Why Mediators Should Be Regulated

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by
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The desire to eliminate charlatans and quacks from a given profession is more than mere rhetoric for both the practitioner and the consumer.

I. Introduction

Gary J. Karpin arrived in Phoenix shortly after he was disbarred in Vermont and established himself as a divorce mediator. He spent the next several years swindling hundreds of thousands of dollars from his clients before taking up residence in the Arizona penal system.

One of his unsuspecting victims was Gina Niedzwiecki. She learned about Karpin from a friend and convinced her estranged husband to try mediation. During their first consultation, Karpin greeted the Niedzwieckis warmly, explained the mediation process, and reviewed his standard mediation agreement. They signed it and paid him a non-refundable $975 retainer for further sessions, which they believed would cover the entire cost of their divorce.

At the end of their second mediation session, Karpin asked for $1,000; Gina paid it. In their third session, Karpin asked for information he had already received and then asked for more money, which caused Niedzwiecki’s husband to storm out of the building in a rage.

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1 Clinical Professor of Law and Director of the Lodestar Dispute Resolution Program at the Sandra Day O’Connor College of Law at Arizona State University and Senior Fellow at the Center for the Study of Dispute Resolution at the University of Missouri School of Law; A.B. Washington University in St. Louis, 1988; J.D. and LL.M. University of Missouri 1993 and 2000 respectively. I thank the following for reviewing earlier drafts of this article: Jim Alfini, Jess Alberts, Adam Chodorow, Bob Dauber, Jack Goetz, Zak Kraemer, Michael Moffitt, Sharon Press, Geetha Ravindra, Leonard Riskin, Troy Rule, Andrea Schneider, Sarah Selzer, and Roselle Wissler. I also thank Jim Coben, Janice Fleischer, and Susan Yates for being a part of a presentation on the topic of regulating mediators that influenced my thinking for this paper. Finally, I thank Trisha Becker, Sophia Pia-Long, and Ashley Votruba for their research assistance and Beth DiFelice and Tara Mospan for their librarianship.

2 Marc T. Law & Sukkoo Kim, Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation, 65 J. ECON. HIST. 723, 728 (2005)


6 Id.

knowing what to do, Niedzkwicki turned to Karpin who consoled and comforted her before she left.\(^8\) She ultimately decided to attend the next regularly scheduled meeting with Karpin -- even though her husband refused to attend any further sessions.\(^9\) At this meeting Karpin told Niedzwiecki that her divorce “was considered a contested divorce and was going to go into litigation” and, as a result, she needed to give him another $5000.\(^10\) She gave him the money and continued meeting with him every other week for the next several months.\(^11\)

During these one-on-one meetings Niedzwiecki grew to trust Karpin completely.\(^12\) He charmed her, gave her unexpected and flattering attention, and provided emotional support.\(^13\) She considered him one of her closest friends.\(^14\) Over these several months, she made numerous payments to Karpin in $1000 to $10,000 increments believing each payment was necessary to move her divorce through the court system.\(^15\) Karpin even signaled that he wanted more; he repeatedly told her, “Let’s get you single so we can take this to the next level.”\(^16\) Although Karpin claimed to be providing Niedzwiecki mediation services, he was giving her legal advice and acting as her lawyer, despite the fact that he was not licensed to practice law in Arizona.\(^17\)

Because he was acting as Niedzwiecki’s\(^{\text{defacto}}\) lawyer, Karpin also manipulated her thinking about the terms of her divorce. Three months after their initial appointment, the

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\(^9\) Id. at 14.
\(^10\) Id. at 41; id., pt. 2., at 13-14.
\(^11\) Id. at 37.
\(^13\) Id. at 20-21 and 36-37 (arguing to the Court over an objection); Rubin, Dr. Buzzard, supra note __.
\(^14\) Karpin Tr., supra note __, Aug. 14, 2008, pt. 2, at 14, 20-24, 28-29, 36-37; Rubin, Dr. Buzzard, supra note __.
\(^15\) See e.g., Karpin Tr., supra note __, Aug. 14, 2008, pt. 1, at 15, pt. 2 at 18-19, 27, 33, 44-46. Niedzwiecki testified that Karpin told her they were waiting for a judge to make various rulings in her case and that he had appeared in front of the judge 8 times on her behalf. Karpin Tr., supra note __, Aug. 14, 2008, pt. 2, at 29, 47
\(^16\) Karpin Tr., supra note __, Aug. 14, 2008, pt. 2, at 36-37 (arguing to the Court over an objection); Rubin, Dr. Buzzard, supra note __.
\(^17\) Karpin Tr., supra note __, Oct. 6, 2008, pt. 1, at 25 (Van Wie Closing Argument)(stating “This is not a trial about the unauthorized practice of law. Clearly [Karpin] engaged in the unauthorized practice of law.”); Karpin Tr., supra note __, Oct. 6, 2008, pt. 2, at 81 (Van Wie Closing Argument)(stating “That doesn’t make it mediation. What it was was legal work. He was practicing legal work, just calling it something else.”) Furthermore, all of the court documents that Karpin filed on Niedzwiecki’s behalf were filed as if she were representing herself. Karpin Tr., supra note __, Aug. 14, 2008, at 27-30 (indicating that Karpin field all of her court papers for her, but did so as if she were unrepresented).
Niedzwiecki had a basic understanding on most of the terms of their divorce. But Karpin convinced Gina to reconsider her decisions on child custody, child support, and financial terms. As their meetings continued, Karpin proposed numerous alternatives that were so contradictory that Niedzwiecki could not keep track of them.

In one of their last meetings, Karpin reportedly had Niedzwiecki practice her “court testimony,” which focused on intimate details of her sex life. A few days later Karpin told her that she did not have to testify, and within a week her divorce decree arrived in the mail from the Superior Court. By this time, 15 months had passed since her first mediation session and she had paid Karpin a total of $87,767 for his services.

Upon learning of the finalized decree, Karpin asked Niedzwiecki to come by his office for one last meeting. Karpin presented her with a $25,000 final bill, which he described as a bargain because he had “talked the corporate office down” from $36,000. She wrote him a check for $9,000, but later stopped payment on it. After attempting to deposit the check Karpin, left Niedzwiecki numerous voicemail messages, ranging from furious threats of legal action to warm apologies for his earlier nasty messages. Subsequently Niedzwiecki asked for documentation supporting the charges she had incurred, but Karpin claimed a janitor had thrown them all away.

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19 Id. at 25-26.
20 Id. at 30-32 (describing changes Karpin claimed a judge was suggesting), 35-36.
21 Karpin Tr., supra note __, Sept. 2, 2008, 58-61
22 Id. at 62-63, 66
25 Id. at 71-72, 75.
26 Id. at 75-77; Rubin, Dr. Buzzard, supra note __
27 Karpin Tr., supra note __, Sept. 2, 2008, at 59, 80-81. Niedzwiecki testified that Karpin told her that he had climbed into the dumpster searching for her files. Id. at 63.
Not knowing where to turn Niedzwiecki sought assistance from the Arizona State Bar which referred her case to the Maricopa County Attorney’s Office. The ensuing investigation led the authorities to believe that Karpin had pocketed approximately $1 million from more than 300 victims, 40 of whom were named in the criminal charges brought against him. Karpin was subsequently indicted for, and convicted of, theft by material means and for fraudulent schemes and artifices.

How could Karpin con so many people out of so much money before he was prosecuted? Why were there no mechanisms in place to monitor mediators’ conduct and discipline or remove mediators from practice for engaging in such acts? In an age where occupational regulation is commonplace, why are mediators utterly unregulated?

Mediation has seen tremendous growth over the last thirty years, moving from an unconventional means of conflict resolution to a common step in the traditional litigation process. This growth has generated periodic calls for regulation, but these calls have been largely unanswered. Anyone in any state can hold herself out to the public as a mediator without any training or other demonstration of competence. No state regulatory authority acts as a gatekeeper to the mediation field; no state agency can keep a person from providing

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28 Id. at 75.
31 Mediation is defined as a facilitated negotiation process in which an impartial third party assists disputing parties in their attempt to resolve a dispute. SARAH R. COLE, ET AL., MEDIATION: LAW, POLICY & PRACTICE, ch.1.1-1.2 (2012-13).
32 See infra notes __ to __ and accompanying text (detailing the growth of mediation).
33 DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT 303 (2nd ed. 2012); COLE ET AL., supra note __, at 587; ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON CREDENTIALING, REPORT ON MEDIATOR CREDENTIALING AND QUALITY ASSURANCE 22 (Draft 2002) [hereinafter ABA, MEDIATOR CREDENTIALING].
34 Paula M. Young, Take It or Leave It, Lump It or Grieve It: Designing Mediation Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process and the Field, 21 OHIO ST. J. ON DISP. RESOL. 721, 725-26 (2006).
mediation services; no state regulator applies professional ethical standards across the mediation field; and no state agency can discipline wayward mediators in a meaningful manner to keep them from harming the public.35

This is not to say that mediators are always unregulated. Court-connected mediation programs exist in state and federal courts and serve a quasi-regulatory function. However, most of these programs are small, focusing only on mediators who mediate cases in that particular court, and only a handful of states operate a statewide court-connected mediation program out of a centralized office.36 As quasi-regulators, courts exert control over which mediators are included on their list of approved mediators, basing inclusion primarily on training and experience credentials.37 Few programs assess mediator performance, either at selection or on an on-going basis, although some do solicit users’ feedback.38 But a strategy of relying on court-connected mediation programs as the structure to regulate mediators is problematic because most mediation takes place outside of court-connected programs. When mediators are removed from a court-approved list, there is no mechanism to discontinue their mediation practice outside the court system. This leaves the vast majority of mediators in the United States largely unregulated and subject only to market forces.39

One might expect civil litigation to be an important check against unsavory mediators, acting as a substitute for regulation through breach of contract or professional malpractice claims.40 But several states protect mediators from civil liability.41 Furthermore, establishing a

35 See FRENKEL & STARK, supra note __, at 303; COLE ET AL., supra note __, at 587; GOLANN & FOLBERG, supra note __, at 405; ABA, MEDIATOR CREDENTIALING, supra note __, at 22.
36 See infra notes __ to __ and accompanying text.
38 Id.
39 See FRENKEL & STARK, supra note __, at 303; COLE ET AL., supra note __, at 587; GOLANN & FOLBERG, supra note __, at 405; ABA, MEDIATOR CREDENTIALING, supra note __, at 22.
40 See KLIENER, supra note __, at 1-2.
41 See infra note __ and accompanying text.
mediator’s duty of care to mediation clients, an essential element for a malpractice claim, is challenging, and quantifying any resulting damages is extremely difficult.42 For all intents and purposes, consumers engage mediators on a strict caveat emptor basis.43

At present, regulation has been kept at bay with no significant impact on mediation’s continued growth. The concerns fueling regulation’s proponents, however, refuse to go away. Advocates for regulation contend that regulation would enhance consumer protection, educate the public about mediation and mediators, produce higher skilled practitioners, and enhance the field’s credibility.44 Those opposed to regulation argue that market forces already ensure quality, mediation is too poorly defined for regulatory purposes, regulation would impose a straight-jacket on a dynamic and varied field, and regulation would diminish provider diversity and consumer access.45 This paper addresses these arguments against mediator regulation head-on and demonstrates that they fail to justify mediation’s defacto unregulated status. Using Karpin’s exploits as an example, it argues that consumer protection should be the motivating justification for regulating mediators and that this justification has an impact on the type of regulation states should adopt.

To make the case for the regulation of mediators this article proceeds as follows. Part II puts Niedzweiki’s story in context, explaining how regulatory gaps allowed Karpin to thrive as a self-identified mediator for nearly nine years. Part III discusses occupational regulation generally, including the policies behind it and the various forms of occupational regulation. It also details prior attempts at regulating mediators to explain why mediators are unregulated, and Part IV lays out the policy reasons why mediators should be regulated and refutes the established

44 See infra notes __ to __ and accompanying text.
45 See infra notes __ to __ and accompanying text.
arguments against regulation. With that backdrop, Part V provides a two pronged method for regulating mediators that avoid the pitfalls of prior regulatory efforts, suggests the best form of regulation, and discusses what regulation means to the field as whole. Part VI ultimately contends that the time for licensing has arrived, especially for mediation to be recognized as more than a sub-field of other professions.

II. Karpin in Depth

Gary Karpin’s fraudulent and unethical conduct began well before he posed as a divorce mediator in Arizona and continued throughout his nearly nine-year mediation career. Over this period, numerous clients complained to various professional organizations, but these organizations were powerless and referrals to the Arizona Attorney General’s Office went nowhere. Only after the Arizona State Bar referred Niedzwecki to the Maricopa County Attorney was he finally prosecuted and convicted.

A. Background

Karpin received bachelor degrees from two small liberal arts colleges in Vermont before attending the Vermont Law School which awarded him a J.D. in 1985. He was admitted to the Vermont Bar in 1987 and shortly thereafter became a Deputy State’s Attorney in Orleans County. In less than a year, he became a solo practitioner in Newton, Vermont.

In 1992 the Vermont Professional Conduct Board (PCB), the entity responsible for attorney discipline in Vermont, charged Karpin with fraudulent conduct and found him to be unscrupulous with his clients. In one case, Karpin advised his clients to seek double recovery

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46 Arizona v. Karpin, No. CR2006-031057, filed 11-12-2010; Rubin, Dr. Buzzard, supra note __.
48 Id.; Karpin Tr., supra note __, Oct. 1, 2008, at 32 (Gary Karpin testimony).
49 PCB No. 41, supra note __.
for losses to their newly built home.\textsuperscript{50} His clients followed his advice, made claims against the home builder and on their homeowners’ insurance policy, and were subsequently charged with insurance fraud.\textsuperscript{51} Karpin settled another case without his client’s consent because he was unprepared for the impending trial and afterwards duped the client into signing a document releasing Karpin of all potential claims, including claims for malpractice and ethical violations.\textsuperscript{52} In yet another situation, Karpin asked his legal assistant to forge a client’s signature on an affidavit and then lied to a judge saying he did not know who signed the document.\textsuperscript{53} The PCB also found that he had paid his legal assistant to lie to the PCB about during its investigation.\textsuperscript{54} The PCB recommended disbarment, stating:

\begin{quote}
[T]he depth and breadth of [Karpin’s] unethical conduct is so significant and wide-ranging that he is a threat to the public, the profession, the courts, and his clients.\textsuperscript{55}
\end{quote}

The Vermont Supreme Court agreed and disbarred Karpin on May 21, 1993.\textsuperscript{56} Karpin subsequently relocated to Phoenix and took a week-long mediation training program.\textsuperscript{57} Almost immediately he branded himself as a divorce mediator and began advertising his mediation services. Karpin’s advertisements offered “Divorce with Dignity,” highlighting his experience as a former prosecutor and claimed that he was a “Superior Court Certified”

\begin{footnotes}
\textsuperscript{50} PCB No. 41, supra note __.
\textsuperscript{51} PCB No. 41, supra note __.
\textsuperscript{52} PCB No. 41, supra note __.
\textsuperscript{53} PCB No. 41, supra note __.
\textsuperscript{54} PCB No. 41, supra note __.
\textsuperscript{55} PCB No. 41, supra note __.
\textsuperscript{56} In re: Gary Karpin, A.2d 700, 714 (Vt. 1993).
\end{footnotes}
Within three months of completing his mediation training, the Arizona State Bar received its first complaint about Karpin.

B. Karpin’s Modus Operandi

Karpin’s advertisements attracted customers by promising two things – an initial free consultation and reasonable rates. During initial consultations, Karpin explained the mediation process and had his clients sign a mediation agreement that included a $975 non-refundable retainer and a waiver of all civil claims against him, including claims for engaging in the unauthorized practice of law and claims for fraud. While he was happy to exploit anyone for financial gain, most of Karpin’s victims were women. He would consistently alienate the estranged husbands in some way – by making demands for more money, unfounded accusations, or inappropriate comments – in hopes of getting them out of the way so he could gain the divorcing wife’s trust and confidence.

Karpin was a skilled listener and empathizer, and he projected a sincerely caring persona. He would comment about how strong, brave, or attractive his women victims were

59 See Letter from Rena Selden to Fran Johansen (Dec. 9, 1996), State Bar of Arizona (on file with author) (indicating that documents Karpin provided to Ms. Selden’s client suggest he is a licensed attorney in Arizona).
60 See id.; Press Release, County Attorney, supra note __.
61 Divorce with Dignity Mediation Agreement (on file with author).
62 See, e.g., John Goldyn, Unauthorized Practice of Law Reporting Form (July 31, 2005)(relating that he and his wife had paid over $9,000 for over 16 mediation meetings); Statement from Timothy Smith (DATE) (on file with author)(reporting that Karpin asked both him and his wife to pay thousands of dollars); Statement from Angel Ortega, to Michael Leavene (May 19, 2005) (on file with author) (describing his interactions with Karpin that ultimately resulted in Ortega’s divorce being filed); Statement from Roger Rizzo, to Michael Leavene (Oct. 25, 2005) (on file with author).
63 Of the 40 victims listed in Karpin’s indictment, 30 were women. Karpin Indictment, supra note __.
64 Letter from Bill Ludlow, to Fran Johansen, State Bar of Arizona, (Sept. 24, 2002) (on file with author) (stating that Karpin told Mrs. Ludlow that Mr. Ludlow was badmouthing her during the mediation sessions); E-mail from Timothy Smith, to Gary Karpin, (June 7, 2002) (on file with author) (recounting Karpin’s conversation where Karpin “took her side”); Rubin, Dr. Buzzard, supra note __ (quoting an Arizna State Bar official as saying, “when a young woman comes in, [whom he] becomes interested in, he becomes their advocate.”); Starr, supra note __ (discussing Karpin’s ability to gain women’s confidence).
65 Ruth Murray statement to Fran Johansen, Arizona State Bar, at 10 (July 29, 2004) (on file with author) [hereinafter Murray Statement]; Starr, supra note __ (describing how Karpin was able to get individuals to trust him).
before steering the conversation to their intimate life or making inappropriate advances. \(^{66}\) For example, one former client said that Karpin told her that he was attracted to her and wanted to take her out on a date. \(^{67}\) Her response was to ask if it was unethical for him to be involved with her, and he reportedly responded that their date “would be off the record. We could kiss … as a form of therapy.” \(^{68}\) With several victims he mentioned the possibility of the two of them having a future together – sometimes in passing, other times more directly. \(^{69}\) Some clients welcomed the unexpected attention at a time when they were feeling very low, \(^{70}\) but others had the opposite reaction. \(^{71}\) All the while he would ask these women for more money. \(^{72}\)

Eventually, when victims refused his requests for more money, Karpin transformed into a different person: intimidating, angry, and bullying. \(^{73}\) He regularly threatened to file defamation lawsuits \(^{74}\) and did file one against a former male client. \(^{75}\) Once a lawyer requested a refund for a former client and Karpin responded by faxing a hand-written note in thick marker challenging

\(^{66}\) Murray statement \textit{supra} note __.

\(^{67}\) Murray statement \textit{supra} note __.

\(^{68}\) Murray statement \textit{supra} note __.

\(^{69}\) Murray statement, \textit{supra} note __; Statement from Tae Enum, to Michael Leaveane (Apr. 4, 2005) (on file with author)

\(^{70}\) Murray statement, \textit{supra} note __; Rubin, \textit{Court House Scoundrels}, \textit{supra} note __, at 3 (describing Rebecca Ludlow’s experience with Karpin).

\(^{71}\) See Enum statement, \textit{supra} note __.

\(^{72}\) See e.g., Email from Timothy Smith, to Gary Karpin (June 19, 2002); Murray statement, \textit{supra} note __. See also Patrick J. Beauperlant, Timeline Association with Gary Karpin, J.D., (indicating payments to Karpin of more than $21,000 spread out for over a year) (on file with author). For one client he initially stated he would provide his services for free, although she ended up paying him over $3500. Murray statement, \textit{supra} note __.

\(^{73}\) Rubin, \textit{Dr. Buzzard}, \textit{supra} note __.

\(^{74}\) See e.g., E-mail from Gary Karpin, to Timothy Smith (June 20, 2002) (on file with author); Facsimile from Gary Karpin, to Keith Moore (Mar. 24, 2003) (on file with author); Paul Rubin, “\textit{Dr. Gary} Nailed: A County Grand Jury Indicts “Mediator” Who Was Preying on Vulnerable Divorcees, PHOENIX NEW TIMES (July 21, 2005), http://www.phoenixnewtimes.com/2005-07-21/news/dr-gary-nailed/ [hereinafter Rubin, “\textit{Dr. Gary} Nailed”]. (discussing Karpin’s threatened defamation actions against Gina Niedzwicki and Ruth Murray).

the lawyer to “beat it out of my ass - you think you’re man enough[?]”.

Typically, however, once Karpin concluded the well was pumped dry, he would leave his victims alone.

C. Official (in)Action

Many of Karpin’s victims sought assistance when they realized he was a fraud. The Maricopa County Association of Family Mediators, the Association of Conflict Resolution, and the Legal Document Preparer Division of the Arizona Supreme Court’s Administrative Office all investigated Karpin between 2000 and 2004. The net result was one public rebuke. Karpin disregarded it.

Most of Karpin’s victims – either directly or through legal counsel – turned to the Arizona State Bar for assistance. Karpin was no stranger to the State Bar, even before he moved to Arizona. After learning that Karpin was planning to move to Phoenix, the Vermont State Bar’s Discipline Unit sent a letter to its Arizona counterpart enclosing a copy of the Vermont Supreme Court case disbarring Karpin. Despite the warning, there was little the State Bar could do – Arizona did not, and still does not, allow for criminal or civil sanction against those

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76 Karpin facsimile supra note __.
77 Smith statement, supra note __, at 6.
78 Capra email to Art Hinshaw, Feb. 16, 2015 (on file with author); Arriola email to Art Hinshaw, Feb. 18, 2015 (on file with author).
79 Letter from David Hart, to Timothy Smith (July 2, 2002) (on file with author) (confirming ethics complaint to the Association of Conflict Resolution); Letter from Timothy W. Smith, to Frances Johansen and Margaret Powers (June 19, 2002) (on file with author) (detailing Karpin’s actions acting as a mediator in Smith’s divorce case); Email from Danette J. Ross, to Gary Karpin (June 19, 2002) (on file with author) (informing Karpin of ethics complaint against him to the Association of Conflict Resolution).
80 Linda Grau, Legal Document Preparer Program Coordinator, letter to Gary J. Karpin, January 22, 2004 (requesting Karpin to cease and desist in the preparation of legal documents and to apply to become a legal document preparer) (on file with author).
81 Id. Karpin abandoned his membership in the Maricopa County Association of Family Mediators before its ethics procedure began. Capra email, supra note __. The results of the Association of Conflict Resolution investigation are confidential, so it is unclear what came of that investigation. Letter from David Hart, to Frances Johansen (Sept. 3, 2002) (on file with author) (stating that Timothy Smith’s complaint to the Association of Conflict Resolution was going through a confidential ethics process); Letter from David Hart, to Timothy W. Smith (Sept. 3, 2002) (on file with author) (stating that materials regarding the investigation into Smith’s complaint against Karpin had been improperly shared with the Arizona State Bar).
82 Rubin, Court House Scoundrels, supra note __, at 1. The letter was reported to state, “Suffice it to say out of excess of caution, I forward this decision for your reading pleasure….” Id. See also Karpin Tr., supra note __, Aug. 18, 2008, at 14 (testimony of Francis Johansen).
engaged in the unauthorized practice of law. Over an eight and a half year span, the State Bar received 34 complaints against Karpin but its attorney for unauthorized practice of law matters had no choice but to “tell people there was very little I could do for them. I’m talking about folks who genuinely had been hurt.” Although the State Bar could not take direct action against Karpin, it referred six complaints about him to the Attorney General for prosecution under the state’s consumer fraud statute. This was not a fruitful avenue for relief either; the Attorney General’s Office refused to investigate any of them “because both staff and resources are limited.”

In 1998 the State Bar sent Karpin its first cease and desist letter demanding that he refrain from engaging in the unauthorized practice of law. Unsurprisingly, Karpin ignored it. It was not until 2004 that the State Bar again sent Karpin another cease and desist letter, and this time the State Bar followed the letter with a lawsuit seeking to enjoin him from engaging in the practice of law. Karpin counterclaimed for defamation, abuse of process, and other assorted tort claims. Within a year the case settled with a consent judgment where Karpin admitted to engaging in the unauthorized practice of law and agreed to refund his fees to four clients, to

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83 See AZ. SUP. CT. R. 31; In re Van Dox, 152 P.3d 1183 (Ariz. 2007).
84 Rubin, Dr. Buzzard, supra note __, at 3.
85 Karpin Tr., supra note __, Aug. 18, 2008, at 41 (Johansen testimony) (stating the State Bar had no enforcement power on unauthorized practice of law matters during the relevant time period); Regulation of Non-Lawyers, STATE BAR OF ARIZONA, http://www.azbar.org/lawyerconcerns/non-lawyers (last visited Feb. 19, 2014) (describing the following actions that the State Bar takes against those who engage in the unauthorized practice of law – attempting to enter a cease and desist agreement, seeking a civil injunction to order the non-lawyer to refrain from engaging in the unauthorized practice of law, and referral of the case to the Arizona Attorney General’s Office for investigation into any violations of the consumer fraud statute).
86 Complaints Filed Against Gary Karpin with the State Bar of Arizona and the Attorney General’s Office, prepared by Fran Johansen (indicating which complaints the State Bar forwarded to the Arizona Attorney General’s Office)(on file with author); See also Rubin, Court House Scoundrels, supra note __, at 2 (quoting Johansen about referring UPL claims to the Attorney General’s Office “That’s where it usually ends. Nothing seems to happen to anyone. We can’t seem to get the government interested in this problem…..”).
engage in binding fee arbitration with six others, and to inform all of his current clients of the consent order. In exchange for those concessions, the State Bar withheld issuing a press release about the case, but affirmed that its files about Kaprin would be publicly available and that it would answer any questions about the matter honestly.

D. Prosecution and Conviction

In early 2005, Gina Niedzweicki approached the State Bar with extensive documentation about her involvement with Karpin, thanks to her prolific note-taking. This time, the State Bar forwarded her complaint about Karpin to the Maricopa County Attorney’s Office for investigation. A grand jury indicted him and he was arrested on July 11, 2005.

Three years later, Karpin went to trial on 25 counts of theft by means of material misrepresentation and one count of fraudulent schemes and artifices. The prosecution’s strategy was to use mediation as the backdrop for Karpin’s criminal conduct and did not focus on whether Karpin had engaged in the unauthorized practice of law. All of the victims who testified against Karpin had similar stories. They thought he was a lawyer because his business cards and newspaper ads included phrases like “JD” and “former prosecutors,” [sic] and his office prominently displayed his law school degree and other certificates on the wall. All of

91 Order Re: Consent to Cease and Desist Agreement, No. CV2004-007080 (June 13, 2005).
95 Id.; Karpin Indictment, supra note __.
97 See Karpin Tr., supra note __, Oct. 6, 2008, pt. 2, at 19, 74-75 (Karpin Closing Argument)(complaining that the State produced no expert witness to discuss mediation).
98 Karpin Tr., supra note __, Oct. 6, 2008, pt. 2, at 25 (Van Wie Closing Argument)(discussing unauthorized practice of law). But see Karpin Tr., supra note __, Oct. 6, 2008, pt. 2, at 81 (Van Wie Closing Argument)(stating “That doesn’t make it mediation. What it was legal work. He was practicing legal work, just calling it something else.”).
99 Karpin I, supra note __ at __.
them testified that they would not have hired him to mediate their respective divorces had they known he was not licensed to practice law in Arizona.\textsuperscript{100}

Karpin’s defenses consisted of blaming his victims for falling into his trap,\textsuperscript{101} claiming that his actions were harmless,\textsuperscript{102} and arguing that his actions should be addressed through civil claims for breach of contract or malpractice, not through criminal liability.\textsuperscript{103} These arguments failed. The jury found Karpin guilty on 24 counts of theft by means of material misrepresentation and one count of fraudulent schemes and artifices.\textsuperscript{104} He was sentenced to 15.75 years in prison and was ordered to pay restitution to his victims in the amount of $240,448.99.\textsuperscript{105} The jury verdict, the restitution award, and the denial of his post-conviction request for relief were all upheld on appeal.\textsuperscript{106} He is scheduled for release from prison in November 2022.\textsuperscript{107}

E. Other Egregious Cases

Karpin’s case is alarming and atypical, but it is not the only documented horror story of bad actors taking advantage of the mediation process.\textsuperscript{108} In a child support arrears case, a consent decree was set aside when it came to light that the parties’ mediator was not a mediator,

\textsuperscript{100}Id.

\textsuperscript{101} This argument was based on his mediation agreement in which signatories acknowledged that he was “not an attorney for divorce mediation purposes,” so none of them could have rightfully thought that he was a licensed attorney in Arizona. \textit{Karpin I}, supra note __; \textit{Karpin Tr.}, supra note __, (October 1, 2008), at 5-7, 26-27 (Karpin testimony); \textit{Karpin Tr.}, supra note __, (October 6, 2008), pt. 2, at 4-5 (Karpin closing argument). The statement is in Karpin’s Mediation Agreement, but it is buried on the third page of a four page agreement, not bolded or underlined. \textit{See} Divorce with Dignity client agreement, supra note __.

\textsuperscript{102} This argument claimed the victims were not harmed because they would have paid an attorney the same amount they paid him. \textit{State v. Karpin}, 2011 WL 553153, at 4 (Az. Ct. App) [hereinafter \textit{Karpin II}]; \textit{Karpin Tr.}, supra note __, (October 6, 2008), pt. 2, at 33, 56 (Karpin closing argument).

\textsuperscript{103} \textit{Karpin I}, supra note __, at 5; \textit{Karpin Tr.}, supra note __, (October 6, 2008), pt. 2, at 10, 31, 39, 55, 70, 72, 77, 87-88 (Karpin closing argument).

\textsuperscript{104} \textit{Karpin II}, supra note __, at 3. One count of theft was dismissed prior to trial. \textit{Id}.

\textsuperscript{105} \textit{Karpin II}, supra note __, at 2-3; \textit{State v. Karpin}, 2013 WL 6040376 (Az. Ct. App) [hereinafter \textit{Karpin III}].

\textsuperscript{106} \textit{Karpin I}; \textit{Karpin II}; \textit{Karpin III}.


\textsuperscript{108} Since mediators are difficult targets for malpractice claims, \textit{see infra} note __, there are few documented mediation horror stories.
but a convicted felon and friend of the ex-husband posing as a mediator.\textsuperscript{109} Not only did “the mediator” convince the ex-wife to discharge her attorney, he also convinced her that the amount of child support due was significantly less than what she was seeking.\textsuperscript{110} In another case an organization claiming to be a mediation service provider was found to be engaging in the unauthorized practice of law when it sought out defendants in recently filed collection cases and offered to mediate those claims.\textsuperscript{111} The organization had previously been sanctioned for engaging in the unauthorized practice of law for attempting to settle claims between their clients and their clients’ creditors through the client’s power of attorney. Rather than ending its practices it simply changed the title of its contract for services from “Limited Power of Attorney Appointment” to “Mediation Agreement.”\textsuperscript{112} There are also many cases where mediators get away with cringe worthy conduct with little to no sanction.\textsuperscript{113} Along with Karpin’s exploits, these cases show just how easily exploited the mediation process is when there is little to no regulation.

III. Occupational Regulation

Occupational regulation dates back to ancient Greece and Babylonia, established roots through the medieval system of guilds, and was an integral element of professional life in

\textsuperscript{109} Everett v. Morgan, 2009 WL 113262 (Tenn. Ct. App.) 2-3
\textsuperscript{110} Id. at 3
\textsuperscript{111} Cincinnati Bar Ass’n v. Jansen, 5 N.E.3d 627 (Ohio 2009).
\textsuperscript{112} Id. at 628-29
colonial America. But it was not until 1888 -- when the United States Supreme Court confirmed the right of states to grant licenses to protect the health, welfare, and safety of their citizens in *Dent v. West Virginia* -- that occupational regulation began to evolve into the practice we are familiar with today. During the Progressive Era, roughly the 1890s-1920s, occupational licensing became commonplace across a variety of professions and skilled trades, such as medicine, dentistry and engineering, and today it is accepted as routine.

A. Policy Rationale and Operation

The policies supporting occupational regulation are justified by two widely accepted economic theories. The first is public interest theory which posits that consumer protection flows from providing consumers access to information about the services they are consuming. Consumers of specialized services often lack information about whether a particular provider meets minimum standards of quality, which is most problematic when the consequences of poor performance are the greatest. Because the invisible hand of the market can take too long to weed out poor service providers, occupational regulation fills the information gap by setting minimum standards of practice. Furthermore, occupational regulation increases the quality of service by preventing less competent providers either from entering into or remaining in the

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116 Morris M. Kleiner, A License for Protection, 29 Regulation 3 (2006) [Hereinafter Kleiner, License for Protection].

117 Law & Kim, supra note __ at 725 and 727.


120 Kleiner, License for Protection, supra note __ at 18.

121 Law & Kim, supra note __, at 754.
Thus, state regulation protects the public from rogue operators, incompetents, quacks, and charlatans, and for this reason regulation has historically enjoyed broad public support. 

The other economic principle that has been used to explain the necessity of occupational regulation is capture theory which argues that licensing is designed to benefit the service providers because it is a means of limiting competition. Regulation keeps the number of service providers lower than it otherwise would be, thereby allowing service providers to charge a higher price for the regulated service. Capture theory also suggests that service providers are motivated by protecting the profession’s reputation, known as “title protection,” and that licensing in and of itself can increase the overall public demand for the service in question. In effect, capture theory corroborates George Bernard Shaw’s famously cynical observation “Every profession is a conspiracy against the laity.”

There are three basic forms of occupational regulation: registration, certification, and licensing. Registration is the least restrictive. It requires individuals to give a governmental entity their names, contact information, and qualifications along with posting a bond or fee before practicing their occupation. Slightly more restrictive is a certification regime which allows any person to perform the relevant service, but only those who have met the certifying agency’s knowledge and skill requirements are certified, presumably giving them a reputational

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123 Kleiner, License for Protection, *supra* note __ at 20; Potts, *supra* note __, at 72.
124 KLEINER, LICENSING OCCUPATIONS, *supra* note __ at 152.
128 GEORGE BERNARD SHAW, THE DOCTOR’S DILEMMA, act 1 (1911).
130 Kleiner and Krueger, *supra* note __, at 676-77.
advantage in the marketplace.\textsuperscript{131} Individuals without certification may perform the duties of the occupation, but may not claim to be certified.\textsuperscript{132} The most restrictive form of regulation is licensure, which is also known as the right-to-practice.\textsuperscript{133} Licensure laws typically make it unlawful to practice an occupation without first meeting the government’s standards and obtaining a license.\textsuperscript{134} Presently, only a few states offer certification schemes for mediators, but in the majority of states none of these forms of regulation are used for mediators in the United States.

B. Attempts to Regulate Mediators

The idea of regulating mediators is not new; the arguments for and against regulation have played out time and again. Legislative proposals and regulatory efforts through statewide professional organizations have crumbled, and national organizations have shied away from creating credentialing systems as well.\textsuperscript{135} Court-connected mediation is the only place where any modicum of regulation exists.\textsuperscript{136}

1. Legislative

Legislation impacting mediation processes is proposed and adopted regularly, but legislation to regulate mediators is rarely promulgated. California has the most extensive history of attempts to regulate mediators but has never successfully done so.\textsuperscript{137} In 1995, State Senator Newton R. Russell introduced a bill to create a three-part mediator credentialing system administered by a new state agency.\textsuperscript{138} First, the bill proposed to funnel applicants into three

\begin{flushleft}
\textsuperscript{131} Id., at 677.
\textsuperscript{132} Id., at 677.
\textsuperscript{133} Id., at 677.
\textsuperscript{134} Id., at 677.
\textsuperscript{135} See infra notes \_\_ to \_\_ and accompanying text.
\textsuperscript{136} See infra notes \_\_ to \_\_ and accompanying text.
\end{flushleft}
tracks – those with no training, those with some training, and those who already met the training standard for the credential.\textsuperscript{139} Second, it required a total of 58 hours of training divided between 25 hours of lectures on enumerated topics and 33 hours of practical experience observing or conducting simulated or real mediations.\textsuperscript{140} Third, it mandated a performance evaluation including an individualized assessment of several specified skills.\textsuperscript{141}

After the California mediation community voiced its opposition to the bill, Senator Russell agreed to allow a year’s worth of consideration before resuming the bill’s progress through the legislature.\textsuperscript{142} Three subsequent hearings prompted Senator Russell to introduce a revised bill based on a voluntary certification program\textsuperscript{143} with universities and mediation organizations conducting the certification process.\textsuperscript{144} The revised bill also enumerated a list of fundamental “rights” for mediating parties,\textsuperscript{145} required mediators to adhere to a code of ethics,\textsuperscript{146} expanded the list of mandatory training topics,\textsuperscript{147} allowed for a mix of performance evaluation

\textsuperscript{139} Id. at §463.2(B).

\textsuperscript{140} Id. at §§463.5, 464. The topics included: the history of dispute resolution and its relationship to the traditional justice system, an overview of the California justice system, the theory of dispute resolution services, communication skills and techniques, problem identification and disagreement management techniques, methods of achieving agreement and/or settlement, a general review of fact patterns in typical disputes, administrative and intake skills, and the role of attorneys and witnesses in dispute resolution proceedings. Id. at §463.5.

\textsuperscript{141} Id., at §464.2. The skills to be assessed during the performance evaluation included: personal interaction, tone of proceedings, process flow, opening statement, facilitating position statements, coordinating exchange, managing negotiations, generating options, closure, ethical behavior, empowerment of clients, communication, creating empathy, clarification, organization of issues, active listening, neutral language, and strategy planning. Id., at §464.2(C).


\textsuperscript{144} Cal. S. B. 1428, §464.1(a)(1).

\textsuperscript{145} Id., at §1(b)(4). Those rights included: the freedom to choose mediation and to withdraw from mediation without a prejudice to other methods of obtaining justice, the freedom to speak freely without fear of having one’s words used against him or her, the expectation of informed consent in all aspects of the mediation process including when waiving legal claims, the expectation of disclosure of any conflicts of interest the mediator may have, the right to retain their own decision-making power, and the right to select any mediator regardless of the mediator’s degrees or primary professional training. Id.

\textsuperscript{146} Id. at §464.9(a)(5). Interestingly the proposed legislation did not identify a particular code, just that a mediator must adhere to one and provide it to the parties prior to mediation. Id.; Barrett, supra note __, at 624.

\textsuperscript{147} Cal. S. B. 1428, §464.3. The expanded list of training topics included: instruction about ethics, the difference between evaluative and facilitative mediation, understanding power imbalances, abstaining from giving legal advice,
methods, and mandated specific mediator disclosures. Although this second bill enjoyed the widespread support of the California mediation community, it never made it out of the Senate Business and Professions Committee.

More recently, in 2012, the Bay Area Lawyers for Individual Freedom proposed legislation to the California Conference of Bar Associations (CCBA), a group of attorneys from specialized bar sections who attempt to improve California’s laws. This legislation would have established minimum qualifications for mediators including: completing 40 hours of mediation training, conducting 20 separate mediations, and holding a law degree or specialized graduate degree in a field directly related to the subject matter of the controversy being mediated, such as medicine, psychology, or engineering. This proposal named the State Bar of California as the certifying and regulating body, and named the State Bar Court as the disciplinary tribunal.

The CCBA rejected the proposal outright. Two bases for its disapproval deserve mention as they highlight the difficulties surrounding the regulation of mediators. First, the California State Bar Association’s Committee on Alternative Dispute Resolution argued that requiring the State Bar to regulate non-attorneys was outside its mission and, arguably, beyond confronting unrealistic expectations, making responsible evaluations, and handling other practical dilemmas that mediators regularly face. Id.; Barrett, supra note __, at 625.

148 Cal. S. B. 1428, §464.2(b) (keeping three tracks of training based on training and experience). Most notably the bill allowed for mediators who already had 25 hours of training and 50 hours of real mediation experience in the last two years to be exempt from any training requirements. Id. at §464.2(b)(3); Barrett, supra note __, at 626.

149 Cal. S. B. 1428, §464.9(a). The items to be disclosed included: a mediator’s training and experience, previous personal or business relationships with any of the parties, any financial interests that may have bearing on the case, all fees and expenses, a code of ethics to which the mediator subscribes, any personal biases that would impact the individual’s performance as a neutral mediator, and prior disciplinary action in any profession. Id.; Barrett, supra note __, at 625-26.

150 Weckstein, supra note __ at 759.


152 Resolution 05-01-2012, at § 6243.

153 Id. at §§ 6243 and 6244.

154 CCBA supra note __.
its regulatory jurisdiction.\textsuperscript{155} Second, the California Supreme Court’s strict interpretation of the state’s mediation confidentiality statute\textsuperscript{156} likely means that any mediation communications forming the basis of a mediator malpractice claim would inadmissible in court.\textsuperscript{157} The proposal before the CCBA would not have amended these statutes.\textsuperscript{158} And, under the proposed regulatory system, the State Bar would have been tasked with adjudicating the fitness of mediators without any real possibility of uncovering a mediator’s conduct during the mediation sessions in question— a wholly untenable responsibility.

2. National Professional Organizations

Mediation’s two national professional organizations, the American Bar Association’s Dispute Resolution Section\textsuperscript{159} (ABA DR Section) and the Association for Conflict Resolution (ACR)\textsuperscript{160} have worked for decades to protect the integrity of the field by providing expertise, advice, and guidance to legislative, judicial, and administrative bodies in drafting policies and best practices.\textsuperscript{161} And while these organizations favor mediator certification over licensure, they have refused to certify mediators.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Cal. Evid. Stat. §1119.
  \item \textsuperscript{157} See, e.g., Cassel v. Superior Court, 244 P.3d 1080 (Cal. 2011) (holding that no exception to California’s mediation confidentiality statutes existed to allow a client to bring a malpractice claim against a lawyer based on the lawyer’s advice in mediation to settle the case). This conclusion is currently on appeal in Chodish v. Trotter and JAMS, supra note __.
  \item \textsuperscript{159} See Section of Dispute Resolution, American Bar Association, http://www.americanbar.org/groups/dispute_resolution.html (last visited Feb. 20, 2015) (American Bar Association Dispute Resolution Section home page).
  \item \textsuperscript{160} See The Association for Conflict Resolution (ACR), http://www.acrnet.org/ (last visited Feb. 20, 2015) (Association for Conflict Resolution home page).
  \item The Association for Conflict Resolution was formed in 2001 through the merger of three other mediation organizations—the Society for Professionals in Dispute Resolution, the Academy of Family Mediators, and the Conflict Resolution Education Network. The History of ACR, Association for Conflict Resolution, http://www.acrnet.org/Page.aspx?id=1385 (last visited Feb. 20, 2015) (follow “About Us” hyperlink; then follow “History” hyperlink).
  \item \textsuperscript{161} Society of Professionals in Dispute Resolution Commission on Qualifications, Qualifying Neutrals: The Basic Principles 1, 4, 6 (1989) [hereinafter SPIDR, Qualifying Neutrals].
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In 1989 the Commission on Qualifications of one of ACR’s predecessor organizations, the Society of Professionals in Dispute Resolution (SPIDR), published its first report. This report adopted three central regulatory principles for mediators:

A. No single entity (rather a variety of organizations) should establish qualifications for mediators;

B. The greater degree of choice the parties have over the dispute resolution process, program, or neutral, the less mandatory the qualification requirements should be; and

C. Qualification criteria should be based on performance rather than paper credentials.\(^{162}\)

In 1995 the Commission on Qualifications confirmed the conclusions of its 1989 report and recognized that formal certification would assure practitioner competence.\(^{163}\) But it then concluded that certification is only appropriate when: (1) certification standards are specific enough to serve as a basis to decertify a practitioner, (2) there is a mechanism in place for certification, (3) certification is tied to competence, and (4) the certification process is regularly reviewed and amended as needed.\(^{164}\)

In 2002 the ABA DR Section’s Task Force on Credentialing made recommendations outlining the essential components of a credentialing program and the methods for assessing mediator competency.\(^{165}\) However, the Task Force only proposed a flexible, low-cost accreditation system for mediator training programs, not individual mediators.\(^{166}\) In 2004 the ACR Mediator Certification Task Force recommended establishing a voluntary two-step certification program through a separate administrative entity,\(^{167}\) ACR ended up abandoning the plan entirely.\(^{168}\)

\(^{162}\) *Id.* at 11.

\(^{163}\) SPIDR, ENSURING COMPETENCE, *supra* note __, at 23.

\(^{164}\) *Id.*

\(^{165}\) ABA, MEDIATOR CREDENTIALING, *supra* note __ at 4.

\(^{166}\) *Id.* Apparently, this happened for practical reasons: the recommendations had a greater likelihood of adoption and were compatible with existing programs and policies in courts and agencies at both the state and federal level. *Id.*

\(^{167}\) ASSOCIATION FOR CONFLICT RESOLUTION, ACR MEDIATOR CERTIFICATION TASK FORCE: REPORT AND RECOMMENDATIONS 1 (2004).

\(^{168}\) *Id.*; ASSOCIATION FOR CONFLICT RESOLUTION, MODEL STANDARDS FOR MEDIATION CERTIFICATION PROGRAMS 1 (2011); SOUTHERN CALIFORNIA MEDIATORS ASSOCIATION AD HOC COMMITTEE ON MEDIATOR REGULATION OR
In 2005, ACR and the ABA DR Section developed a survey for practicing mediators about a national certification program. The survey was sent to members of both organizations, and a majority of respondents indicated that certification would be professionally valuable, provide value to mediation users, and would heighten the field’s prestige and professionalism. However, less than 40% of respondents thought a national certification program was necessary. Based on these survey results, the ABA DR Section determined that a national credentialing program was not feasible.

A 2008 ACR membership survey indicated broad support to establish a certification process. Instead, ACR promulgated Model Standards for Mediator Certification Programs in 2011. Along these lines, ACR’s ongoing strategic plan includes developing a certification program for family mediators that would include a performance based assessment. In 2012, the ABA DR Section’s Task Force on Mediator Credentialing adopted a policy supporting credentialing efforts, but limited its support to an optional system available to both lawyers and non-lawyers. Since then, the ABA DR Section has not had a group study the question of occupational regulation.


ACR/ABA, Mediator Feasibility Study, supra note __, at 1.

Id., at 2-4.

Id.


Association for Conflict Resolution, Model Standards for Mediation Certification Programs, 1 and 3-4 (2011)

3. Statewide Professional Organizations

Using frameworks developed by the national organizations, numerous state-level working groups have attempted to create and adopt statewide mediator certification standards. For example, in the mid-1990s, several Colorado organizations proposed a new oversight group to administer a certification program, but the proposal died after the state bar refused to endorse it. The Oregon Mediator Competency Work Group met in the late-1990s but failed to propose anything, in part over disagreements about the definition of mediation and what constitutes best practices. In the early 1990s the Arizona Dispute Resolution Association’s Credentialing Committee drafted rules for the certification of mediators, mediation trainers, and mediator evaluators; standards of conduct for mediators; a grievance procedure; and core curricula for basic and advanced civil mediation training. Despite these advanced efforts, the program never launched because ADRA’s board grew less confident in the validity of its credentialing scheme and never found funding for a full time administrator to lead the program. More recently, in response to California’s latest attempt to regulate mediators, the Southern California

178 ABA, MEDIATOR CREDENTIALING, supra note __, at 29, 41 (hypothesizing that representatives from some of the entities did not keep their constituents well briefed about the options explored and the tentative agreements).
180 Letter from Nancy Glasscock & Kim McCandless, to Joan Tobin, President of the ADRA, (Mar. 11, 1996) (on file with author); Memorandum from Bob Dauber, to ADRA Credentials Committee Members and Others Interested in Mediator Certification (October 4, 1995) (on file with author).
181 E-mail from Bob Dauber (November 4, 2014) (on file with author). ADRA’s hope was that the credentialing system would be accepted by the state court system and that the court’s administrative office eventually would take over the funding responsibility, but several judges were vocal opponents of the credentialing system. Id. Also, ADRA’s Board began to question the validity of its credentialing system after a couple of its members failed in their attempts to “pass” the proposed performance evaluation. Id.
Mediation Association’s Ad Hoc Committee on Regulation or Certification recommended a voluntary certification system; its system is still in the design stages.\textsuperscript{182}

4. Courts

Some jurisdictions regulate those who conduct court-ordered mediations.\textsuperscript{183} Known as either court-connected or court-annexed mediation programs, these mediation programs maintain rosters of approved mediators for judicial referral. Every state in the country has some form of a court-connected mediation program and each state runs its program differently. A few states such as Florida,\textsuperscript{184} Georgia,\textsuperscript{185} Maine,\textsuperscript{186} Maryland,\textsuperscript{187} Minnesota,\textsuperscript{188} North Carolina,\textsuperscript{189} and Virginia\textsuperscript{190} have well-developed and comprehensive state-wide mediation programs; other states’ programs are run out of a trial courts’ administrative offices or an individual judge’s chambers.\textsuperscript{191}


\textsuperscript{183} Typically court-connected mediation exists alongside a thriving private mediation sector. See e.g., Press, Crossroads, supra note __, at 55 (discussing Florida);


\textsuperscript{185} The entity that regulates court-connected mediators in Georgia is the Georgia Dispute Resolution Commission. Georgia Commission on Dispute Resolution, GEORGIA COMMISSION ON DISPUTE RESOLUTION, http://www.godr.org/ (last visited Feb. 20, 2015).

\textsuperscript{186} The entity that regulates court-connected mediators in Maine is the Office of Court ADR, Alternative Dispute Resolution (Mediation Services), MAINE.GOV, http://www.courts.state.me.us/maine_courts/adr/index.shtml (last visited Feb. 20, 2015).


\textsuperscript{188} The entity that regulates court-connected mediators in Minnesota is the ADR Ethics Board. ADR Ethics Board, MINNESOTA JUDICIAL BRANCH, http://www.mncourts.gov/?page=1121 (last visited Feb. 20, 2015).


\textsuperscript{190} The entity that regulates court-connected mediators in Virginia is the Division of Dispute Resolution Services, Dispute Resolution Services: About, VIRGINIA’S JUDICIAL SYSTEM, http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/about.html#overview (last visited Feb. 20, 2015).

\textsuperscript{191} Roselle Wissler and Bob Rack, ______.
The more comprehensive court-connected mediation programs were developed for a wide range of reasons, but all seem to recognize that a successful program requires a pool of practitioners who will protect the legitimacy of the program and the integrity of the courts. When mediation becomes an integral part of a court’s civil litigation system, the court assumes responsibility for protecting the public from bad mediators.

To meet their consumer protection objectives, these court-connected mediation programs require the following from their mediators:

- A combination of minimal mediation training and experience;
- Continuing education requirements;
- On-going regular work as a mediator;
- A formal ethics code; and
- A complaint and disciplinary procedure to penalize mediators engaging in misconduct, including the possibility of removal from the approved mediator list.

In addition, some of these programs also mandate training by specific mediation trainers, training programs, or continuing education programs. Other programs provide their mediators with ethics advisory opinions.

Initially, reactions to this limited form of regulation from the national mediation community ranged from open hostility to begrudging acceptance. Over time, however, this

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193 Press, Institutionalization, supra note __, at 909-10, 915; Young, supra note __, at 731.
194 Press, Institutionalization, supra note __, at 909-10, 915; Young, supra note __, at 731.
195 See, e.g., Fla. Rule 10.100 et. seq.; Note that these requirements may vary due to the kind of mediation (family, general civil, environmental, etc.) the mediator plans to conduct.
196 See e.g.,
197 See e.g., supra note __, at 915 (stating, “Once a court embarks on the road of certification [of mediators], doesn’t the court then retain some responsibility to ensure continuing competence?”)
198 See e.g., Fla. Rule 10.200 et seq.
199 See e.g., Fla. Rule 10.700 et seq.
200 See Press, Institutionalization, supra note __, at 914.
201 See e.g., Fla. Rules of Professional Conduct for Certified and Court Appointed Mediators R. 10.700-.880
discomfort has been replaced with increased acceptance of and familiarity with this type of regulation. Some of this change in attitude may stem from the development of effective administrators, the perception that court referrals may be a good source of business, the belief that having a court-related credential is good marketing, or, perhaps, the reluctant acknowledgment that courts have the inherent authority to control all aspects of the litigation process. Yet, despite the apparent success of court-connected mediation in states with comprehensive state-wide mediation programs, there appears to be no impetus to adopt similar systems in other states.

IV. Why Mediators Should Be Regulated

Public interest theory offers the strongest and most altruistic arguments for the regulation of mediators. Mediation is still a relatively new professional service and many consumers – both individuals and lawyers – do not have enough information about providers to evaluate a mediator’s qualifications and practice. Capture theory maintains that mediators’ self-interests favor regulation, and several regulatory attempts have been headed by mediators and mediation organizations. Contrary to capture theory, however, it has been the mediators themselves who have kept regulation at bay. Although mediators have some concern for protecting the field’s reputation, historically they have not viewed regulation as an economic boon; instead, they are wary of regulation and favor a more laissez-faire approach. Certainly some mediators in this

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202 See e.g., George Nicolau, Ill-Considered Criteria Endanger Mediation, SPIDR President Warns, 2 ALTERNATIVE DISP. RESOL. REP., 244, 245 (1988); Press, Institutionalization, supra note __, at 909 (discussing “outrage” from the national mediation community when Florida adopted mediator qualification requirements to become a court-approved mediator).

203 See e.g., Press, Institutionalization, supra note __ at 907-08; Press, Crossroads, supra note __ at 60.

204 See Daniel J. Meador, Inherent Judicial Authority in the Conduct of Civil Litigation, 73 Tex. L. Rev. 1805, 1808 (1995). Meador defines a court’s inherent authority as “the authority of a trial court …. to control and direct the conduct of civil litigation without the express written authorization in a constitution, statute, or written rule of court.” Id., at 1805. See also, Maureen Weston, Confidentiality’s Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation, 8 Harv. Neg. L. Rev. 29, 64-68 (2003).

205 NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES 76 (2009).

206 See supra Section __.
group see the mediation market itself as the most efficient regulator, but market efficiency arguments have not carried the day.\textsuperscript{207}

Typically the vocal anti-regulation mediators and mediation groups sees themselves as protectors of the theoretical bases of the modern mediation movement. This group wants to maximize mediation’s potential as a dispute resolution method, and focuses on the goals of maintaining flexibility and innovation in mediation. They fear that regulation will result in an unacceptable monochromic version of mediation, one that only meets the needs of the commercial mediation market -- loosely thought of as the mediation of civil claims involving businesses as one or both parties. Nadja Alexander has described this phenomenon where mediators themselves keep the field’s regulatory impulses in check and named it the diversity-consistency tension.\textsuperscript{208}

At its essence, the diversity-consistency tension pits concerns for the mediation process against concerns for mediation consumers. On the diversity side of this tension is a deep-seated desire the field has to embrace, welcome, and support flexibility and innovation by accepting more styles and methods in the fold.\textsuperscript{209} When the balance tilts too far towards the diversity side, consumers have difficulty informing themselves about the process and to judging mediator quality and performance.\textsuperscript{210} As a result, mediation’s integrity becomes endangered.\textsuperscript{211} On the consistency side of the tension is the pressure to establish and enforce uniform and reliable measures of quality in mediation practice.\textsuperscript{212} When the balance tilts too far towards consistency, opportunities for innovative development is stifled possibly resulting in the exclusion of some

\textsuperscript{207} See supra Section __.
\textsuperscript{208} ALEXANDER, supra note __, at 75 (2009).
\textsuperscript{209} Id.
\textsuperscript{210} Id. at 76.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
activities currently falling under the mediation umbrella. To this point, the diversity side of this tension has kept the field from developing effective methods to protect consumers from incompetent and unscrupulous practitioners.

The next two sections put the diversity-consistency tension, public interest theory, and capture theory in context by laying out the policy arguments made for and against the occupational regulation of mediators. After presenting the chief arguments in favor of regulation, I present the primary arguments against regulation and refute them primarily on consumer protection grounds.

A. Arguments For Regulation

Four policy justifications comprise the chief arguments support regulating mediators: (1) protecting the public from problematic mediators, (2) providing information to the public about mediators, (3) improving mediator ability, and (4) enhancing the credibility of the profession.

1. Public Protection

Regulation is necessary to protect the public from bad actors, incompetent practitioners, and unqualified providers. This can be done in two ways. The first is to establish a barrier to entry into the field to keep any person off the street from claiming to be mediator. Presently the field has no entry standards whatsoever - no required demonstrations of mediation knowledge, competence, or skill. While not fool-proof, demonstrations of competency can keep unqualified mediators outside the field.

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213 Id. at 75-76.  
214 Consumers do have traditional civil actions available to them that are not mediator specific, but they are difficult to establish or are barred by state-sponsored civil immunity. See generally Michael Moffit, Ten Ways to Get Sued: A Guide for Mediators, 8 HARV. NEGOT. L. REV. 81 (2003) (discussing how winning a claim against a mediator is quite difficult); Michael L. Moffitt, The Four Ways to Assure Mediator Quality (and Why None of Them Work), 24 OHIO ST. J. ON DISP. RESOL. 191, 193-99 (2009) [hereinafter Moffitt, The Four Ways].  
aspiring mediators out of the field and reassure the public that mediator practitioners have at least minimal levels of ability and knowledge.

Other fields with barriers to entry still contend with bad actors and incompetent service providers who cause serious financial and emotional harm. In regulated fields these individuals are subject to professional discipline, up to and including removal from the field, as well as malpractice claims. Currently the vast majority of mediators are unregulated and not subject to any professional discipline whatsoever. And those who are regulated cannot be removed from the field. Unlike other fields, malpractice claims are not a viable alternative. Malpractice claims are unavailable to those who live in the many states that give mediators de jure protections against malpractice claims, including judicial immunity, and, even without immunity, there is no established standard of care for mediators, making it difficult (if not impossible) to show that a mediator breached a duty to a client. The public’s lack of recourse against mediators is problematic and can be rectified through professional discipline associated with a regulatory regime.

2. Public Information

Even though many legal disputes are subject to mediation under contractual, statutory, or judicial auspices, many mediation users lack a basic understanding of what mediation is and have an even more tenuous understanding of the potential differences among mediators. To make educated choices, consumers need trustworthy information about mediation and mediator

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216 In Florida, for example, a court-connected mediator has judicial immunity as if the mediator were a judge. Fla. Stat. § 44.107 (2014). Arizona law exempts mediators from professional malpractice claims “except for those acts or omissions that involve intentional misconduct or reckless disregard of a substantial risk of a significant injury to others.” Ariz. Rev. Stat. § 12-2238(F) (2014). In California, the mediation confidentiality laws are strictly construed which may result in the that it’s likely that any statements a mediator says either in preparation for a mediation or during a mediation session cannot be part of a malpractice claim against the mediator. See supra note __. See also Scott H. Hughes, Mediator Immunity: The Misguided and Inequitable Shifting of Risk, 83 Or. L. Rev. 107 (2004).

217 Moffitt, Suing Mediators, supra note __, at 153-59; Moffitt, Four Ways, supra note __, at 212-214.

218 Donald T. Weckstein, Mediator Certification: Why and How, 30 U.S.F. L. Rev. 757, 763 (1996). See Golann & Folberg, Mediation, supra note __, at 261 (instructing attorneys to prepare clients for mediation by discussing mediation basics such as the difference between mediation and typical negotiation and the mediator’s style).
quality. At present, conducting online research or asking for referrals can be helpful, but finding comprehensive and reliable information about individual mediators can be difficult, if not impossible. In most states consumers have no place to learn about which mediators to avoid. Moreover, these information problems are not limited to the general public. Even sophisticated repeat players, who may have personal knowledge of individual mediators or access to information networks to answer questions about them, often have difficulty finding reliable information about a specific mediator and how that person conducts mediation sessions. These problems could be addressed by a well-known and easily accessible repository of information about individual mediators and mediation in general.

3. Enhanced Skill Level

A comprehensive professional regulatory scheme would necessarily improve mediators’ skill sets. For new mediators, regulation could establish entry standards based on a combination of education, mediation skills training, experience, performance-based testing, and accompanying text.

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219 See Jean R. Sternlight, “Live Free” or Regulate? Consider A, B and Their Dispute Resolution Clause Regarding Blackacre, 19 DISP. RESOL. MAG. 4, 5 (Spring 2013); Weckstein, supra note __, at 764. See also supra notes __ to __ and accompanying text.

220 Sternlight, supra note __, at 5.

221 Some court-connected mediation programs have web site that do precisely these things. See e.g., Alternative Dispute Resolution, FLORIDA COURTS, http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/ (last visited Feb. 19, 2015) (Florida Dispute Resolution Center website); North Carolina Dispute Resolution Commission. THE NORTH CAROLINA COURT SYSTEM, http://www.nccourts.org/Courts/CRS/Councils/DRC/Default.asp (last visited Feb. 19, 2015) (North Carolina Dispute Resolution Commission). However, such comprehensive web sites are the exception to the rule.


223 Presumably such training would be from a reputable program. For examples of unqualified mediation trainers see Art Hinshaw, Mediation and Three Other Words, INDISPUTABLY: THE ADR PROF BLOG (Aug. 8, 2013), http://www.indisputably.org/?p=4950 (describing an adjunct professor without any knowledge of mediation accepting an assignment to teach mediation); Diane Levin, The 40 Hour Mediation Training Requirement: A Good Argument for Regulating the Private Practice of Mediation, THE MEDIATION CHANNEL (May 5, 2010), http://mediationchannel.com/2010/05/05/the-40-hour-mediation-training-a-good-argument-for-regulating-the-private-practice-of-mediation-2/ (describing university instructors who call her to ask whether they should take a mediation training program before teaching a mediation class).
apprenticeship work. Furthermore, enforceable ethical standards, continuing education requirements, and a well-designed discipline system would prompt experienced mediators to hone their skills and enhance their mediation knowledge.

4. Enhanced Credibility

Adding regulatory requirements would necessarily enhance the professional standing of the field in general and of practicing mediators individually. Regulation would signal to the public that credentialed mediators have achieved a level of expertise on par with other professional fields like medicine and law. In addition, regulation would enhance the field’s status as a distinct profession and not just as a subsidiary of other licensed fields.

B. Addressing the Arguments Against Regulation

Four main policy arguments form the basis of arguments against regulating mediators: (1) market forces already ensure high mediator quality, (2) mediation is not a well-defined field, (3) regulation is contrary to the ethos of mediation, and (4) the costs associated with regulation will bring unintended consequences for mediator diversity and access to mediation services. None of these is persuasive.

1. Market Based Regulation

Currently, without any barriers to entry, mediators find it very difficult to make a mediation practice financially viable. Nationally there is an oversupply of mediators without

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225 See e.g., JOINT MODEL STANDARDS, Std. IV(A)(2) (2005).

226 See, e.g. GOLANN & Folberg, supra note __, at 406.

227 Nancy Welsh & Bobbi McAdoo, Eyes on the Prize: The Struggle for Professionalism, 11 DISP. RES. MAG. 13, 13-14, (Spring 2005); Craig McEwan, Giving Meaning to Mediator Professionalism, 11 DISP. RES. MAG. 3, 3-4 (Spring 2005); JOINT MODEL STANDARDS, STD. VI(A)(5).

228 See generally Volenjka, supra note __, at 261.
enough demand to create many mediation opportunities or jobs. Most mediators self-report they are not able to support themselves solely through mediation practice, and the vast majority of mediation providers return to their prior careers within two years. Because the market already weeds out ineffective mediators, one argument against regulation is that it is unnecessary because only effective practitioners can build and maintain mediation practices.

But market forces are not enough. Although they may foster mediator quality in some segments of the field, Gary Karpin’s exploits evidence the market’s difficulty in weeding out everyone who is unscrupulous or incompetent. And, of course, Karpin is hardly alone: several stories suggest that there are more problematic mediators than the field would like to admit.

More troubling is the long-term reality that problematic mediators will continue to cause difficulties for their clients and the field as long as there is no readily available way to identify them and require them to correct their conduct or exit the field. In addition, private methods of market regulation -- both informal ones like social media and formal ones like malpractice actions -- are not enough. Social media reviews, even moderated ones are rife with errors and ripe for abuse and widely popular websites like Yelp or Angie’s List do not include

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229 Id. at 269-71.
230 Id. at 263-64; JEFFREY KRIVIS & NAOMI LUCKS, HOW TO MAKE MONEY AS A MEDIATOR (AND CREATE VALUE FOR EVERYONE): 30 TOP MEDIATORS SHARE SECRETS TO BUILDING A SUCCESSFUL PRACTICE 9 (2006).
231 The market presumably also weeds out effective mediators, not necessarily ensuring that the best mediators survive in the marketplace.
232 See GOLANN & FOLBERG, supra note __, at 406; KRIVIS & LUCKS, supra note __, at __ : SPIDR, ENSURING COMPETENCE AND QUALITY, supra note __ at 7 (1995) (listing typical discussion points about ADR practitioner qualifications including “The market place is fine…”)[hereinafter SPIDR, ENSURING COMPETENCE]; ABA, MEDIATOR CREDENTIALING, supra note __, at 35.
234 See supra Section __ (discussing mediation horror stories). See also Moffitt, The Four Ways, supra note __, at 210-12 (expressing skepticism about the reputational marketplace for mediators).
mediators.\textsuperscript{235} Proof problems plague malpractice claims making them difficult, if not impossible, for claimants to prevail.\textsuperscript{236} While the criminal justice system might catch the exceptionally egregious case, most victims of substandard but not criminal mediators are without recourse. A centralized regulatory agency provides the only functional method to address problematic practitioners in a swift and timely manner.

2. Mediation’s Ethos

One of the hallmarks of mediation is its flexibility\textsuperscript{237} which has allowed mediation to be practiced in different ways in different settings with practitioners emphasizing different methodologies in different venues.\textsuperscript{238} There are three ways in which regulation could undermine mediation’s historic malleability.

First, regulation brings the potential for a “one size fits all” standard of practice, which could result in certain styles or practices being favored at the expense of others.\textsuperscript{239} This concern is a direct reaction to the legal system’s attempts, perceived or actual, to colonize mediation turning it into a subsection of the legal profession which is focused primarily on evaluating legal claims.\textsuperscript{240} The second concern is that bureaucratic regulators are the antithesis of subtly and

\begin{footnotesize}

\textsuperscript{236} See, supra note __.

\textsuperscript{237} \textit{FRENKEL} \& \textit{STARK}, supra note __, at 1; Sharon Press, \textit{Institutionalization: Savior or Saboteur of Mediation?} 24 Fla. St. L. Rev. 903, 908-10 (1997).

\textsuperscript{238} See \textit{SPIRDR, ENSURING COMPETENCE}, supra note __ at 18 (stating “The field of dispute resolution practice is as varied and broad as the range of human relationships.”); \textit{ACR MEDIATOR CERTIFICATION TASK FORCE}, supra note __, Preamble (mentioning facilitative, law-centered, transformative, evaluative, and managerial mediation styles being used in various legal and non-legal disputes).

\textsuperscript{239} See generally, Ellen Waldman, \textit{The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity}, 30 U.S.F. L.Rev. 723 (1996) (arguing that any mediation credentialing system must reflect the “true breadth and scope of the mediation field” rather than a particular ideological belief about what constitutes mediation). See also, Dwight Golann, \textit{A New Policy on Mediator Credentialing}, 19 Disp. Resol. Mag. 38, 38 (Spring 2013) (stating that the field does not want a single “correct” method of mediating to be imposed by a regulating entity).

\textsuperscript{240} See generally Debra Berman & James Alfini, \textit{Lawyer Colonization of Family Mediation: Consequences and Implications}, 95 MARQ. L. REV. 13 (2012) (arguing that as family mediation becomes dominated by lawyers, mediation’s potential as a dispute resolution process lessens because lawyer mediators focus more on the lawyers’ needs at the expense
nuance, attributes characteristic of mediation. The third is that mediation has been, and should remain, dynamic and evolving. The calcification inherent in regulation would discourage this innovative spirit. Thus, creating an official body to oversee and manage mediators “strikes many as antithetical to the field.”

At its core, this argument is based upon a fear that uninformed or narrow-minded regulators or other professionals outside the mediation field, including hard-core litigators and judges, will narrow the range of acceptable mediation practices, thereby causing the field to lose its trademark flexibility by favoring one model of mediation over others. Essentially, this is a fear that the needs and desires of the litigation system will dominate the regulating entity and mediation will turn into nothing more than a process for evaluating litigants’ legal rights and responsibilities. However, this argument fails to recognize that regulation by a broad cross-section of the field offers the best chance at holding these forces at bay because such regulators are likely to recognize the importance of other professional backgrounds and the skills they bring to enhance the mediation field, particularly with the human side of conflict.

Further, any concerns about board staff should be alleviated by the experience of states that...
already regulate segments of the mediation field. Staff members in those states have been thoughtfully concerned about regulation’s impacts on the field’s flexibility and varying styles of practice. There is no reason to think that this experience would not be replicated in other states.

Finally, concerns about the impact of legislators and other political entities are exaggerated. Mediators have been quite successful in the political sphere and have a history of thwarting legislative efforts they believed to be harmful to the field. In fact, legislatures across the country have consistently adopted favorable laws such as stringent mediation confidentiality protections and robust liability protections. There is no reason to believe that regulation will affect that ability. Instead, a regulating body could hire its own lobbyist, adding another voice in the ear of lawmakers.

3. Definitional Problems

While related to the practice of law and other professions, mediation has a separate purpose from those professions. However, the question of whether mediation is a distinct enough occupation to be a separate profession is far from settled. The fundamental attributes

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248 Two excellent examples are Sharon Press and Geetha Ravindra. Press, the former Director of the Florida Dispute Resolution Center, has written extensively about the issues related to the impact of regulation and institutionalization on mediation practice. Sharon Press, Hamline Law School, faculty profile at http://www.hamline.edu/law/faculty/sharon-press/. Ravindra, the former Director of the Virginia Supreme Court’s Dispute Resolution Services is now a mediator for the International Monetary Fund and the President of the American Bar Association’s Dispute Resolution Section. See, ADR as First Career, Geetha Ravindra at http://adras1stcareer.blogspot.com/2014/10/geetha-ravindra.html.

249 See supra Section __.

250 See supra notes __ and ___ and accompanying text.

251 FRENKEL & STARK, supra note __ at 2; Hinshaw, supra note __ at 290-93 (describing mediation as a secondary profession). A prime example of this is that many mediation professional organizations are connected to bar associations, the most notable of which is the American Bar Association’s Section on Dispute Resolution. See ABA Dispute Resolution Section, homepage at http://www.americanbar.org/groups/dispute_resolution.html. And while mediation is widely thought of as within the sphere of lawyering activities, see MODEL RULE OF PROF. CONDUCT 2.4, one need not be a lawyer to be a mediator. See MODEL STDS. OF CONDUCT FOR MEDIATORS § ___ (discussing the mixing of professional roles).

252 See, e.g., Golann, supra note __, at 38 (stating “We want to see mediation recognized as a true profession...”); Nancy A. Welsh & Bobbi McAdoo, Eyes on the Prize: The Struggle for Professionalism, 11 DISP. RESOL. MAG. 13, 13 (Spring 2005)(stating that the mediation field is in the process of professionalization); Sharon Press, Institutionalization of Mediation in Florida: At the Crossroads, 108 PENN. ST. L. REV. 43, 57 (2003)(stating that given the number of mediations occurring and the number of mediators, mediation is being treating as a profession).
of a profession are a clear definition of the profession, a core body of knowledge, and a settled ethical framework.\textsuperscript{253} Mediation has, and does struggle, with all three of these attributes.

Without question, a clear definition of the regulated activity is essential to any regulatory scheme.\textsuperscript{254} To date, defining mediation has been much more complicated than it should be, largely because of two factors: quibbling within the field as to whether certain practices constitute mediation,\textsuperscript{255} and being so caught up in particular practice groups and their methodologies resulting in an inability to zoom out far enough to see the big picture.\textsuperscript{256}

The truth is that there is no real problem defining mediation: there are already several commonly accepted non-controversial definitions from which to choose.\textsuperscript{257} Furthermore, mediation is already a defined and codified term in every state in the United States through mediation confidentiality statutes.\textsuperscript{258} The problem is that these definitions do not create distinct lines around mediation practice to the exclusion of other fields; too many professions claim mediation as part and parcel of the services the profession provides.\textsuperscript{259} Traditional regulatory notions of occupational line drawing do not work for mediation. What mediation needs is a more innovative regulatory framework.

The other two attributes of a profession are more problematic. First, internal debates of what processes should be considered mediation and which practices are consistent with

\textsuperscript{254} Moffit, Schmediation, supra note __, at 72.
\textsuperscript{255} Moffit, Schmediation, supra note __, at 70-73 (describing difficulties defining mediation). See also, Adler supra note __, at 1-2 (arguing that defining mediation “is an endless self-indulgence” and a “bottomless pit of pontificating” based on which mediation theories one employs).
\textsuperscript{256} Adler, supra note __ at 1-2.
\textsuperscript{257} See infra note __ and accompanying text (giving the definition contained in the Uniform Mediation Act; supra note __ (defining mediation for use in this paper).
\textsuperscript{258} See infra note __ (listing mediation confidentiality statutes, all of which define mediation).
\textsuperscript{259} Hinshaw, supra note __, at 290-93
mediation’s function, reveal fundamental disagreements about what mediation’s core knowledge is or should be. Secondly, the Joint Model Standards of Conduct for Mediators appear to create a shared ethical structure, but some argue that the Standards are internally contradictory and create as many problems as they solve. As a result, mediation practitioners routinely ignore them, or are completely unaware of them, leaving the field with little in the way of common ethical guidance.

4. Unintended Negative Consequences

The final argument against regulating mediators is that a regulatory scheme increases the transaction costs associated with mediation services and this will have many unintended and unpredictable adverse consequences. For example, one potential negative impact could be that additional costs and qualifications will decrease the racial diversity in the pool of mediators. Despite the efforts of mediation organizations, most mediators are white males presumably because a large number of mediators are drawn from the ranks of the judiciary and legal practitioners, and neither group is ethnically or racially representative of the general population.

A striking example of this recently occurred within the ABA Section of Dispute Resolution Task Force on Mediator Credentialing. In an article discussing the Task Force’s work, the chair stated:

[M]ost members believed there is a lack of consensus within the field about … what processes should be considered “mediation,” even within a specific subject area (although some members believed the field has, or could, do so for particular schools or styles of mediation).

Golann, supra note __, at 39 fn. 2 (Spring 2013).

Welsh & McAdoo, supra note __, at 13 (stating “[I]t should come as no surprise that there is no consensus regarding the approach, skills, or ethics mediators should share.”). See also Juliana Birkhoff et al., Points of View: Is Mediation Really A Profession? 8 DISP. RESOL. MAG. 10, 11-12 (Fall 2001) (highlighting a discussion between two well respected people in the mediation field who disagree about the core knowledge for mediators); ASSOCIATION OF CONFLICT RESOLUTION AND AMERICAN BAR ASSOCIATION DISPUTE RESOLUTION SECTION, MEDIATOR CERTIFICATION FEASIBILITY STUDY 3 (2005) (reporting that only 40% of mediators surveyed agreed with the statement that mediation covers a unique body of knowledge)[hereinafter ACR/ABA CERTIFICATION FEASIBILITY STUDY].


Welsh & McAdoo, supra note __, at 13 (stating that the Model Standards exist “but many practicing mediators seem unaware of them or any other discrete set of norms.”).

Id.; ABA, MEDIATOR CREDENTIALING, supra note __, at 16.

population. Additionally, increased professional costs will likely exclude capable but financially strapped potential practitioners who may not be able to pass the costs along to consumers. Or, practitioners would successfully pass the costs to consumers which could price lower-income consumers out of the market.

Diversity and affordability are deep structural problems. Racial and gender diversity among practitioners, or the lack thereof, is regularly recognized as a concern and focus for the mediation field. And yet the field’s attempts to increase practitioner diversity have not been particularly successful. This appears to be the result of a confluence of factors: mediation’s feeder professions lack diversity, the field lacks visibility in diverse communities, mediators are typically selected through personal experience or recommendations via word-of-mouth, and diversity initiatives may only be successful when instituted on the local level. Regulation, in and of itself, is unlikely to address all of these factors, but it could push the field toward increased diversity by creating a more structured method of entry into the field, raising the field’s visibility in a broader swath of communities, and providing a platform to spearhead diversity initiatives. For example, a regulatory body may be able to better identify and recruit diverse practitioners.

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266 Id.
267 See COLE ET AL., supra note __, at 8; SPIDR, ENSURING COMPETENCE, supra note __, at 17. See also Potts, supra note __ at 73; Kleiner, License for Protection, supra note __, at 19.
270 See, e.g., Beth Trent et al., The Dismal State of Diversity: Mapping a Chart for Change, 21 DISP. RESOL. MAG. 21, 21 (Fall 2014) (asking the ADR field to “acknowledge our collective failure” to achieve diversity); Press, Mediation and Minorities, supra note __ at 37 and 39 (answering the question of whether progress has been made on the diversity front with a “qualified yes”); Sharon Press, Court Connected Mediation and Minorities: A Report Card, 39 CAP. U. L. REV. 819, 842 (2011) (grading mediator diversity efforts as “a good start but a long way to go”); Marvin Johnson & Homer C. La Rue, The Gated Community: Risk Aversion, Race, and the Lack of Diversity in Mediation at the Top Ranks, 15 DISP. RESOL. MAG. 17 (Spring 2009) (describing their difficulties in creating opportunities for top mediators of color).
271 Trent et al., supra note __, at 22; Johnson & LaRue, supra note __, at 18.
individuals who would make good mediators, it may be better situated to reach out to the civil rights community to recruit potential mediators, and it may be better able to bring diversity concerns to the forefront of those who select mediators.

Although the cost of regulation would likely flow through to consumers, it seems unlikely that these costs would be prohibitive. Assuming that an annual licensing fee would be $600 per year and that a mediator conducted only one mediation per month, the resulting pass-through cost would be $50 per mediation or $25 per disputant, an amount unlikely to price someone out of the mediation market.

V. Answering Three Critical Questions

Outside of court-connected mediation, every attempt at regulating mediators has been a fruitless endeavor. Yet, in the abstract, creating a workable regulatory framework for mediation is well within reach. Long-standing statewide court-connected mediation programs serve as robust models for solving fundamental regulatory questions, and dispute system design processes can and should be used to ensure that each state’s regulatory system has a structure and process that is both informed by and reflective of its culture and needs.

The devil is not in the details. Instead the culprits are more fundamental: a structural question about the activity to be regulated, a procedural question asking what form of registration should be used - registration, certification, or licensure, and an existential question about the impact of regulation on the field’s collective identity.

A. What Is the Regulated Activity?

272 See Trent, et al., supra note __, at 21-22.
273 I thank Lynn P. Cohen for this suggestion.
274 Trent, et al., supra note __ at 21-22.
275 [get cost of other licensed professions]
276 See generally NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES (2013); LISA BLOMGREN BINGHAM ET AL., DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (2012). See also ALEXANDER, supra note __, at 92 (stating that “participation in determining regulatory measures …. supports aspirations to achieve best practices in the regulated market.”).
Regulatory structures are based on definitions, the most fundamental of which is - what activity is regulated? The answer to that question determines who and what processes receive the benefits of regulation and who and what processes are excluded from those benefits. 277 Although defining the regulated practice is fairly easy and non-controversial for most regulated occupations, such is not the case for mediation. As noted earlier, there are several commonly accepted definitions for mediation, 278 and the diversity-consistency tension has kept the field from reaching consensus on a single definition, 279 thereby halting regulatory measures in their tracks. 280

In his work discussing the definition of mediation, Michael Moffitt has rightly criticized various mediation definitions for being too narrow or too broad and has even suggested avoiding the “definitional trap” if at all possible. 281 The definitional trap of using traditional methods of drawing lines around occupational boundaries to the exclusion of existing professions and practices does not apply to mediation and is impractical. 282 Mediation is not a primary profession; it is a secondary profession with the vast majority of practitioners coming to the field after working in more established professions like law, counseling, social work, or psychology. 283 Moreover, all of these professions, which require licensure, can rightfully claim

278 See supra note __ (providing several definitions of mediation).
279 Moffitt, Schmediation, supra note __, at 82-92; Moffitt, Four Ways, supra note __, at 205-06.
280 See supra Section __.
281 Moffitt, Schmediation, supra note __, at 93.
282 Id., at 101.

In the United States this matter of precisely defining mediation is an endless self-indulgence and entertainment when the different tribes, clans and races of mediation gather together for their annual conferences. It is also a bottomless pit of pontificating.

283 See e.g., Hinshaw, supra note __ at 290-93 (describing family mediation as a secondary profession in that mediation services fall under the umbrella of services that several professions provide). Contra ADR as First Career (a
mediation as being associated with their respective professional services, although some more directly than others.\textsuperscript{284} Thus, sidestepping the definitional trap problem while still drawing a line around the relevant portion of mediation practice is the key to regulation. The most sensible method of line drawing is to use a two pronged approach: regulating mediators who either seek to use mediation’s state-granted benefits or receive payment for mediation services.

The state could restrict access to state granted benefits -- mediation confidentiality, civil immunity and case referrals -- to those mediators who agree to subject themselves to state regulation. This regulatory method is analogous to governmental funding for non-governmental organizations - upon receipt of federal funds the recipient agrees to certain engage in or to refrain from engaging in certain activities.\textsuperscript{285}

Mediation confidentiality statutes provide a sound hook for the benefits prong.\textsuperscript{286} Mediation confidentiality laws are all but sacrosanct,\textsuperscript{287} and each state provides strong testamentary privileges for mediation communications.\textsuperscript{288} Thus, regulation would be based upon

\textsuperscript{284} For example, in answering the question of whether a disbarred lawyer could act as a mediator, the Supreme Court of Massachusetts noted the ability of mediators to switch professional roles and engage in the practice of law during the course of a mediation. In Re Bott, 969 N.E. 2d 155, 161-62 (Mass. 2012) (holding that “In the context of bar discipline cases mediation may constitute legal work such that an individual may engage in it only in certain circumstances and under specified conditions.”). See also, Joint Model Standards, § VI(A) (warning mediators that mixing the role of mediator and another profession is problematic and advising them to distinguish between such roles).

\textsuperscript{285} There are many examples of this kind of a regulatory hook on the federal level, but an easy one is Title IX to the Higher Education Act of 1965. 20 U.S.C. §§1681-1688 (2014). An overly simplistic explanation of how Title IX works is that no person can be discriminated against on the basis of sex by any university receiving federal monies, as a condition of the university’s receipt of those funds. Beth B. Burke, To Preclude or Not to Preclude?: Section 1983 Claims Surviving Title IX’s Onslaught, 78 WASH. U. L.Q. 1487, 1492-93 (2000).

\textsuperscript{286} See Moffit, Four Ways, supra note __, at 215.


\textsuperscript{288} The vast majority of states and the District of Columbia have broad based mediation confidentiality statutes already in place. See e.g., ALA. CODE § 6-6-25(b)–(c) (2014); ARIZ. REV. STAT. ANN. § 12-2238 (2014); ARK. CODE ANN. § 16-7-206 (2014); CAL. EVID. CODE § 703.5 (West 2014); COLO. REV. STAT. § 13-22-307 (West 2014); CONN. GEN. STAT. § 52-235d (2015); DEL. CODE ANN. tit. 6, § 7716 (2015) (Business Disputes—Voluntary ADR); D.C. CODE § 16-4207 (2015) ; FLA. STAT. §§ 44.401—406 (2014); GA. ALT. DISPUTE RESOLUTION R. IIV; HAW. video blog featuring stories of individuals who started out their professional careers in the ADR field) at http://adras1stcareer.blogspot.com/ (last accessed on Feb. 20, 2015).
a popular and well-defined existing framework. However, requiring regulation to receive the benefit of confidentiality protection could only work if mediation confidentiality protection could not be available through other means such as contracts, court rules, or the common law. Essentially this would create a market based approach to regulation. Mediation users who value confidentiality protection would hire only regulated mediators, and mediators who value the ability to provide confidentiality protection would agree to be regulated. Presumably this method would capture the mediators who should be regulated while leaving those professions that engage in quasi-mediation services out of the regulatory framework. Furthermore, other state benefits like civil immunity and case referrals could follow confidentiality protection and only be available to regulated mediators. The primary drawback to this approach is that it does not achieve optimal levels of consumer protection because mediators who opt out of the confidentiality market could still mediate and take advantage of the public. That is where the payment prong comes in.

The regulatory scheme’s second prong, regulating those who receive payment for providing mediation services, would focus on a more traditional line drawing regulatory approach. This prong would focus on capturing professional mediators, those who (a) hold...
themselves out as mediators, (b) provide mediation services, and (c) charge money for those services.

First, mediation regulation should reach only those individuals who self-identify as mediators. Professionals providing services under the umbrella of the other regulated profession that could loosely be considered mediation -- marriage counselors, parenting coordinators, and judges engaging in settlement conferences -- should not be caught in the regulatory scheme. Self-identification as a mediator could be done through word-of-mouth, advertising, signing a mediation services contract, or any other means to imply that one is engaging in mediation.

This prong also requires common, straightforward, and workable definitions of mediation and mediator. Such a definition for mediation resides in the Uniform Mediation Act (UMA), which is typical of most state mediation confidentiality statutes. It defines mediation as “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.” The UMA also defines mediator, but this definition -- “an individual who conducts a mediation" -- is not as helpful. It ensures that those who provide mediation services would be regulated, but it is too broad and would lead to absurd regulatory results. Parents attempting to resolve their children’s quarrels, for example, would be considered mediators. The requirement of charging money in exchange for providing mediation services narrows that group down. Additionally, this element should be

291 This concept draws on Profesor Riskin’s decision to include the mediation approaches of all self-identified mediators in his seminal article describing what mediators do. See Riskin, Understanding Mediators’ Orientations, supra note __, at 13 (defending his decision to include what were then controversial practices in his description of mediation practices).

292 For example, a facilitator who was not subject to mediator regulation could run afoul of this by stating, suggesting, or hinting that mediation confidentiality protections apply to conversations he is facilitating.


294 UMA § 2(3).
a clear-cut component to establish. Furthermore, mediators who solely provide gratis mediation services -- peer mediators in schools, clergy working with congregants, and friends or family members helping each other resolve disputes -- could continue to mediate without being pulled into regulatory framework.\textsuperscript{295}

Using the innovative approach of a two pronged regulatory method should be broad enough to capture all mediation activity that should be regulated without being overreaching. Plus, it would make mediators flock to be regulated because only regulated mediators would have access to the tremendous benefits mediators receive under state law - access to the strong confidentiality protection, civil immunity, and a source for business.

B. What Form of Regulation?

The next fundamental question is what form of regulation should be used? The answer depends on the goals of regulation. Here the primary goal is to protect the public by creating standards for entering and staying in the field, by providing information about the quality of practitioners, and by disciplining sub-standard practitioners. A secondary benefit is that regulation creates title protection, preserving the field’s reputation and integrity.

There are three methods of occupational regulation – licensure, certification, and registration.\textsuperscript{296} Registration, the simple listing of one’s address and posting a bond or fee, is the lowest level of occupational regulation available. Because it provides little information about the registrant and creates no standards or methods for quality control, registration fails to protect either the public or the field’s reputation. It should be eliminated from consideration.

Certification requires individuals to meet minimum standards of competency, but certification systems allow non-certified individuals to engage in the regulated activity, and

\textsuperscript{295} Organizations that use rosters of volunteer mediators might require their volunteers to get the credential, and volunteers may seek regulation to signal their training and credentials.

\textsuperscript{296} See supra notes ___ to ___ and accompanying text.
losing one’s certification does not restrain one’s ability to provide services in the field. Thus, it provides only a limited measure of public protection by signaling to the public who has achieved and maintained minimum standards of quality. Because certification is not an absolute barrier to entry into the field, charlatans like Gary Karpin could simply refuse to join the ranks of the regulated and continue exploiting the public and the field. Thus, a certification system defeats regulation’s primary goal of public protection.

Licensure makes it unlawful to engage in the regulated profession without a license. Because licenses can be revoked for unethical, unprofessional, or criminal conduct, licensure provides a method of recourse against troublesome mediators. It is the only form of regulation that satisfies regulatory goals of consumer protection and title protection.

Since licensure achieves the primary goals of regulation, the question becomes whether licensure is suitable for the two pronged method of regulation proposed earlier. The professional prong of the two pronged regulatory scheme employs traditional regulatory line-drawing to distinguish regulated mediation activity from other work-activities. This looks like licensure, which is the regulatory method that should be employed for mediators.

C. What Regulation Means for the Field’s Identity

Mediation is a routine part of the civil litigation process, but that was not always the case. In the late nineteenth and early twentieth centuries mediation was used to quell disruptive labor strife,297 and became a routine part of the collective bargaining process.298 The modern mediation movement began when the Civil Rights Act of 1965 created the Community Relations Service (CRS), a division of the U.S. Department of Justice designed to apply labor mediation

297 See generally, COLE, ET AL., supra note __ at 68 (discussing the origins of mediation in the US); BARRETT, supra note __ at 85-95 (describing the early days of the labor movement).

298 See generally, BARRETT, supra note __ at 102-106 (describing the creation of the Department of Labor and the Federal Mediation and Conciliation Service among other agencies) and 118-121 (describing the National Labor Relations Act and the growth of collective bargaining).
concepts to restore harmony and stability in areas plagued by racial and ethnic strife. By the mid-1970s, the CRS’s achievements led some to believe that mediation could provide a more democratic and effective alternative to the judicial system, one that could rebuild neighborhoods and communities that had lost faith in the judicial system. Consequently, many early proponents viewed mediation as a democratizing social movement designed to transform society’s methods of managing and engaging in conflict. Others saw mediation as a more humanistic disputing process, one that recognized individuals’ relational capabilities to transform the manner in which they engage in conflict.

In the 1980s, as the judiciary began experimenting with mediation and other forms of dispute resolution, many of mediation’s proponents expected their movement to transform civil litigation, moving the legal system’s emphasis from lawyers to clients. But by the early 1990s, those who viewed mediation as a social movement began to feel their movement was being co-opted by a litigation system that was distorting mediation into a technocratic method of solving legal disputes. Some intellectual leaders continued to push mediation as a truly alternative method of achieving justice, but others began to temper their goals to a simple hope.

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300 COLE, ET AL., supra note __, at 71-73. For example, the U.S. Department of Justice piloted neighborhood justice centers in Atlanta, Kansas City, and Los Angeles each of which used a broad range of citizens as mediators. Id. at 72-73. Two of these three centers were underutilized and abandoned, and the third survived on a steady stream of court referrals. Id. at 73.
301 BARRETT, supra note __, at xiii. This thought is captured nicely in an early discussion of mediation:

[Mediation] is also an expression of a set of positive values about how people should deal with one another… Mediation is a paradigm that can lead to a peaceful and evolutionary revolution in the way people act and think in general.

John Lande, Mediation Paradigms and Professional Identities, 4 MED. Q. 19, 19 (June 1984).
303 In fact, the “mediation movement” was widely viewed as being anti-judicial system. See COLE, ET AL., supra note __, at 71-72 and 73-74. See also Adler, Expectation and Regret, supra note __, at 3-4 (discussing how the courts and lawyers have eroded the premises and core values of the early mediation movement).
304 James Alfini et al., What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions, 9 OHIO ST. J. ON DISP. RESOL. 307, 309 (1994); Adler, Expectation and Regret, supra note __, at 3-4.
305 Alfini, et al., supra note __, at 309; Adler, Expectation and Regret, supra note __ at 3-4.
that mediation could lead to better lawyering. Others simply acknowledged that mediators “really are simply practitioners of a useful skill which ought to be sold . . . like other useful skills.” Accepting more tempered goals has been difficult for some segments of the field as evidenced by resistance to institutionalization and debates about whether evaluating legal claims should be considered mediation. Moreover, a lament of missed opportunity echoes through the field’s old-guard, who now see mediation’s ideals of social transformation as no more than “a wonderful, but occasional side-effect” in litigation. For many, regulation will signal the death of mediation’s soul as mediation is completely absorbed into the litigation process.

Such fatalistic thinking ignores the fact that mediation is, fundamentally, a “useful skillset” that provides numerous approaches to conflict resolution focusing on the needs, well-being, and interests of the people participating in the mediation. Mediators regularly show this concern by acknowledging and engaging the emotional aspects of conflict and appealing to

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306 Alfini, et al., supra note __, at 325 (commentary of Professor Riskin viewing mediation as having the potential for changing the way lawyers practice law by encouraging them “to think broadly” and “in terms of underlying interests.”).

307 Id., at 310 (quoting noted jurisprudence scholar Austin Sarat).

308 See supra notes __ to __ and accompanying text. See also, James J. Alfini, Trashing, Bashing, and Hashing It Out: Is This the End of Good Mediation?, 19 Fla. St. L. Rev. 47 (1991).

309 For nearly ten years mediation’s intellectual community argued whether mediators should be allowed to evaluate disputants’ legal claims. The Facilitative-Evaluative Debate, as it became known, was started in reaction to an article organizing a schema around various mediator tasks. See Riskin, Understanding Mediators’ Orientations, supra note __; Lela Love, The Top Ten Reasons Why Mediators Should Not Evaluate, 24 FLA. ST. U. L. REV. 937 (1997). While this debate still resonates within the segments of the field, it formally came to an end when there was little reaction to Professor Riskin’s revision of his organizational schema. See Riskin, Decisionmaking in Mediation, supra note __.

310 See, e.g., Adler, Expectations and Regret, supra note __. In preparation for a speaking engagement in England, Peter Adler interviewed twenty-five “veterans who helped develop mediation” in the U.S. Id. at 2. Several themes emerged, one of which he called “the Decline and Decay of True Mediation” and described as follows:

The essence of the first story line is this: mediation has changed in response to bureaucratic imperatives and the workings of the marketplace. It isn’t all bad, but most of those I spoke with think it has degenerated and gotten worse.

Id. at 3.

311 Alfini, et al., supra note __, at 315 (comments of Prof. Len Riskin).

individuals’ self-determination, informed decision-making, and improved communication.\textsuperscript{313}

These skills have, in part, led to the field’s growth. In fact, if organized as prescribed in this article, the regulating entity could recognize that non-legal professions have the requisite skills to be successful mediators, particularly those professions that deal with the human side of conflict.

But like doctors and bedside manner, some mediators are good at engaging the human side of conflict and others are not.\textsuperscript{314} It is this latter group of people who may be causing some to fear of regulation. If a regulatory body were populated with individuals who lacked or did not value bedside manner, such skills could be devalued in favor of case evaluation skills.\textsuperscript{315}

However, this concern is not well-taken. Case evaluation is not a competency necessary for entry into any established court-connected mediation program,\textsuperscript{316} the place where such evaluative skills are presumably most valued. And, even though segments of the market may favor mediators with strong case evaluation skills,\textsuperscript{317} case evaluators who are unable to connect on a human level with their clients often fail to get cases settled.\textsuperscript{318}

\textsuperscript{313} See Alfini, et al., \textit{supra} note __ at 310 (Prof. Bush noting that these concepts helped originate the mediation field) and 315 (Prof. Riskin arguing that mediation should be structured to “allow for the human dimension.”)

\textsuperscript{314} See \textit{In re} Cornelio, No. 12-177, (Ariz. Comm’n Jud. Conduct 2013), available at \url{http://www.azcourts.gov/portals/137/reports/2012/12-177.pdf} (censuring a judge for treating litigants poorly during judicial settlement conferences); COMMITTEE ON ETHICS OF THE GEORGIA DISPUTE RESOLUTION COMMISSION, OPINION 2002-1 available at http://www.godr.org/files/Formal%20Opinion%202002-1%203-23-04TP.pdf (disciplining a mediator for making inappropriate comments speculating about why a woman was attracted to her spouse).

\textsuperscript{315} See Riskin & Welsh, \textit{supra} note __ at 874-76 and 896-97.

\textsuperscript{316} For example, the Florida Rules for Certified and Court-Appointed Mediators specifically states:

\begin{quote}
A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue…. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.
\end{quote}


\textsuperscript{317} See e.g., Frenkel & Stark, \textit{supra} note __ at 16; ABA TASK FORCE ON IMPROVING MEDIATION QUALITY, \textit{Final Report} supra note __ at 14.

\textsuperscript{318} See generally, Frenkel & Stark, \textit{supra} note __ at 16-21 (arguing that mediators need to know “how disputants contribute to and experience conflict, what matters to them in disputing, and how strong conflict and pervasive cognitive and motivational biases affect parties’ negotiating behavior and decision making.”); Jeff Kichaven, \textit{For Professional Mediators, It’s About More than Assessing the Case’s Value}, 24 \textit{Alternatives to the High Cost of Litigation}, 129
VI. Conclusion

Gary Karpin has shown that mediation can be exploited in ways few ever imagined. Disguised as a professional divorce mediator, he received large sums of money from people seeking mediation services before the criminal justice system put him out of business. Yet, his story has received little publicity, even within Arizona’s tight-knit mediation community.319 Using Karpin’s abuses as a jumping off point to illustrate how easily the guise of mediation can be used to defraud the public, I argue that the occupational regulation of mediators is necessary to protect both the public and the mediation field.

Of course, relying exclusively on his exploits as a basis for regulation is challenging. His is a case of egregious behavior, far exceeding that of any other documented cases,320 and the typical abuses in which mediators engage are minor in comparison.321 Some may argue that regulation in response to Karpin is simply an overreaction to an isolated case that falls into the “bad cases make bad law” category. Others may argue that regulation will not solve the rogue mediator problem as every regulated profession still has problematic practitioners. The proponents of these arguments either misunderstand or ignore the lessons that Karpin teaches us: first, that mediation consumers are vulnerable to charlatans who use the process as a means to

319 This author participated in two mediation continuing education programs detailing Karpin’s story – at the 2011 statewide Arizona AFCC meeting and another in 2013 for the State Bar’s Dispute Resolution Section. At the AFCC program only one person in a room of approximately 50 people knew of Karpin’s exploits. At the State Bar program only three of approximately 25 attendees knew of him. 320 See supra Section __ (discussing other egregious cases).

321 For example the last three cases resulting in sanctions imposed on Florida mediators include: lawyer’s failure to disclose prior disbarment in another state on mediator application, violating the Florida Lawyer Assistance program contract, and the improper transfer of funds from IOLTA account to firm’s operating account; sending letters to homeowners subject to foreclosure about mediation that gave misimpressions of how the state’s home foreclosure mediation program worked; law firm employee referring mediations to a brother-in-law without disclosing the brother-in-law’s relationship to the law firm. See Sanctions – Imposed, FLORIDA COURTS, http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-consumers/discipline-proceedings-sanctions/sanctions-imposed.stml (last visited Feb. 20, 2015) (noting: Keith Alan Manson, Florida Mediator Qualification Board, QCC2013-057; William Todd Lax, Florida Mediator Qualification Board, MQB2013-005; Florida Mediator Qualification Board, Karen A. Watson, QCC2012-014).
take advantage of others, and second, that it is far more difficult than it should be to push those individuals out of the field.

Despite the field’s vulnerability and ever increasing visibility, efforts at regulating mediators have fallen flat because the public is not clamoring for mediators to be regulated and mediators are not galvanized on the issue of regulation. Mediators’ laissez-faire attitude toward regulation is understandable as the push and pull of diversity-consistency tension has left the field wary of regulatory attempts. Complicating matters is the fact that mediation does not easily fit into the existing occupational regulatory framework. Mediation and mediator are so broadly defined that it is all but impossible to differentiate mediators from other related professionals.

Of course there may be other explanations for mediators’ resistance to regulation. Many practitioners are already licensed in another field and may view more occupational regulation as unnecessary. Maybe they see themselves as libertarians fearful of governmental intervention of any sort. Maybe mediators do not have the stamina to return to legislators time and again until licensure is adopted. Maybe they fear that regulation will suffocate their favored mediation style or method. Maybe they want to maintain the field’s legacy of flexibility and inclusiveness to ensure its ability to evolve. Maybe they find nothing wrong with the status quo and adhere to the adage that “if it’s not broke, don’t fix it.” Whatever the case may be, it is simply dumb luck that there has only been one Karpin, at least that we know of, and it is only a matter of time before more con artists dons the cloak of mediation.

It is worrisome that the field feels little or no need to protect mediation’s integrity through regulation, but more troubling is the fact that consumer protection is of little concern to regulation’s opponents. This is especially so because the mediation field prides itself on its ability to understand and address other peoples’ concerns. Instead of taking an external
empathetic approach to regulation, the field has focused inwards making the perfect the enemy of the good thereby refusing to acknowledge the innate problems with a *caveat emptor* regime of practitioner quality control. Simply ignoring consumer protection issues more closely resembles the inertia associated with perceived inconvenience and blind traditionalism rather than a principled argument against regulation. Sadly, with no external pressures to force the field’s hand, it is unlikely that mediators will be regulated any time soon. The field’s unease with regulation suggests that mediators want to have their cake and eat it too – they push for professionalization but do so without the trappings of professionalism.