. The Importance of the Nonlawyer-Mediator

While mediation frequently incorporates elements of law and legal skills, the practice of law and the practice of mediation are not one and the same. [2] In light of this reality, it would be shortsighted to assume that all lawyers are necessarily better mediators than nonlawyers. [3] Rather, studies indicate that nonlawyers often bring a unique perspective to the bargaining table. [4] Thus, the exclusion of nonlawyers from the field of mediation would eliminate the freedom presently available to parties to resolve their disputes through a variety of mediation styles and philosophies. Instead, parties would be left with a system controlled by the same attorneys responsible for the often rigid and adversarial legal system. [5]

In most contexts, the role of third-party mediator may be played by either a licensed attorney or someone lacking formal legal training and certification. [6] Perhaps surprisingly, most mediators working today are members of this second class and have little or no legal expertise. [7] As the use of mediation continues to gain widespread popularity, the demand for experienced mediators will invariably grow along with it. [8] While it is certainly conceivable that this growing demand could be satisfied by legal professionals alone, the presence of experienced nonlawyer-mediators in the field will vastly expand the number of options available to parties seeking mediation services.

Aside from this basic quantity-driven justification, nonlawyer-mediators may also bring a unique skill set and perspective to mediations that are not commonly found in licensed attorneys. [9] For example, due to their ignorance of applicable laws

and precedents and lack of formal legal training, nonlawyer-mediators are often better suited to conduct informal mediation sessions. [10] The more relaxed atmosphere created by the nonlawyer's penchant for informality often fosters better communication between the parties. [11] When the focal point of the mediation is shifted away from rigid legal rules and conjectures about probable legal outcomes, the parties tend to begin to focus on their real interests and develop more creative solutions. [12] It is for this very reason that flexibility and informality have been considered hallmarks of the mediation process. [13] Thus, given its desirable effects on the behavior of parties in mediation, the nonlawyer's ignorance of the law may be viewed as a positive characteristic. [14]

In addition, while many lawyer-mediators have trouble abandoning their deeply-rooted adversarial mindsets that have been nurtured by years of legal training, nonlawyers tend to have a "less combative and antagonistic" frame of mind. [15] As a result, in his or her role as mediator, a nonlawyer is more likely to identify the interests underlying each party's positions and seek common ground through which the parties can come to mutually beneficial agreements. [16] This open-mindedness may also allow the nonlawyer to achieve greater success by encouraging the parties to think outside of the box and explore more creative or atypical solutions to their problems. [17]

Another noteworthy characteristic of nonlawyer-mediators is their tendency to gravitate towards a more facilitative, rather than evaluative, style of mediation. [18] Facilitative mediation promotes greater involvement by the parties themselves and tends to result in agreements that are more reflective of parties' genuine needs and desires. [19] This notion of self-determination is "among the pillars of the mediation process." [20] Studies have shown that its presence in the mediation process also tends to result in settlements that the parties are more likely to carry out. [21] In addition, the proclivity of nonlawyers to seek maximum party involvement tends to mitigate the negative impact that the presence of legal counsel can have on mediations. [22] Unlike the lawyer-mediator, more likely to deal with the other lawyers in the room, the nonlawyer-mediator is more apt to deal directly with the parties themselves. [23] Thus, in the presence of a nonlawyer-mediator, an attorney's capacity to burden the proceeding with an adversarial mindset is greatly diminished. [24]

Finally, when seeking a mediator, parties often view nonlawyers as an attractive alternative to legal professionals simply because they tend to be more affordable. [25] For example, in many divorce mediations, parties may not necessarily need to incur the additional expense of employing a lawyer-mediator because the legal issues involved in the dispute may be fairly uncomplicated. [26] Requiring a lawyer-mediator in this scenario would likely eliminate some of the cost savings that parties often seek when bringing their divorce disputes to mediation. [27] Unlike nonlawyers, lawyer-mediators, aware of the fact that parties will want to rely on their legal expertise and hold them to a higher standard of care, tend to account for the advantages they afford through higher fees. [28] Moreover, most are reluctant to meet competition from nonlawyers by offering comparable fees. [29] As a result, parties seeking to benefit from the cost savings offered by mediation may find greater satisfaction with a nonlawyer-mediator.

Overall, while it would be unfair to suggest that nonlawyers make better mediators than lawyers, at the very least, the participation of nonlawyers in mediation provides parties with a wider variety of affordable options. In addition, the collaborative mentality that nonlaywers tend to bring to the bargaining table creates an effective median through which parties often have greater success reaching an amicable agreement. For these reasons, it is important to ensure that the field of mediation always preserves a place for nonlawyers.

II. Red Flag: The Unauthorized Practice of Law

The importance and fundamental need for nonlawyer-mediators is readily apparent, but their involvement in the mediation process invariably raises a difficult question. How can nonlawyers serve as mediators when mediation often becomes intertwined with legal evaluation and the practice of law? First, before addressing this question, it is important to recognize that according to the prevailing view, by merely performing the basic functions of a mediator, an individual is not engaging in the practice of law. [30] However, this seemingly simple definition becomes far more complicated when mediators go beyond serving as mere facilitators for the parties. In reality, mediators often engage in many practices, beyond simply facilitating discussion, which may lead parties to believe that their mediators are legal professionals such as: dispensing legal advice, evaluating the legal merits of a case, helping draft settlement agreements, or assisting in the drafting of court documents. [31]

Unfortunately, given the rising demand for these more proactive evaluative mediation techniques, the unintentional deception of mediation parties is a problem that will probably continue to escalate in the future. [32] Recognizing the potential consequences of this growing dilemma, state and local enforcement agencies [33] have begun to heighten their scrutiny of mediator practices. [34] The concern among these agencies is that some mediators may be crossing the line between providing permissible mediation services and engaging in the unauthorized practice of law. [35]

The mediators affected by the aforementioned problems arising from evaluative mediation tactics are not limited to nonlawyers. Lawyer-mediators, like their nonlawyer counterparts, may also be sanctioned for practicing law while mediating.

[36] However, while both lawyer and nonlawyer may be sanctioned for giving legal advice, there is an important distinction between the two regarding how violations are typically characterized. [37] When a lawyer practices law while mediating, it is generally considered a violation of mediator ethics or a lawyer's code of professional responsibility. [38] On the other hand, when a nonlawyer does the same, the violation may be characterized as the unauthorized practice of law. [39]

At the present time, the number of UPL charges that have been filed against nonlawyer-mediators is still relatively small. [40] However, the number is beginning to grow, [41] and in many states, the consequences facing mediators found guilty of UPL violations are extremely harsh. Though most states still classify UPL violations as misdemeanors, in some states, they can actually result in criminal penalties. [42] In others, they may constitute contempt of court or result in injunctions against further practice. [43]

The broad variance among states in regard to the severity of their UPL penalties is of obvious concern to nonlawyer-mediators. [44] However, this problem is further compounded by the lack uniformity among state UPL enforcement standards. [45] These standards, often ambiguous in and of themselves, create a wildly inconsistent set of guidelines to which mediators are expected to adhere. To make matters worse, in many jurisdictions, the state provisions still relied upon to govern UPL have not even been formally applied to mediation. [46] Thus, mediators are left to conjecture as to how courts in these jurisdictions might apply UPL standards to mediation based on how they have been applied in other contexts. [47] The result, in most states, is that the line between permissible actions and the practice of law is drawn in accordance with one of the following five general tests (the "Five Tests"): [48]

1. *The "Commonly Understood" Test*: This test asks whether or not the task is one that the community traditionally expects to be performed by a lawyer. [49]
2. *The "Client Reliance" Test*: This tests hinges on whether the parties actually believe that they are receiving legal services. [50]
3. *The "Relating Law to Specific Facts" Test*: This test classifies acts as the practice of law if they involve relating general legal principles to a specific fact pattern or case. [51]
4. *The "Affecting Legal Rights" Test*: This test asks, in very broad terms, if the matter inherently involves the parties' legal rights. [52]
5. *The "Attorney Client Relationship" Test*: The determining factor under this test is whether or not the relationship between the parties is easily distinguishable from an attorney-client relationship. [53]

The distinctions drawn by these tests present some vague guidelines for nonlawyers to use to steer themselves away from UPL violations but hardly achieve the clarity necessary to protect even the most well-intentioned mediator. Recognizing the insufficiency of the Five Tests, some states have elected to take proactive steps to develop more transparent guidelines specifically for mediators.

One such state at the forefront of the movement to develop standards applicable specifically to mediation is Virginia. [54] The Virginia *Guidelines on Mediation and the Unauthorized Practice of Law* (the "Virginia Guidelines"), drafted by the Supreme Court of Virginia, attack the issue by identifying two common types of mediator practices that could be considered the practice of law. The first, dispensing "legal advice" is described as follows:

A mediator is considered to have offered legal advice when 'he or she applies legal principles to facts in a manner that (I) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges, or recommends a course of action by a disputant or disputants as a means of resolving a legal issue.' [55]

It is important to note that this definition permits mediators to provide copies of statutes and cases, ask reality testing questions, and even state what they understand to be the governing law on a given issue. [56] As opposed to giving "legal advice," a prohibited practice, providing "legal information" is generally permissible. [57] However, the Virginia Guidelines explicitly forbid a mediator from applying law to factual situations or using it as a basis for any sort of advice or guidance.

The second distinct practice identified by the Virginia Guidelines is the drafting of settlement agreements. [58] With respect to these agreements, the Virginia Guidelines note that settlement agreements are contracts, which, in turn, makes them legally enforceable documents. Nevertheless, Virginia authorizes nonlawyer-mediators to draft written agreements for parties "so long as they, like attorney-mediators, limit their drafting services to those of a scrivener." [59] Thus, nonlawyers are deemed to have engaged in the practice of law if their drafting activities extend beyond those terms specified by the parties. [60]

Similar to the Virginia Guidelines, the focus of the North Carolina *Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law* ("North Carolina Guidelines") is primarily the two categories of legal advice and settlement agreements. As it pertains to legal advice, the North Carolina Guidelines take a comparable approach to that of the Virginia Guidelines. "In the mediation context, a non-attorney mediator who takes the facts of a particular case, applies

these facts to the law of the matter and advises a participant to the mediation as to this analysis, is committing the unauthorized practice of law." [61] Exempted from this class of impermissible actions, just as it is allowed under the Virginia Guidelines, is the supply by nonlawyer-mediators of basic legal information such as brochures and copies of applicable law. [62] Essentially, the North Carolina Guidelines attempt to mirror the Virginia Guidelines by trying to differentiate between "legal advice" and "legal information."

On the topic of settlement agreements, [63] the North Carolina Guidelines permit the drafting of documents by nonlawyer-mediators but they repeatedly emphasize that such individuals cannot offer any advice as to the legal effects of such documents. Additionally, the Guidelines state that the mediator should encourage the parties to consult with legal counsel before creating any writings that they intend to be legally binding. [64]

III. A New Direction

Both the North Carolina and Virginia Guidelines represent a significant progression in UPL governance for nonlawyer-mediators. Not only have they refined and synthesized many of the general principles underlying the Five Tests, they are also the first attempt to tailor UPL provisions specifically to mediation. This alone makes these guidelines a more effective articulation of the distinction between permissible conduct and UPL than previously existed. However, while the guidelines symbolize progress, they are admittedly less than perfect. The standards set forth by the guidelines may still be extremely difficult to enforce in practice. As stated in the North Carolina Guidelines, "there are no bright lines" in the distinctions made by the new rules. [65] Unfortunately, until some brighter lines begin to appear, nonlawyer-mediators will continue to be vulnerable to the threat posed by UPL sanctions.

One practical flaw in the North Carolina and Virginia Guidelines is that they tend to rely too heavily on the presence of an easily discernable division between "legal information" and "legal advice." The reality, however, is that in most situations, when a mediator decides to bring any kind of substantive law to the attention of the parties, the division between legal advice and legal information will quickly become murky. [66] The following statement, an example created by lawyer-mediator David Hoffman, provides a prime illustration of the problem inherent in the distinction between legal information and legal advice: "The plaintiff seems to have a better liability case than [the defendant]." [67] As Hoffman points out, whether this statement constitutes legal information or legal advice is unclear. [68] Similarly, consider the following statement: "This proposal could turn out to be a good thing for you." [69] Under the second prong of the legal advice test created by the Virginia Guidelines, would this constitute "directing, urging, or recommending a course of action?" Ambiguities such as these are bound to arise when mediators are asked to walk the sometimes invisible line between advice and information.

The drafters of the North Carolina and Virginia Guidelines are not the only groups that have struggled to articulate a clear difference between advice and information. For example, in its 2004 Proposed Policy Statement on the Authorized Practice of Mediation ("ACR Proposal"), the Association for Conflict Resolution ("ACR") grouped mediation practices into three categories: authorized, improper, and "rub areas" warranting increased scrutiny. [70] Among the authorized practices were listed the following:

- Facilitate the parties' conversation about applicable law
- Facilitate the parties' discussion regarding their assessments of the strengths and/or weaknesses of their respective cases
- Prepare agreements that incorporate only the terms agreed to by the parties [71]

The second group, improper practices, included the following:

- Apply legal precedent to the specific facts of the dispute
- Advise parties about their legal rights and responsibilities...
- Offer any personal or professional opinion as to how the court in which a case has been filed will resolve the dispute [72]

The third category, "rub areas," contained the following:

- Proposing options for parties' consideration
- Recommending a specific course of action
- Providing any personal or professional evaluation of the strengths and weaknesses of the case, either directly or implicitly, even when it is not intended to coerce the parties or direct a resolution. [73]

Much like the North Carolina and Virginia Guidelines, the ACR proposal falls short in its attempt to draw any practical distinction between authorized practices — legal information — and those which it deems improper — legal advice. It simply

places the controversial practices into a separate group, the "rub areas," and advises mediators to engage in their own decision-making "based on careful consideration of the fundamental values of mediation in order to preserve the integrity of the process." [74] It seems unrealistic to assume that nonlawyer-mediators will always be able to properly determine whether or not a "rub area" tactic should be permitted under the circumstances. Thus, although the labels used by the ACR Proposal differ from North Carolina and Virginia, all three fail to draw a clear line between advice and information. Aside from this fundamental deficiency, the North Carolina and Virginia Guidelines also fall short on the subject of written agreements. When evaluating a written agreement or memorandum of understanding generated by a mediator, it would be very difficult to know if he or she had acted solely as scrivener, as demanded by the guidelines, or instead, drafted beyond the explicit instructions of the parties. [75]

This recognition of the shortcomings of the North Carolina and Virginia approaches suggests that a basic change in philosophy will be necessary for the next generation of UPL statutes designed for mediation to ease the burden on nonlawyer-mediators. Some have suggested that the solution to the information/advice problem is to eliminate the distinction altogether and simply exempt mediators from UPL rules. [76] However, giving nonlawyer-mediators unlimited freedom to dispense advice would pose a serious risk to mediation party participants. [77] The outcomes of mediations could potentially be shaped by legally inaccurate information and there would be no avenue for recourse against offending mediators. Clearly, this solution is too dangerous to warrant serious consideration.

Unfortunately, this article will not attempt to assert some kind of "perfect solution" to the UPL problem facing the nonlawyer-mediator because such a solution simply does not exist. Any proposed guidelines will invariably be forced to face the same questions regarding the line between permissible conduct — legal information — and that which is impermissible — legal advice. As the ACR Proposal illustrated, simply changing the phrasing of the rules will not allow mediators to circumvent this basic dilemma. No matter how future drafters choose to script new guidelines, they will eventually have to ask themselves how far nonlawyers should be allowed to stray from facilitative mediation into the domain of evaluative mediation, and this is the essential question in the legal information versus legal advice debate. [78]

Having conceded that there are no easy answers that will somehow allow the next wave of guidelines to solve all the nonlawyer-mediator's UPL issues, there is still one basic ideological change that could allow future regulations to drastically improve upon their predecessors. Presently, most UPL guidelines, including those of North Carolina and Virginia, implicitly assume that all mediation situations are the same. However, this assumption is fundamentally flawed. In reality, mediations can differ drastically from one another depending on a variety of surrounding circumstances. The potential inconsistencies in these contextual factors make it virtually impossible to draw a comprehensible division between permissible evaluative mediation and UPL under the "one size fits all" mentally which dominates existing UPL guidelines. [79] Rather, in the future, in order to devise a standard that works properly in all mediation situations, drafters of UPL regulations must take a more practical approach and embrace a more flexible standard which acknowledges the importance of context in the mediation setting. [80] With this in mind, the line between permissible act and UPL violation should shift gradually depending on several contextual factors.

To effectuate real progress for mediators and party participants alike, the factors should satisfy two objectives. First, they should eliminate, rather than promote confusion. Uncertainty and ambiguity are precisely the qualities that necessitate a shift away from rigid definitions of advice and information, thus, any flexibility factors should avoid these same problems. Second, the factors should seek to improve the quality of service that parties receive from mediators. In practice, this equates to allowing mediators as much freedom as possible to engage in evaluative mediation, if desired by the parties, so long as they have been adequately trained and will do no harm to the parties through their actions.

With these goals in mind, the factors themselves must satisfy two important criterions. The first is that they are easily discernable. For example, one of the contextual factors suggested by the ACR Proposal is the presence of counsel. [81] Since both a mediator and an enforcing agency could easily determine whether or not a mediation session was being conducted in the presence of counsel for the parties, this appears to satisfy the first criterion. On the other hand, another contextual factor mentioned in the ACR Proposal is the parties' understanding of the mediation process and the role of the mediator. [82] Unlike the presence of counsel, which is clearly identifiable, this contextual element is often difficult to ascertain and could be subject to a wide variety of perceptions and interpretations. Thus, it would it would not be a good factor upon which to base the UPL line because it would lead to the same type of ambiguity problems caused by the advice versus information distinction.

The second criterion is that the factor provides persuasive evidence that the nonlawyer-mediator's evaluations and observations will either be accurate, valuable to the parties, or unbiased. This requirement aims to strike the balance sought by the mediation quality objective and insure that the governing UPL standard will afford competent mediators as much freedom as possible to aid the parties. Again, using the presence of counsel as an example, the existence of this factor provides compelling evidence that any inaccurate or misleading evaluations made by the mediator will be corrected before

reaching the parties and that the parties will be able to interpret the evaluations accurately. A factor such as the relationship of the parties does not have such probative value, hence, it would not be a good variable to incorporate into the guidelines.

With these criteria in mind, the following factors appear to be suitable UPL dependency variables:

1. *The Presence of Counsel*: As stated, this element easily satisfies both criterions. It is a yes or no proposition and if it exists, it strongly suggests that evaluations by the mediator will not adversely affect the mediation. Thus, when counsel is in fact present for both parties during a mediation session, UPL standards should be relaxed. Many jurisdictions have already incorporated this element into their UPL enforcement practices by refraining from prosecuting mediators who communicate legal advice or drafting suggestions to counsel for the parties. [83]
2. *The Mediator's Fee or Lack Thereof*: This clearly satisfies criterion one. The mediator, the parties, and an enforcement agency already know, or could easily obtain this information. The information satisfies the second criterion as well. As held by the Missouri Supreme Court, when an individual charges a fee for a law-related service, the person is essentially implying that they are in the business of law. [84] Thus, if a fee is being charged by a nonlawyer-mediator for his or her services, the parties are more likely to believe that the mediator has legal expertise and will accord more weight to any evaluative statements he or she might make. The real question, however, is how UPL guidelines should shift to accommodate this contextual element. If the parties naturally expect that professional mediators will have more substantive legal knowledge, the law should permit them to engage in more evaluative mediation practices. However, greater responsibility should also accompany this additional freedom. Paid mediators should be forced to satisfy additional training requirements and should face more severe penalties for violating the more liberal UPL standard.
3. *The Nature of the Mediation Program (Court vs. Non-Court)*: Prong one of the factor test is satisfied as it is common knowledge whether a mediation program is operated by a court. Regarding the second criterion, in a court-operated mediation program, the court often regulates the program and assumes responsibility for ensuring the quality of the mediators. [85] The presence of additional training requirements and regulatory oversight adds an extra layer of protection against the possibility that overly evaluative mediator statements will negatively affect the parties. Due to these additional safeguards, many jurisdictions have relaxed standards for court-appointed mediators. [86] Any new UPL guidelines drafted for mediation should follow suit.
4. *Whether or Not the Dispute is In Litigation*: Once again, this is a simple yes or no proposition. Additionally, the answer can seriously impact the probable accuracy of settlement agreements in particular because court approval may be a prerequisite to the finalization of any agreement. [87] Thus, if the nonlawyer-mediator is mediating a dispute which has already begun moving through the litigation process, UPL standards should be relaxed.

IV. Conclusion

Without a doubt, there is a serious need to preserve the role of nonlawyers in the field of mediation. Their presence provides parties seeking mediation services with a diverse set of mediator options from which to choose. In addition, the ability of nonlawyer-mediators to approach mediations with a collaborative mindset and a perspective unconstrained by traditional legal boundaries may actually give party participants greater opportunity to reach mutually desirable agreements.

Incorporating the nonlawyer into mediation has been, and will continue to be, an extremely difficult task. Questions about the unauthorized practice of law will consistently arise as nonlawyer-mediators employ necessary evaluative techniques in mediations and help parties draft settlement agreements. While the five most common tests for determining what constitutes the practice of law have been inconclusive and inconsistent, the new guidelines adopted by North Carolina and Virginia are a major step towards the development of effective UPL rules specifically for mediation. Nevertheless, these new guidelines still rely on a vague distinction that fails to protect the well-intentioned mediator from UPL violations. While there is no easy solution that will correct this problem, serious improvements can be made by accepting the fact that drafting UPL guidelines for mediation should not be a "one size fits all" proposition. Mediators face a wide variety of circumstances, many of which are easily identifiable and highly probative of the accuracy and/or value of the information which they may choose to dispense. Thus, future guidelines should be flexible and base the parameters of UPL upon these circumstantial factors.

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[1] *See* Sarah R. Cole et al., Mediation: Law, Policy & Practice §10:5 (2d ed. 2006). Individuals not licensed as lawyers are commonly referred to as "nonlawyers."

[2] *See* Stephanie A. Henning, Note, *A Framework for Developing Mediator Certification Programs*, 4 Harv. Negot. L. Rev. 189, 204 (1999) ("[T]he argument that mediation should be limited to lawyers because mediation is a natural out growth of law and legal skills is unconvincing[.]").

[3] *Id.*

[4] *Id.* (citing a study of mediation in Georgia which indicated that nonlawyer-mediators tended to be less evaluative, more interested in problem solving, and more concerned with process than outcome).

[5] Brian Wassner, Note, *A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs*, 4 Cardozo J. Conflict Resol. 1 (2002).

[6] *See* Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 Ark. L. Rev. 207, 231 (2001) (noting that under certain circumstances and in certain situations, only lawyers are allowed to serve as mediators).

[7] *See* Cole, *supra* note 1, §10:5, at 10-34; Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. Disp. Resol. 247, 282 (2000).

[8] *See* Ass'n for Conflict Resol., The Authorized Practice of Mediation 1 (2004), *available at* http://www.acrnet.org/pdfs/upl-draftrpt-aug04.pdf (last visited March 28, 2007) [hereinafter ACR Proposal] (recognizing the growth in popularity and use of mediation).

[9] *See* Mathew Daiker, *Despite Challenges, Non-Lawyer-mediators Make Critical Contributions to the Field of Mediation*, 3 Mayhew-Hite R. on Disp. Res. and Cts Issue 1 (2004), *available at* http://moritzlaw.osu.edu/jdr/mayhew-hite/vol3iss1/index.html (last visited March 28, 2007).

[10] *Id.*

[11] *Id.*

[12] Paul J. Spiegelman, *Certifying Mediators: Using Selection Criteria to Include the Qualified — Lessons From the San Diego Experience*, 30 U.S.F. L. Rev. 677, 696 (1996).

[13] ACR Proposal, *supra* note 8, at 7.

[14] *See* Stempel, *supra* note 7, at 258.

[15] Daiker, *supra* note 9; *see also* Abstracts, 18 Berkeley J. Emp. & Lab. L. 166, 173 (1997) (associating nonlawyer-mediators with non-adversarial thinking).

[16] *See* Daiker, *supra* note 9; *see also* Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 Harv. Negot. L. Rev. 235, 252 (2002) ("Lawyers...tend to confine their discussion of conflicts and disputes in structural categories that are familiar to them. 'Cases' are referred to mediation. 'Litigants' participate in the mediation process. Their involvement has given rise to charges that they are making ADR more adversarial and legalistic . . . In the view of one commentator, lawyers have 'intentionally created an ever widening feeling of distance between the everyday citizen and the practice of mediation.'").

[17] Daiker, *supra* note 9.

[18] Symposium, *Toward More Sophisticated Mediation* Theory, 2000 J. Disp. Resol. 321, 322 (2000).

[19] *See* Carole J. Brown, *Facilitative Mediation: The Classic Approach Retains its Appeal*,4 Pepp. Disp. Resol. L.J. 279, 290 (2004).

[20] Symposium, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. Disp. Resol. 295, 300 (2000); *see also* Marjorie H. O'Reilly, *Race, Culture & Mediation*, 27 Fam. Adv. 37, 38 (2004) (noting that one of the major advantagaes of mediation is that the parties have greater control over the process and ultimate outcome).

[21] *See* Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes, in* Mediation Research: The Process and Effectiveness of Third-Party Intervention 53, 59 (Kenneth Kressel et al. eds., 1989).

[22] *See* Daiker, *supra* note 9.

[23] *Id.*

[24] *Id.*

[25] Andrew S. Morrison, Comment, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 Cal. L. Rev.

1093, 1125 (1987).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See, e.g.*, John W. Cooley, The Mediator's Handbook: Advanced Practice Guide for Civil Litigation § 1.6.5 (2000); *see also* ABA Sec. of Disp. Resol., Resolution on Mediation and the Unauthorized Practice of Law (2002), *available at* http://www.abanet.org/dispute/resolution2002.pdf (last visited March 28, 2007) [hereinafter ABA Resolution]; Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO HIGH COST LITIG. 74 (1996) (finding that mediation is not the practice of law because there is no attorney-client relationship). *But see* Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST LITIG. 57 (1996) (arguing that certain elements of mediation constitute the practice of law).

[31] Cooley, *supra* note 30, at 1.6.5.

[32] *See* Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 Pepp. Disp. Resol. L.J. 111, 113 (2002) ("[T]here is evidence of a rising level of 'market demand' for a form of mediation in which the mediator provides expert case evaluation (assessing strengths and weaknesses of each party's case), substantive settlement recommendations (based on predictions of court outcomes, for example), and strong pressures to accept those recommendations, in addition to tightly managing the discussion process."); *see also* Stempel, *supra* note 7, at 263 (stating that mediators should also be prohibited from giving legal advice to "prevent the mediator from choosing sides, playing favorites, interfering with party-lawyer relations, or impeding voluntary resolution through needless, legalistic Monday-morning quarterbacking").

[33] Examples of such agencies are state Attorney General's offices, district attorney's offices, and state bar UPL committees. David A. Hoffman & Natasha A. Affolder, Ass'n for Conflict Resol. , A Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law 1 (2000), *available at* http://www.acrnet.org/pdfs/hoffman-affolder.pdf (last visited March 28, 2007).

[34] *Id.; see also* Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 Harv. Negot. L. Rev. 81, 98 (2003).

[35] Hoffman, *supra*, note 33, at 1.

[36] *See, e.g.*, Virgina Tele-Court Project, Mediation: A Consumer Guide Ch. 2, § 2, *available at* http://www.courts.state.va.us/drs/upl/legal_advice.html#introduction (last visited March 28, 2007) ("[N]either lawyer nor non-lawyer-mediators may give legal advice to the disputing parties during mediation. Non-lawyers who do so have engaged in unethical mediation practice, which may lead to decertification and are subject to criminal prosecution or civil action for UPL. Lawyer-mediators who provide legal advice have likewise engaged in unethical mediation practice which may lead to decertification and are subject to discipline by the Virginia State Bar.").

[37]*See* Cole, *supra* note 1, §10:5, at 10-35 n. 3 (citing Supreme Court of Virginia, Guidelines on Mediation and the Unauthorized Practice of Law).

[38] *Id;. see also* Moffitt, *supra* note 34, at 102 ("Even attorneys — for whom UPL poses no threat — confront the prospect of ethical complaints if they engage in the traditional practice of law while acting as a mediator.").

[39] Cole, *supra* note 1, §10:5, at 10-35 n. 3.

[40] *See* ACR Proposal, *supra* note 8, at 2.

[41] *See* Moffitt, *supra* note 34, at 102.

[42] *Id.* at 100.

[43] *Id.*

[44] *See generally* Nolan-Haley, *supra* note 16, at 260 ("UPL enforcement methods vary and may rest with bar associations, supreme court committees or civil and criminal law enforcement through the attorney general or public prosecutor's office.").

[45] Hoffman, *supra* note 33, at 1.

[46] *See* Cole, *supra* note 1, §10:5, at 10-36-10-37 (citing Werle v. Rhode Island Bar Ass'n, 755 F.2d 195, 199-200 (CA1 1985)).

[47] *Id.*

[48] The five tests were originally laid out in *Guidelines on Mediation and the Unauthorized Practice of Law*.

[49] Roger Wolf, *The Gray Zone: Mediation and the Unauthorized Practice of Law*, Md. Bar. J., July-Aug. 2003, at 40, *available at* http://www.msba .org/departments/commpubl/publications/bar_journ/v36/grayzone.htm (last visited March 28, 2007).

[50] *Id*.

[51] *Id*.

[52] *Id.*

[53] *Id.*

[54] Nolan-Haley, *supra* note 16, at 272 (citing Virginia Guidelines on Mediation & the Unauthorized Practice of Law 35-38 (1999)).

[55] *Id.*(quoting Virginia Guidelines on Mediation & the Unauthorized Practice of Law 35-38 (1999)).

[56] Hoffman, *supra* note 33, at 3; *see also* Virgina Tele-Court Project, Mediation: A Consumer Guide Ch. 2, § 4, *available at* http://www.courts.state.va.us/drs/upl/legal_advice.html (last visited March 28, 2007).

[57] *See generally* Wolf, *supra* note 48, at 40 (recognizing the "large area of gray" between the permissible act of providing legal information and the impermissible act of providing legal advice); Hoffman, *supra* note 33, at 4 ("The distinction drawn in both sets of Guidelines between 'legal information' and 'legal advice' is a familiar dividing line between permissible and impermissible practice from the standpoint of mediator ethics.").

[58]Virgina Tele-Court Project, Mediation: A Consumer Guide Ch. 3, § 2, *available at* http://www.courts.state.va.us/drs/upl/mediated_agreements.html (last visited March 28, 2007).

[59] *Id.*

[60] Hoffman, *supra* note 33, at 3.

[61] North Carolina Bar Ass'n, Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law (1999), *available at* http://www.mediate.com/articles/ncarolinabar.cfm (last visited March 28, 2007).

[62] *Id*.

[63] The North Carolina Guidelines also refer to a written mediation document as "Memorandum of Understanding." *See id.*

[64] *Id.*

[65] *See id.*

[66] Joel Kurtzberg and Jamie Henikoff, *Freeing the Parties From the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. Disp. Resol. 53, 83 (1997) ("Many mediators who introduce substantive law to parties during a mediation try to distinguish their actions from those typically conducted by lawyers by relying on the nebulous distinction between providing 'legal information' and providing 'legal advice.'").

[67] Hoffman, *supra* note 33, at 4.

[68] *Id.*

[69] *Id.*

[70] *See* ACR Proposal, *supra* note 8, at 8-12.

[71] *Id.* at 8-9.

[72] *Id.* at 10.

[73] *Id.* at 11-12.

[74] *Id.* at 11.

[75] Hoffman, *supra* note 33, at 4.

[76] *See* Nolan-Haley, *supra* note 16, at 273-274 ("A second approach for avoiding UPL issues is to carve out an exception to UPL for mediators. This avoids the difficult problem of trying to distinguish between legal information and advice.").

[77] *See generally id.* at 268 (noting that the UPL doctrine was originally designed as a device to protect the public against fraud and incompetent, unlicensed lawyering).

[78] *See generally*, Cooley, supra note 30, at 1.6.5 ([T]here is a debate within the ADR profession as to what conduct does and does not constitute the unauthorized practice of law when a person is serving in the role of mediator...[T]he heart of the debate seems to revolve around differences between facilitative and evaluative mediation...").

[79] *See generally* Nolan-Haley, *supra* note 16, at 273 ("The advice/information distinction can be problematic as a long-term solution to the problem of managing UPL in mediation practice. Some commentators have observed that there is no real difference between information and advice. Moreover, distinguishing between the two forms of communication may be more difficult for a layperson than for an attorney and may well depend upon *context*.") (emphasis added).

[80] *See* ACR Proposal, *supra* note 8, at 7("Mediators often face complex and ambiguous circumstances in the midst of mediating, and they are called upon to make a broad range of decisions concerning proper and effective practice. These decisions will be reached through an interplay of specific circumstances of the mediation with the fundamental principles of the process. When considering possible steps or interventions, the specific context requires a mediator to consider — explicitly or implicitly — a range of factors...").

[81] *Id*.

[82] *Id.*

[83] *See* Cole, *supra* note 1, §10:5, at 10-36.

[84] *Id.* at 10-38 – 10-39 (citing In re Mid-America Living Trust Associates, Inc., 927 S.W.2d 855, 859 (Mo Sup. Ct. 1996)).

[85] Robert W. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 Ohio St. J. on Disp. Resol. 609, 619 (2002).

[86] *See* Cole, *supra* note 1, §10:5, at 10-36 (citing a survey of state and selected municipal bar counsels or prosecution agencies charges with unauthorized practice responsibilities conducted in April, 1988).

[87] *Id*. at 10-45 ("The additional safeguard of court approval could be added for mediation of disputes already in litigation.).