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A CONNECTICUT MEDIATOR IN A KANGAROO COURT: SUCCESSFULLY COMMUNICATING THE AUTHOR

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A CONNECTICUT MEDIATOR IN A KANGAROO COURT?: SUCCESSFULLY COMMUNICATING THE “AUTHORIZED PRACTICE OF MEDIATION” PARADIGM TO “UNAUTHORIZED PRACTICE OF LAW” DISCIPLINARY BODIES

Paula M. Young

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*1049 1. Introduction

Mark Twain's book, A Connecticut Yankee in King Arthur's Court, 1 tells the story of Hank Morgan, a nineteenth century resident of Hartford, Connecticut, who wakes one day to find himself in early medieval England. Hank uses his knowledge of modern technology, advertising, and democratic values to influence the superstitious, uneducated, and brutal aspects of English society. Twain exposes the romanticized ideas about medieval chivalry and life under the thumb of powerful forces, including the aristocracy and the Roman Catholic Church. 2

A review in an 1889 issue of the Boston Sunday Herald noted: “the pages are eloquent with a true American love of freedom, a sympathy with the rights of the common people, and an indignant hatred of oppression of the poor, the lowly and the weak, by the rich, the powerful and the proud.” 3

This article tells the cautionary tale of a Connecticut therapist-mediator, 4 Dr. Resa Fremed, 5 faced with a disciplinary proceeding in what she believes was held in a kangaroo court. 6 She spent $6,000 out of her own pocket unsuccessfully defending a complaint accusing her of the unauthorized practice of law (UPL).

When the author interviewed her for this article, Dr. Fremed still had a poor understanding of what she had done that had drawn the attention of the family law judge who requested the disciplinary investigation. She also had a vague understanding of the
basis for the consent judgment she reluctantly signed with the Chief Disciplinary Counsel because she could no longer finance her defense or endure the emotional and psychological toll of a disciplinary proceeding. She cannot translate into action the limitations of the consent judgment and so, Connecticut has lost a skillful family mediator because she is simply too afraid to practice in the state.

A careful review of the facts leading to her disciplinary proceeding and a careful review of the transcript of that proceeding leads to one conclusion—no clear and convincing evidence showed that she had engaged in the practice of law. At the same time, that same review shows that her behavior fell within a reasonable interpretation of the ethics guidelines—both aspirational and mandatory—that apply to the mediation field. The disciplinary proceeding highlights one of the cross-cultural conversations that occur when lawyers talk with mediators about mediation.

More specifically, Professor John W. Cooley suggests that we need to reframe the problem presented when nonlawyer-mediators provide certain services—including option generation, option evaluation, and the drafting of mediated settlement agreements. Instead of applying the dominant paradigm represented by the various analyses of the practice of law, the mediation field needs to provide a competing paradigm that asks “what is the authorized practice of mediation within the larger practice of ADR?” Cooley explains:

[T]he principal quandary of the pioneers and designers of this new paradigm—the ADR profession—is that members of the prevailing—law practice—paradigm want to apply their law practice definitions before the pioneers have had an opportunity to define basic terms and establish clear boundaries of their ADR profession. The pioneers, therefore, must design an interim paradigm to avoid being subsumed into the law practice paradigm. An interim paradigm, or as some would urge, a “parallel” paradigm, appears to be the optimal solution to the reframed problem.

This article does not attempt to design an “interim” or “parallel” paradigm. Instead, it applies several expressions of that paradigm to the specific facts of this disciplinary proceeding. It concludes that Dr. Fremed adhered to the values of her mediation profession. However, the application of a broad interpretation of the prevailing “law practice” paradigm to her situation had a significant impact on mediation in Connecticut. As Cooley predicted, aggressive UPL enforcement or suggested efforts to avoid it “muzzle[s] mediators, . . . *1052 discourag[e]s] talented non-lawyers from entering the ADR profession, [and] reduce[s] the mediation process to a mechanical, word-precise, self-conscious, inflexible, content-void exercise.” If disciplinary bodies in other states use Dr. Fremed's case as precedent, it will have a much broader and inappropriate impact on the mediation field.

This article joins Cooley's “call to arms” and invites the mediation field to play a much more active role in disciplinary proceedings that involve mediators. The mediation field should demand greater due process guarantees in these proceedings, demand that the disciplinary body meet a high burden of proof to support a finding of unauthorized practice of law, support mediators and their attorneys through expert testimony and amicus briefs, and generally ensure that the disciplinary bodies are well-schooled in the “authorized practice of mediation” paradigm before they make a decision in a proceeding.

This article also calls for the mediation community to accept greater responsibility for the regulatory vacuum that allows UPL disciplinary bodies to step in more easily and apply the “law practice” paradigm. The field should actively engage in changing applicable law through legislation, creating new regulatory infrastructures for mediators, and pursuing litigation to establish favorable precedent.

Unfortunately for Dr. Fremed, neither persons operating the Connecticut court-connected mediation programs nor members of its mediation community have created the regulatory “infrastructure” that supports high quality mediation in the state.
infrastructure helps develop the “parallel” paradigm of what constitutes the “authorized practice of mediation.” At the time of Dr. Fremed's disciplinary proceeding, Connecticut had no court-approved standards of ethics governing mediators. It had no formalized court-approved training program for mediators or other barriers of entry to the field. It did not attempt to discover if prospective mediators had good moral character. It had no licensing, registration, certification, or recertification process. It did not require mediators to get continuing mediator education. It had no immunity statute for mediators. And, it had no ethics advisory panel that could help mediators resolve the inevitable ethical dilemmas they face.

Instead, a private group of Connecticut mediators, the Connecticut Council for Divorce Mediation (CCDM), offered some of the elements of the “infrastructure” supporting mediators in the state. But none of those elements had the express blessing of the Connecticut Supreme Court or the organized bar. In other words, they carried limited weight among those persons who might decide the UPL issue in the context of mediation. More importantly, without the dialogue that accompanies design of a regulatory infrastructure, the legal community perpetuates many misconceptions about mediation.

Had Connecticut judges, lawyers, and mediators created a more comprehensive infrastructure for mediation, the “parallel” paradigm arising from that infrastructure could have changed the outcome in this case. First, it may have changed the way Judge Vilardi-Leheny analyzed the situation before she decided to make a referral to the disciplinary body. Second, it could have changed the way the members of the disciplinary body analyzed the facts of the situation. While fears of a disciplinary proceeding do not alone justify the field's efforts to create the “parallel paradigm,” the current lack of certification, regulation, and oversight of [mediators] is in large part fueling the efforts of the 'practice of law' proponents to bring mediation within the scope of lawyer regulation. The author sees the development of the “parallel” paradigm in every state as a way to “push back” against the “law practice” paradigm.

II. This Article

Section III of this article analyzes the disciplinary proceeding brought against Dr. Resa Fremed and the statutes and precedent on which the Connecticut Statewide Grievance Committee relied in finding that she had engaged in UPL. The analysis is highly critical of the decision. Section IV discusses the “law practice” paradigm as expressed in the UPL context. Section V looks at the application of UPL doctrine in the context of mediation, including the state ethics advisory and grievance opinions relating to mediation. Section VI describes the “authorized practice of mediation” paradigm. This section considers definitions of mediation, the role of the mediator, the constraints imposed by mediator ethics codes on mediator behavior, and the lack of evidence of any harm to the public from services provided by mediators. Section VII suggests that the UPL guidelines for mediators developed in Colorado, Georgia, North Carolina, and Virginia attempt to balance two competing policies while the mediation field establishes the “parallel” paradigm of the “authorized practice of mediation.” It summarizes the advice offered by these guidelines about the distinction between legal advice and legal information. It also summarizes the advice they give on drafting memorandum of understanding, settlement agreements, and court forms. Section VIII suggests some precautions individual mediators can take to avoid UPL charges. Section IX describes the challenge facing the mediation field in “pushing back” against the “law practice” paradigm. It urges the field to lobby for changes in the definitions of the “practice of law” found in statutes and court rules. They should expressly exclude mediation. The field should aggressively use UPL proceedings involving nonlawyer-mediators as a way to establish favorable court precedent. It also urges state courts to build the infrastructures needed to support mediation and to protect the public through codes of ethics, ethics advisory opinions, and grievance systems. It concludes that to the extent certain actions of mediators come close to the boundaries of law practice, UPL disciplinary bodies should first scrutinize those actions in light of the core values of mediation and generally accepted ethical constraints on mediators. They should worry first about consumer protection and not turf protection. The author hopes that this article will serve as the template for any brief a lawyer will need to file in the future on behalf of a nonlawyer-mediator accused of engaging in the unauthorized practice of law.
III. A Connecticut Mediator in a Kangaroo Court?

A. The Connecticut Mediator’s Training and Experience

What do we know about the Connecticut mediator who faced the power and perhaps the ignorance and pride of the court-sponsored disciplinary proceeding under the direction of the Office of Chief Disciplinary Counsel of Connecticut? Dr. Resa Fremed trained with John Haynes, a highly respected mediator with a warm and “elicitive” style of practice that this author holds up as a model of good mediation to her students. In 2001, the Association for Conflict Resolution (ACR) created the John Haynes Distinguished Mediator Award to honor him. In short, Dr. Fremed learned her skills from the best of the best among mediators.

Dr. Fremed worked hard to achieve professional competency. She pursued mediation as her third career. She held a Ph.D. degree in education. She served as a licensed marriage and family therapist. She obtained over 400 hours of mediation training. She had conducted about 300 mediations. She had trained other mediators. She had accumulated 20 hours of training in mediation ethics at conferences and other training programs. She met regularly with other mediators in “guildhall” conversations about mediation skills and ethics.

She had obtained the “Advanced Practitioner” designation conferred by ACR. Before the merger of the three organizations that became ACR, the Academy of Family Mediators designated her as an “approved consultant” member. At one point in her career, she helped design the parenting education program for the State of Connecticut. Courts require parents who are involved in child custody or divorce cases to attend this educational program. Thus, Dr. Fremed’s special area of expertise clearly included parenting plans. She actively participated in the events of CCDM. She served on its Board of Directors in the late 1990s. She also became a member of the New York State Council on Divorce Mediation. Taken together, her credentials likely exceed those of most practicing mediators.

B. Connecticut Mediator’s Precautions Against the Unauthorized Practice of Law

Dr. Fremed's brochure advised parties that: “Mediation is conducted under the guidance of a trained professional who helps the [divorcing] couple make their own important decisions concerning their changing future.” It continues: “[During] [t]he first session . . . both parties meet the mediator, review some printed material about the process of divorce or separation, listen to a detailed explanation of mediation and have the opportunity to ask questions.” The brochure explains: “The mediation process culminates . . . in the preparation of a Memorandum of Understanding which sets forth in detail the specifics of your mutually arrived at decisions.” Most importantly, from a UPL perspective, the brochure explains that “[m]ediation does not eliminate the use of attorneys; parties are encouraged to consult independent legal counsel. Mediation simply changes the function of the lawyer from that of an adversarial negotiator to a legal consultant and advisor.” Thus, Dr. Fremed's first contact with potential parties-- the brochure--highlighted the continuing role of attorneys and encouraged parties to use them as legal advisors in the mediation process.

Dr. Fremed's agreement to mediate provided:

Each of us understands that the mediator is not an attorney and is not legally representing either or both of us. We have been advised by the mediator to have separate independent counsel (and any other consultants as required) for consultation during and at the conclusion of the mediation process. We agree to identify our legal counsel and consultants and release [Dr. Fremed] to communicate with them, and we will authorize
them *1059 to communicate with [Dr. Fremed] for purposes of the mediation process. Thus, in this communication, Dr. Fremed clarified the limits of her role and recommended the use of independent legal counsel.

In the section on the costs of mediation, the agreement to mediate states: “There is also a Memorandum of Understanding [(MOU)] that will be prepared by the mediator. We will each receive two copies (including Appendices) and will pay a fee of $700 for the preparation of the document.” One of the last paragraphs of the agreement states:

> We understand that at the conclusion of the sessions, the mediator will prepare a written [MOU], setting forth our agreements. We will each receive two copies. A Memorandum will be submitted to our attorney(s), who will review and implement our decisions as reflected in the Memorandum. Any new issues raised by our attorney(s) will be returned to mediation for further negotiations.

In addition, both parties to the mediation signed a “Waiver of Attorney Client Privilege” which gave each party’s counsel the right to consult with the mediator “at any time, concerning all matters pertaining to my case.” Thus, several sections of the agreement to mediate highlighted the role of attorneys in the mediation process.

Dr. Fremed developed the habit of advising parties in her opening statement that she was not an attorney, that she would not be providing legal advice, that they could consult with an attorney at any time, and that they should have an attorney review any draft agreements they might reach because the agreement could affect the parties' legal rights. At the beginning of the mediation, she would *1060 determine if either party had retained counsel. At the beginning of every new session with the parties, she would iterate these disclosures and recommendations. She would also ask whether either party had consulted with his or her attorney during the time between sessions and what the attorney had suggested. She also asked for permission to talk with each party's attorney about all matters arising in the mediation.

At the close of mediation, her habit was to advise parties to consult with counsel about the points of agreement reflected in the MOU. She preferred to fax the MOU directly to attorneys. If the parties had not yet retained attorneys by the end of the mediation, Dr. Fremed would give each party a copy of the MOU with a transmittal letter to his or her attorney. The MOU that became the subject of the disciplinary proceeding involving Dr. Fremed stated in its last paragraph: “Diane and James [Wright] agree that their attorneys will review this Memorandum to ascertain if there are issues not included.”

C. The Mediation Leading to Her Disciplinary Referral

Dr. Fremed found herself in the midst of a privately-referred mediation between two contentious divorcing parties. The husband later retained counsel. The wife advised Dr. Fremed that she was consulting with an attorney, but apparently she had not formally retained him or her. Both parties intended that a lawyer would draft the final separation agreement.

*1061 The mediation terminated after the parties had developed agreement on most aspects of the parenting plan. They had also reached agreement on post-majority educational support for the children and the life insurance Mr. Wright would maintain. But, the parties had not completed the child support agreement or resolved other financial matters. The parties had discussed the issues with the mediator, but seemed to change their minds at each subsequent session.
terminated the mediation, Dr. Fremed sent to the husband's attorney a draft MOU outlining the partial points of agreement reached by the parties. Neither the mediator nor the parties had signed the MOU.

The husband's lawyer, Barbara Flanagan, drafted a more specific settlement agreement, including provisions governing child support. She also made the decision to attach to the agreement, as Schedule A, a copy of the partial MOU prepared by Dr. Fremed that resolved the parenting plan issues. But shortly after the lawyer's additional drafting efforts, the husband did not renew his retainer and he amicably discharged his lawyer. At this point, the wife took the latest draft of the agreement prepared by the husband's lawyer, re-wrote it, and added additional information.

C. The Divorce Hearing Before Judge Vilardi-Leheny

With this version, or perhaps a later version, of the cobbled-together, re-drafted Separation Agreement in hand, the parties appeared pro se before Superior Court Judge Sandra Vilardi-Leheny, PJ - Family Matters. Based on the hearing transcript, Judge Vilardi-Leheny quizzed the parties about a number of different provisions of the agreement. She expressed concern about the child support calculation appearing at paragraph 11 of the Separation Agreement. The parties had agreed that the husband would pay child support based on a percentage of his income. In Connecticut, however, parties must agree on a fixed amount of child support, generally informed by the state's child support guidelines. The husband could seek a modification of the amount for child support, but it could not freely fluctuate according to his income.

She also expressed concern about the Educational Support Order that governed post-majority educational support for the children. The parties had agreed in paragraph 14 of the Separation Agreement that they would provide four full academic years of college or technical school education for their children, who were students at a private Montessori school at the time of the divorce. The judge also expressed concern about the provision governing life insurance appearing at paragraph 17 of the Separation Agreement.

Judge Vilardi-Leheny reviewed and expressed no concerns about the parenting plan provisions found at Schedule A that the parties incorporated by reference at paragraph 10 of the Separation Agreement. The mediator had drafted only that portion of the final version of the agreement submitted by the parties to the court. The parties also incorporated by reference the Bill of Rights for Children of Divorce and the Bill of Rights for Parent's [sic] Divorcing. The parties' decision to make these bills of rights a part of their Separation Agreement provides an example of a situation in which parties agree that normative values other than the law will apply to their relationship.

Judge Vilardi-Leheny asked the parties several times who had helped them draft the agreement. Their answers, however, never made it clear that the mediator had drafted only the parenting agreement attached as Schedule A to the Separation Agreement. They never made clear on the record which portions of the final version of the agreement the husband's lawyer had drafted, which portions the wife had re-drafted, or which portions reflected the draft MOU the mediator had prepared. The judge apparently understood the parties' answers to her questions as indicating that the mediator had drafted the entire agreement. The judge concluded that the agreement, as first offered by the parties, did not accurately reflect or comply with Connecticut law. On June 7, 2005, Judge Vilardi-Leheny wrote a letter to the Chief Disciplinary Counsel, Mark Dubois. It stated, in its entirety:

Enclosed please find a copy of an Agreement submitted for an Uncontested Dissolution in the matter of Wright v. Wright. This was prepared by Resa Fremed [address omitted].
Judgment entered after I canvassed the parties. You will note on page 4 an initialed modification which occurred when the court indicated it could not enter a percentage of “pay” as a child support order.

It is my belief that Dr. Fremed has a Ph.D. in education and is a licensed mediator. I do not believe she is an attorney and is, therefore, engaged in the unauthorized practice of law. 63

This short letter does not clearly indicate the source of the judge’s concern. It suggests she believed that the mediator had drafted the final version of the Separation Agreement, which itself could be deemed the practice of law. It suggests she may have believed that the mediator, in allegedly drafting the Separation Agreement, incorrectly applied the child custody guidelines and had practiced law negligently and without a license. Based only on the court hearing testimony of the parties, 64 Judge Vilardi-Leheny asked the Chief Disciplinary Counsel to investigate Dr. Fremed. 65

Dr. Fremed, because she was no longer involved with the parties, has only second-hand information about what transpired at the divorce hearing. To this day, Dr. Fremed does not understand the basis for the judge’s concerns. She does not “understand why the judge wrote a letter to [the Supreme Court’s Chief Disciplinary Counsel].” 66 Even today, after sitting through the disciplinary proceeding, Dr. Fremed has no clear understanding of the charges that she had to face and defend.

*1068 E. Prior Connecticut Precedent

As a general thing--as far as I could make out--these murderous adventures were not forays undertaken to avenge injuries, nor to settle old disputes or sudden fallings out; no, as a rule they were simply duels between strangers--duels between people who had never even been introduced to each other . . . . 67

The Chief Disciplinary Counsel discussed in his pre-hearing brief the “practice of law” statute in effect at that time, two court decisions, and three disciplinary decisions involving family law mediators. The following section discusses these precedents. It also discusses some additional law.

1. Connecticut Statutes

Section 46b-53a(a) of the Connecticut General Statutes allows courts to establish domestic relations mediation programs as the “Chief Court Administrator may designate.” 68 The mediation “shall address property, financial, child custody and visitation issues.” 69 Another statute allows courts to refer a civil action to mediation upon stipulation of the parties. 70 The statute provides: “The court shall not in any way impact or influence the alternative dispute resolution program selected by the parties.” 71

At the time of the disciplinary proceeding, section 51-88 of the Connecticut General Statutes provided:

Practice of law by persons not attorneys. (a) A person who has not been admitted as an attorney under the provisions of section 51-80 shall not: (1) Practice law or appear as an attorney-at-law for another, in any court of record in this state, (2) make it a business to practice law, or appear as an attorney-at-law for another in any such court, (3) make it a business to solicit employment for an attorney-at-law, (4) hold himself out to the public as being entitled to practice law, (5) assume to be an attorney-at-law, (6) assume,
use or advertise the title of lawyer, attorney [or] counselor-at-law, attorney-at-law, . . . or an equivalent term, in such manner as to convey the impression that he is a legal practitioner of law, or (7) advertise that he, *1069 either alone or with others, owns, conducts or maintains a law office, or office or place of business of any kind for the practice of law.  

In framing the UPL issue in Dr. Fremed's case, the Chief Disciplinary Counsel relied on the broad prohibition found in section (a)(1) of the statute.  

In June 2007, the Connecticut Supreme Court issued a new rule for the Connecticut Superior Courts, effective January 1, 2008.  

The trust officers communicated with prospective customers about the same matters for the purpose of becoming the customer's executor or trustee. They did not, however, advise prospective or current customers of the terms of any will or trust. Instead, the trust officers encouraged persons to consult with their own attorneys. They earnestly tried to avoid answering any legal questions about specific circumstances of a prospective or current customer. The trust officers also reviewed, at no cost to the customer, wills and trusts for which they would serve as the executor or trustee. They would suggest changes that would “be necessary, proper or desirable.”  

Trust department employees “composed, drafted and filed in the probate courts petitions, accounts, inventories, lists of claims, and applications for the probate of wills, for widows' allowances, for the payment of its own claims against estates it was administering and for approval and acceptance of its accounts and reports.”  

As fiduciaries for the estates they handled, trust department employees appeared and represented the bank at probate court hearings and proceedings. The bank would retain independent legal counsel to make court appearances if an uncertain or unclear issue of law arose in connection with an estate.
Trust department employees also completed and submitted state and federal tax returns. They also interacted with state and federal taxing authorities and tax attorneys representing an estate. If they expected an estate to raise an unclear or uncertain tax issue or if the bank expected a controversy to arise, it retained independent legal counsel. In matters involving real property, the bank retained independent legal counsel. If someone contested a claim, independent legal counsel represented the bank in court.

The lower court found that the bank had simply acted “primarily for itself in the proper exercise of its fiduciary functions under existing statutes.” None of the acts about which the organized state bar had complained constituted the unauthorized practice of law. The state bar appealed.

On appeal, the court held that the dissemination of the marketing materials did not constitute the practice of law. The bank could lawfully disseminate this legal information. It held, however, that the lower court erred as a matter of law when it held that drafting “various types of instruments” was not the practice of law. It also erred as a matter of law when it ruled that the appearances in probate court hearings by salaried attorneys did not constitute the practice of law. Finally, based on the record, the appeals court could not determine if the acts in connection with the tax forms and dealings with tax authorities constituted the unauthorized practice of law.

We do not hesitate to say, however, that if the record indicated that either the preparation of the tax returns or the matters dealt with involved tax law problems of a type such that their solution would be “commonly understood to be the practice of law,” we would hold that the acts performed constituted the unlawful practice of law.

The facts of the case, involving the banks as corporate defendants, led to an analysis that does not necessarily apply to an individual defendant. The court first explained that a corporation could not perform the duties of an attorney to a client and to the courts under applicable ethics rules. The rules necessarily contemplated the personal service of an individual. It also reviewed the history of the statutes governing the practice of law. Earlier versions had focused on appearance or representation in court. The court concluded that the statutory amendments “forbid the performance of any acts by persons not admitted as attorneys, in or out of court, commonly understood to be the practice of law.” The court explained that the practice of law included activities conducted outside the courtroom and “embrace[d] the giving of legal advice . . . and the preparation of legal instruments covering an extensive field.” The court did not define the terms “legal advice” or “legal instruments.” It explained:

The work of the office lawyer has profound effect on the whole scheme of the administration of justice. It is performed with the possibility of litigation in mind, and otherwise would hardly be needed. It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill and of sound moral character, acting at all times under the heavy trust obligation to clients which rests upon all attorneys.

As noted below, the “customary function” test, also known as the “commonly understood” test, creates a very broad category of acts that constitute the practice of law. In some ways, it may cover any act lawyers have ever done as long as the act is customary for lawyers.

The Connecticut Bank court relied on its earlier decision in Grievance Committee of Bar of New Haven County v. Payne, a case that considered whether the town clerk, who was not an attorney, engaged in the unauthorized practice of law when she prepared and delivered certificates of title in which she gave an opinion about who owned a parcel of land based on her review...
of land records and successive conveyances. She also certified that the land was free of encumbrances, except as noted. No one claimed that the clerk lacked experience or intellectual ability to make the certificates of title. Instead, the trial court concluded that her acts had “invad[ed] . . . the field of law and amounted to the practice of law.” The clerk did not deny that issuing opinions about the ownership of land parcels constituted the practice of law. Instead, on appeal she argued that (1) the court had to construe strictly a penal statute; (2) that a state statute allowing a “person” to issue the certificates of title had not restricted that act to attorneys; and (3) the court had erred in ruling on the evidence.

The appeals court began its analysis by saying: “Attempts to define the practice of law have not been particularly successful. The reason for this is the broad field covered. The more practical approach is to consider each state of facts and determine whether it falls within the fair intendment of the term.” The court then considered the history of the “practice of law” statute. It originally precluded non-lawyers from appearing in court. In 1933, the legislature expanded the statute to prohibit “the practice of law” by unauthorized persons. The appeals court interpreted the phrase as covering acts “commonly understood to be the practice of law.” And, no case stated that giving title certifications was outside the scope of the practice of law. The appeals court discussed a possible distinction in which the person simply provided a title abstract unaccompanied by an opinion or interpretation. But that distinction would not apply in the clerk’s situation because she had given an opinion about title.

The appeals court rejected the second argument that the statute allowed any bank authorized person to issue the title certificates. The court dismissed it quickly by saying that only attorneys at law would be qualified. The trial court's ruling, the appeal court said, “was not only reasonable but the only possible result.”

At trial, the clerk had tried to admit evidence showing that for forty-six years town clerks had issued title certificates. The court quickly dismissed this argument saying: “The existence of such a custom at a time when no [practice of law] statute was in effect which might be construed to forbid it is not relevant to determine the meaning of a law subsequently enacted.”

Thus, in outlining the relevant case law in his four-page pre-hearing brief in the Fremed proceeding, the Chief Disciplinary counsel relied on two cases that were over forty-five years old and failed to reflect any of the changes in the practice of law or court administration. The changes included the emergence of collaborative law, limited retention agreements, the role of consulting attorneys, the increasing use of ADR, and the increasing number of parties appearing in courts pro se. The Connecticut cases adopt one of the broadest tests imaginable to define the “practice of law.” While the appeals court gave some attention to the consumer protection function of the statute, its actual application of the law to the facts in both cases feels more like the protection of the lawyers' traditional turf.

Another case played a role in the Fremed case. The Reviewing Committee in its Proposed Decision cited to Statewide Grievance Committee v. Patton, a case that neither party briefed or cited. In that case, the defendant ran a business called Doc-U-Prep of New England. He placed an advertisement in a newspaper: “The Non Lawyer Legal Document Center, Helping People Who Can't Afford the High Cost of Routine Legal Document Preparation, We Will Do Your Wills . . ., Corporation . . ., Divorce (uncontested) . . ., Living Trust . . ., Bankruptcy (chapter 7) . . ., Name Change . . . and many more documents, all at low cost . . . .” The defendant asked customers to select the form they needed, asked them to complete a questionnaire relating to the form, sent that information to Doc-U-Prep in Massachusetts, received the completed form from Massachusetts, and gave the completed form to the customers. He charged a fee for the service. The defendant argued that the lower court’s finding that he had practiced law without a license and enjoining his activities violated his first amendment right of free speech. He also argued his activities did not constitute the practice of law.
The appeals court iterated that defining the practice of law is no easy task. It requires a case-by-case analysis, but the definition has consistently included “the preparation of legal documents.” Without specifically defining legal documents or specifically applying the general law to the facts of the case, it affirmed the lower court. It quoted language from Connecticut Bank and Baron v. City of Los Angeles, stating that the preparation of legal documents required “the application of a trained legal mind” and “the welfare of the public” required customary lawyer functions to be “performed by persons possessed of adequate learning and skill and of sound moral character.” It also rejected the first amendment challenge, noting that “[t]he defendant’s activities are commonly understood to be the practice of law, and he advertised in bold print that he prepared ‘legal documents’.”

The Patton court also cited two cases involving the preparation of legal documents. In 1993, the United States District Court for the District of Connecticut decided Monroe v. Horwitch. In that case, a paralegal allegedly offered to “prepare papers for parties representing themselves in uncontested divorce actions.” The paralegal did not testify at the hearing of the Statewide Grievance Commission (SGC) because he or she did not recognize its authority to conduct the hearing. The paralegal raised a number of legal, rather than factual, defenses on appeal. One defense asserted that the fourteenth amendment precluded the enforcement of the statute because it was impermissibly vague. The court dismissed the argument, first by saying that the defense would operate only when “[a]n activity [was] on the ‘outerboundaries’ of the ‘practice of law.’” However, preparation of legal documents fell firmly within the scope of the practice of law. The court began to draw some distinctions about the types of drafting activities a non-lawyer might pursue. “‘Preparation of instruments, even with preprinted forms, involves more than a mere scrivener’s duties’ and, therefore, constitutes the practice of law.” This statement suggests that acting solely as a scrivener, carefully transcribing the words or intentions of parties, would not constitute the practice of law. The court cited two other cases from courts outside the state. One found that the “drafting or filling in of blanks in printed forms of instruments dealing with land” constitute[d] the practice of law.” The second found that the “preparation of legal documents in [a] patent case constitute[d] the practice of law.”

The second case provided even more insight to the types of drafting activities that could get a non-lawyer into trouble with the Connecticut bar. In that case, Grievance Committee of the Bar of Fairfield County v. Dacey, the defendant, Norman F. Dacey, ran a business that primarily sold shares in mutual funds. He also provided estate planning by giving investment and life insurance advice. If these discussions revealed that a customer had sufficient assets to justify the creation of a trust, the defendant gave those customers a thirty-page brochure. The first six pages of the brochure provided general information regarding the history and use of trusts, along with tax information. The remaining twenty-four pages provided forms and additional information about the “Dacey trust arrangement.” If a customer decided to pursue this trust arrangement, the defendant provided a will and trust based on the specific facts of the customer's financial situation. Many of these instruments deviated substantially from the forms in the booklet, thereby negating an argument that he was merely filling in forms. The booklet advised that the forms were “for the guidance of your attorney.” The record showed that the defendant did not otherwise refer customers to attorneys. None of his customers ever consulted attorneys about the wills or trusts prepared by defendant. Customers compensated him by investing trust assets in a certain mutual fund, the sale of which netted defendant a six percent commission.

In affirming the lower court ruling that the defendant had practiced law without a license, the appeals court noted that he had not performed these services as a favor to a friend. They were not an isolated occurrence. In fact, the defendant had drafted as many as seventy trusts in a fourteen year period.

The court rejected any requirement that it determine if the defendant had “drafted” or “prepared” a legal document. It only had to conclude that the acts constituted the practice of law under the “customary function” test. It recognized that courts could not
agree on whether filling in blanks on pre-printed forms constituted the practice of law. It found that it did not need to address this issue because the defendant had gone substantially beyond this limitation by custom crafting the forms for customers. Interestingly, in dicta, the court concluded, without supporting citation:

> The determination that a given form should be followed without change is as much an exercise of legal judgment as is a determination that it should be changed in given particulars. In either case, legal judgment is used in the adaptation of the form to the specific needs and situation of the client. The claim that Dacey did no more than take an attestation to an otherwise already complete instrument, as a notary public might do, is so lacking in merit as to require no discussion.\(^\text{114}\)

The appeals court then considered the question of whether the defendant had given customers legal advice in violation of the statute. Here, the court drew a line between legal information and legal advice. Like the employees providing marketing material in Connecticut Bank, the defendant argued that he had only provided general information about wills and trusts. He further argued that like the employees in Connecticut Bank, he did not give “final or specific advice,” nor did he give customers terms to be incorporated in their wills or trusts. The court rejected these arguments saying:

> The first six pages of Dacey's booklet might perhaps fall within the classification of general information. The balance of the booklet was focused on the Dacey trust . . . . This information was necessarily amplified in the oral discussions resulting in the preparation and execution of a will or trust adapted to the needs of the particular client.\(^\text{115}\)

In further defining the distinction between legal information and legal advice, the court stated: “When the information given is directed toward a particular person and his needs and to a particular instrument prepared for his execution, it is no longer within the 'general information' classification but has become legal advice embraced within the phrase 'practice of law.'”\(^\text{116}\) It found, more specifically, that the acts of “preparing wills and trusts for particular members of the public, and of advising, as to the desirability in their circumstances, of the specific wills or trusts so prepared for them, constituted the practice of law within the obvious scope of the statute.”\(^\text{117}\)

In contrast, in Connecticut Bank, the bank employees did not offer specific trust or will forms for customers and did not prepare the trust or will for the customer. Moreover, unlike the employees in Connecticut Bank, Dacey never advised his customers to seek independent legal advice. In fact, the statement in Dacey's booklet about how an attorney might use them as guidance worked against Dacey. It “clearly indicated Dacey's awareness that the adoption, adaptation, and execution of such instruments could be properly, and legally, done only by an attorney.”\(^\text{118}\)

The court also addressed whether the defendant's law-related activities were incidental to his primary business activities as an estate planner and fund salesman. It rejected the argument without much discussion saying it was “wholly inefficacious.”\(^\text{119}\) The court also rejected the argument that the bar had to prove an injury to the public arising from the defendant's acts. It stated:

> The complaint alleged an injury to the public, not from the fact that Dacey had practiced law in an incompetent manner or to the particular injury of his clients, but from the fact that he had practiced law without having satisfied the uniform, standard, requirements for admission to the bar imposed for the benefit and protection of the public by . . . the General Statutes. One satisfactorily meeting these requirements, and admitted to the bar, is presumed to be competent to practice law . . . .\(^\text{120}\)
Taken together, the case law does not provide any bright line tests for UPL. The Connecticut courts clearly have proscribed “the preparation of legal instruments covering an extensive field.” In *1081 dicta, the courts have suggested that non-lawyers may not even complete pre-printed forms or tax forms if their selection and adaptation requires legal judgment or if lawyers have customarily prepared those types of forms. A non-lawyer could act, perhaps, solely as a scrivener.

The courts also preclude many activities they characterize as giving legal advice. But in Connecticut Bank and Dacey, they acknowledged a distinction, without much further definition, between legal advice and legal information. The bank employees could distribute marketing materials, providing information about the “application, scope and effect” of laws on estate planning. The first few pages of Dacey’s booklet also may have qualified as legal information standing alone. Similarly, the court clerk could provide land title abstracts but not abstracts with opinions or interpretations. One presumably constituted legal information, the other legal advice. Finally, the Dacey court defined legal advice as “information . . . directed toward a particular person and his needs and to a particular instrument prepared for his execution.” In doing so it adopted the “application of law to the specific facts” test discussed below.

Finally, in the Dacey case, the court acknowledged the incidental services exception, but ruled that Dacey’s trust drafting activities were not incidental to his primary business as an estate planner and fund salesman.

3. Prior Decisions of the Statewide Grievance Committee

The Chief Disciplinary Counsel also relied on three final decisions of the Statewide Grievance Committee (SGC), all issued on January 11, 2001, finding in each case that the nonlawyer-mediator had not engaged in the unauthorized practice of law. In doing so, the SGC rejected in one case the Proposed Decision of the Reviewing Committee that had heard testimony.

a. Carney Disciplinary Proceeding

In *1082 In re Carney, the Reviewing Committee held a hearing on September 9, 1999. Carney engaged in family and divorce mediation. She had “considerable education and training in the field.” She had joined the Academy of Family Mediators and the CCDM. In December 1998, Deryl and Robert Jirsa hired her to conduct a divorce mediation. They came well prepared to the mediation and they had already reached agreement on many of the issues arising in divorce. They intended to appear as pro se parties in an uncontested divorce proceeding.

Carney advised the Jirsas that she was not an attorney. She also advised them to seek legal advice before putting any draft agreement into final form. She also advised pro se parties that she could not draft documents submitted to a court. Either a lawyer would have to prepare those documents or the parties could prepare them. When legal questions arose, she also advised parties to consult with independent legal counsel. She did not give legal opinions, but “she [did] sometimes ask the parties how they might identify potential problems and how they might resolve them.” Eighty percent of her clients used independent legal counsel. For the remaining twenty percent, she testified that she “might raise issues which the parties have missed, such as how the relocation of a party might affect visitation rights.” If the parties expressed concern about an issue, Carney suggested they talk with legal counsel.

After the mediation, Carney pulled together a draft MOU dated January 25, 1999. The parties revised it two weeks later with her help. The Jirsas’ independent legal counsel reviewed and modified the document. The parties presented the revised document to the court on April 23, 1999. For some reason, it still appeared on the letterhead of the mediator.
These facts proved immaterial because the Reviewing Committee, consisting of Attorneys Vincent M. DeAngelo and Anne R. Hoyt, concluded that Carney had engaged in the unauthorized practice of law by performing divorce mediation. The Reviewing Committee concluded that “divorce mediation is, per se, the practice of law.”\(^{133}\) It did not matter that she disclaimed being a lawyer or refrained from answering legal questions. Instead, they reasoned that the identification of issues itself, which is an inherent part of the mediation process, is the practice of law. The recognition that certain issues exist in a divorce, particularly those involving the legal rights and obligations of the parties on topics such as alimony, finances, pensions, child custody and visitation, and taxes, is an essential element of the traditional role taken up by any attorney in counseling a divorce client. It is not necessary that defined legal opinions be given, but rather the identification that certain issues are involved, or by their omission not involved, in a divorce situation is itself the practice of law.\(^{134}\)

The Reviewing Committee recommended that Carney be restrained from practicing law. No sooner had it made this pronouncement, the Reviewing Committee recommended that the mediation community seek legislative reform “in the recognition that this issue would best be resolved through legislative action regarding divorce mediation in general, and on its practice by non-lawyers in particular.”\(^{135}\) It suggested that the matter be stayed nine months to allow a legislative lobbying process to proceed. It also suggested that the UPL “guidelines adopted by the Commonwealth of Virginia . . . may prove useful as a model.”\(^{136}\) It expressed concern that its opinion would otherwise have “far-reaching implications . . . and . . . impact . . . the well-established practices of many non-lawyer divorce mediators.”\(^{137}\)

The SGC declined to adopt the proposed decision of the Reviewing Committee and rejected the position that divorce mediation by a non-lawyer was per se the unauthorized practice of law. Instead, the SGC would resolve the issue on a case-by-case basis. It further found that the facts of the Carney case did not indicate the unauthorized practice of law.\(^{138}\)

The SGC (1) noted that she had not created the MOU for use as a legal document in court; (2) recognized the precautionary steps she had taken to prevent her “work product from being used directly in court[:]” (3) acknowledged that a lawyer had revised the MOU in this case; and (4) found that her conversations with the Jirsas “on dissolution matters were incidental to the mediation process and did not constitute legal advice.”\(^{139}\) But, the SGC could not leave the discussion there. It concluded by saying:

> [T]he Committee expressed concern that marital dissolution is an inherently legal process, and that the role of a divorce mediator can easily involve actions that are traditionally considered the practice of law,\(^{140}\) including the identification of issues implicating the substantive rights of the parties.\(^{141}\) The Committee cautions you to take steps to limit your written summaries and mediation discussions to the core work of mediation,\(^{142}\) to take steps not to practice law,\(^{143}\) and to inform your customers that they should seek the assistance of an attorney.\(^{144}\)

While the SGC reached the correct decision, the reasoning still shows the pull of the dominant “law practice” paradigm. The decision also fails to reflect the values of the “authorized practice of mediation” paradigm by referring to “the core work of mediation,” a term the SGC did not define and a term the mediation community might find puzzling.\(^{145}\)

b. Strong Disciplinary Proceeding
A CONNECTICUT MEDIATOR IN A KANGAROO COURT?...., 49 S. Tex. L. Rev. 1047

On April 5, 2000, a Reviewing Committee consisting of Attorney Margaret P. Mason, Attorney Lorraine D. Eckert, and Professor Paul Hawkshaw heard two UPL complaints against mediators. These respondents had better outcomes at the Reviewing Committee level. The first review involved Leslie Strong. Strong practiced as a marital and family therapist and he had extensive experience in divorce mediation. He joined CCDM and national mediator organizations. He served as a U.S. Postal Service REDRESS mediator and as a Special Master at the Regional Family Trial docket in Middletown. Strong, who has a Ph.D., “taught graduate level courses in marital and family therapy at local universities,” and Judge Steinberg had asked him to join the faculty of “Quinnipiac Law School in 1996 for an interdisciplinary program focusing on collaboration between attorneys and therapists.”

He testified that he handled three to five divorce mediations each year. He encouraged parties to consult with a variety of other professionals, including lawyers, accountants, and therapists. Most of his mediation parties used attorneys in the process, even if only to review any MOU the parties had reached through mediation. He advised and intended that the parties would take the MOU to an attorney or to the court clerk to use to create the documents required for an uncontested divorce. Strong never prepared the documents the parties intended to file in court. Strong did not advertise that he offered legal services. He did not offer opinions on legal issues, and he did not advise parties what legal action they could or should take.

In the summer of 1999, Randy and Cindy Jones-Oliver attended three mediation sessions with him. Strong described the couple as “more autonomous than most of his clients.” They already had a good idea of the way in which they wanted to resolve the issues of divorce. They started with the Superior Court's Do It Yourself Divorce Guide (Guide), talked with the court clerk about the court process, and followed the advice in the Guide about retaining a mediator.

In July 1999, Strong prepared a Memorandum of Agreement reflecting the agreement of the parties. Jones-Oliver presented this same document to the court apparently without having an attorney convert it to an operative legal document or using the Guide to convert it to a Separation Agreement. The court referred the matter to the SGC.

The Proposed Decision of the Reviewing Committee suggests that after this referral, Strong adopted more precautions. His Agreement to Mediate was updated to require the parties to agree to consult with an attorney. It precluded them from using the MOU in court. He also began writing more informal MOUs that would be more difficult to use as stand-alone documents in court. The new MOU also advised parties to share the document with their attorneys, but not to use it in court. The divorcing couple also signed a release so that he could send the summary directly to the attorneys. Finally, the MOU contained no signature lines or contractual boilerplate language.

The Reviewing Committee focused on whether Strong's drafting of the Memorandum of Agreement constituted the practice of law without a license. The Reviewing Committee noted that he had not engaged in other statutorily prohibited conduct, such as appearing in court, advertising as a lawyer, “acting as an advocate, counseling a recommended course of action based on the application of the law to specific factual situations, or preparing documents intended to be filed in court.” The Reviewing Committee conceded that defining the practice of law had given rise to a “diversity” of opinion. It then quoted the circular test used in Connecticut Bank. The practice of law arises when a person “perform[s] acts, in or out of court, ‘commonly understood to be the practice of law.’”

The Reviewing Committee recognized that “while some of the issues raised in divorce mediation may involve legal questions, activities of the type engaged in by the Respondent would only appear to have an incidental relation to the practice of law, probably to no greater degree than that which occurs with professionals in other fields.” In making this comment, it appears
the Reviewing Committee applied to the situation the “incidental services” exception to the “customary function” test. It also found persuasive three other facts. First, the Do It Yourself Divorce Guide provided by Connecticut courts to pro se parties encouraged the use of mediation. Second, Connecticut had passed a statute on mediation confidentiality “which appears to assume that non-lawyers can act as mediators.” Third, the American Bar Association’s Section of Dispute Resolution (ABA’s Dispute Resolution Section) had passed a resolution on April 28, 1999, stating that “mediation by non-lawyers should be permitted.”

The Reviewing Committee concluded that no clear and convincing evidence, taken as a whole, indicated that Respondent had engaged in the unauthorized practice of law. It recommended that the matter be dismissed. On January 11, 2001, the SGC dismissed the matter. It stated:

The [Reviewing] Committee noted that the document created by you was not prepared for your customers to use in court as a legal document. . . . The Committee recognized the steps taken by you to prevent your work product from being used directly in court. The Committee also found that . . . the discussions you had with your customers, in this case, on dissolution matters were incidental to the mediation process and did not constitute legal advice.

Again, the SGC had still more to say. The SGC continued:

Marital dissolution is an inherently legal process, and . . . the role of a divorce mediator can easily involve actions that are traditionally considered the practice of law, including the identification of issues implicating the substantive rights of the parties. The [SGC] cautions you to take steps to limit your written summaries and mediation discussions to the core work of mediation, to take steps not to practice law, and to inform your customers that they should seek the assistance of an attorney.

c. Decker Disciplinary Proceeding

On the same day, the same members of the Reviewing Committee heard the complaint against Martin G. Decker. Decker, a psychologist trained in divorce mediation, typically co-mediated with an attorney. The co-mediator typically drafted any documents coming out of the mediation process, including any documents intended for use in court. Decker characterized his role as “help[ing] the divorcing couple identify problems.” If they asked questions about the law, he suggested they talk with the attorney co-mediator. Decker also testified that he did not plan to provide divorce mediation in the future.

Deborah and Paul Majewicz retained him and a lawyer-mediator. The lawyer-mediator quit after the first session, but Decker found another lawyer-mediator, John Miller, to join Decker in later sessions with the couple. Decker entered the issues the couple resolved in a computer document template that Miller then used to draft a legal document. Miller testified that “when the Majewiczcs went to court with the final draft of the agreement, they were turned away by the judge, who had concerns regarding parenting issues.” The Majewiczcs told the judge that an attorney had reviewed the agreement, but “apparently the judge focused on the statement that the Respondent was not a lawyer.” Miller, the attorney co-mediator, further testified that he acted consistently with the Connecticut Bar Association’s Formal Opinion No. 35 on the ability of lawyers to act as mediators.
The Reviewing Committee again focused only on the agreement drafting issue. It iterated much of what it had said in the Strong Proposed Decision. It concluded that Decker’s drafting activities had “an incidental relation to the practice of law,” found no clear and convincing evidence that Decker had practiced law without a license, and recommended that the matter be dismissed. Unfortunately, the Reviewing Committee did not discuss the role of the lawyer as co-mediator and as the drafter of the final document submitted to the court by the parties.

In a two paragraph letter, the SGC adopted the Reviewing Committee’s Proposed Decision and dismissed the matter. However, in the second paragraph, it stated: “The Committee took into consideration your representation that you no longer will be practicing divorce mediation.” Unfortunately, the letter does not reveal how that consideration affected the SGC’s thinking in the case. The SGC did not include in this letter the cautions it had given the other nonlawyer-mediators in the Carney and Strong cases. Presumably, if Decker did not plan to do divorce mediation in the future he did not need to receive these cautionary remarks.

Taken together, these Reviewing Committee and SGC opinions gave nonlawyer-mediators greater freedom than the Connecticut case law would suggest exists to engage in document drafting. In Carney, the SGC noted that the mediator had not created the MOU for use as a legal document in court, recognized the precautionary steps she had taken to prevent her “work product from being used directly in court,” acknowledged that a lawyer had revised the MOU in this case, and found that her conversations with the parties “on dissolution matters were incidental to the mediation process and did not constitute *1091 legal advice.”

But, it defined as within the practice of law “the identification of issues implicating the substantive rights of the parties.”

In Strong, however, the Reviewing Committee recognized that “while some of the issues raised in divorce mediation may involve legal questions, activities of the type engaged in by the Respondent would only appear to have an incidental relation to the practice of law, probably to no greater degree than that which occurs with professionals in other fields.” The Reviewing Committee did not specify the activities it found to fall in this exception. In the letter to Strong, the Committee seemed to express this exception in different language, saying that “the discussions you had with your customers, in this case, on dissolution matters were incidental to the mediation process and did not constitute legal advice.”

It also made a distinction, as in Carney, that the mediator had not created the MOU for the parties to use in court as a legal document. As in Carney, the Committee’s decision seemed affected by the steps the mediator had taken to prevent the MOU from being used by the parties directly in court.

Next, in Decker, the Reviewing Committee concluded that the drafting activities had an incidental relation to the practice of law, thus adopting the first iteration of this exception found in Strong. Finally, the disciplinary body purportedly ruled based on the lack of clear and convincing evidence that the mediator had not violated the UPL statute.

The decisions strongly indicate that a nonlawyer-mediator may prepare an MOU as long as he or she does not intend that the parties will file it in court as an operative legal document. These drafting activities would fall within the incidental services exception or would be incidentally related to the practice of law. The decisions, however, confuse rather than clarify the types of discussions nonlawyer-mediators may have with parties about issues arising in divorce. Two of the three SGC opinions cautioned the nonlawyer-mediators to forgo the identification of issues that implicate a party’s substantive *1092 legal rights. Yet, the Strong Proposed Decision clearly contemplates some permitted discussions with the parties. Unfortunately, the opinion only describes Strong’s self-described role as acting as a “neutral facilitator for the divorcing couple’s discussion,” and mentions his habit of “not tell[ing] divorcing couples what they ‘should’ do and . . . not offer[ing] opinions on legal issues nor advis[ing] clients as to what action should be taken from a legal perspective.” But it does not say what discussions the SGC would permit other than discussions limited to the undefined “core work of mediation.” The opinions strongly suggest that the SGC, itself, cannot define permitted discussions. The opinions made no effort to frame the discussion in terms of legal
information versus legal advice. And the decisions clearly fail to discuss the core values of mediation or prevailing mediation ethics standards governing appropriate discussions between the mediator and the parties.

4. 1976 Empirical Analysis of Pro Se Divorce in Connecticut

In 1976, Yale Law School conducted empirical research of uncontested divorces filed in New Haven and Bridgeport, Connecticut. 184 It developed the data to evaluate the typical justifications for invoking UPL enforcement against the sale of self-help divorce kits. 185 The authors designed the research to examine the role lawyers played in preparing divorce forms and documents and other related activities, to determine whether these functions justified perpetuation of UPL enforcement, and to learn more about the parties who chose to use divorce kits to dissolve their marriages. To do so, they examined data in 331 uncontested divorce files. They also sent questionnaires to and conducted interviews of the parties and their attorneys, if either party retained one. They also analyzed forty-six dissolutions handled by legal aid attorneys. 186

The attorney-focused research sought to learn the frequency of disputes over child custody, marital property, and child/spousal support. This data would help the researchers assess the actual adversarial nature of the divorce. The attorney research also sought to learn how much time attorneys spent on each uncontested divorce, including client conversations, form preparation, and negotiations with the opposing party or his or her counsel. It also sought to learn the lawyer's primary functions in uncontested divorces. 187 The kit-user research sought to learn why these parties dispensed with lawyer assistance (mostly cost) and whether they faced any problems by proceeding pro se (not many). 188

The research authors asserted that limiting divorce practice to attorneys rested on two empirical assumptions. First, marital dissolution remained an adversary process requiring the skills of an attorney to prepare forms for entry of a decree, compile evidence of culpability, present the evidence at trial, and capitalize on party misconduct to gain bargaining leverage in negotiations. 189 Second, lawyers played an important legal advisory role on “ancillary” issues arising in divorce, including property division, parenting plans, and taxes. 190

Both assumptions proved faulty. In uncontested divorces—the subject of the research (and the focus of many mediations)—parties do not need lawyers to guide them through the adversarial litigation process, because the process is not necessarily adversarial from the parties’ point of view. In fact, as with the Wrights, parties may choose not to retain lawyers to avoid an adversarial escalation of their dissolution process. 191 The study authors suggested that letting attorneys define how to fairly settle the issues in dispute could be “counterproductive” given the ethical requirement that lawyers represent their clients in a zealous manner. 192 The research showed that the divorce kits helped make parties self-sufficient in navigating the litigation process. The kits included a checklist of sixty-eight items that outlined “every move required in the progression from complaint to hearing.” 193

*1094 The research also revealed that lawyers in the study spent very little time preparing the required forms. Only thirteen percent of the surveyed lawyers thought form preparation was their primary function in uncontested divorces. 194 Only one percent thought drafting the separation agreement was one of their primary functions. 195 All responding attorneys spent less than sixty minutes preparing the complaint. Eighty-three percent of responding attorneys spent less than sixty minutes procuring service by registered mail. Ninety-two percent spent less than sixty minutes preparing the divorce decree. On the other hand, sixty-nine percent of lawyers spent over sixty minutes waiting for the court to hear the case. 196
They also spent little time talking with their clients. Nearly forty-eight percent of lawyers reported making four or more personal contacts and seven or more phone conversations. However, only 10.8 percent of clients recalled that much interaction with their lawyers.197 Fourteen of thirty-four plaintiffs whose cases did not involve alimony, child support, or an award of attorneys' fees saw their lawyers in person once or not at all after the first interview and before the final hearing. Only four of those plaintiffs reported meeting their attorneys more than three times.198

Thirty percent of the study participants obtained a divorce in Connecticut by filing only three forms: the complaint, claim for trial, and the decree forms. Parties could get a divorce by filing only the three forms if the case did not involve minor children, a financial award, or an out of-state spouse.199 The study concluded that pro se parties completed the forms with little difficulty,200 and they were “significantly more prompt in filing claims for a hearing than even those lawyers representing parties.”201 Eighty-six percent of pro se parties also filed the affidavits attesting to the irretrievable break down in the marriage that the courts required before they could enter the divorce decree without taking additional testimony. Lawyers, in contrast, filed the affidavits in only one-third of the divorces they handled.202 In connection with the divorce decree, the study found two decrees, both prepared by lawyers, which had identified the wrong judge assigned to the case. The judges signed the decrees in any event, even though they had not heard the cases.203 In addition, only twenty-seven percent of the files handled by lawyers also included a separation agreement.204 Most of those agreements consisted of extended form clauses, which the authors characterized as “at best a limited contribution to ancillary legal issues.”205

In more complicated divorces, the additional forms added “only incrementally to the number of standardized documents required.”206 If parties had minor children, they had to file an affidavit attesting that no other custody proceedings were pending in another court. New Haven attorneys failed to file the affidavit in twenty-six percent of the seventy-six cases they handled, and Bridgeport attorneys failed to file it in 56.5 percent of the eighty-five cases they handled.207 If a party sought alimony, support, or counsel fees, he or she had to file a two-page statement on current income, assets, expenses, and liabilities, which the study authors characterized as no more “intimidating than the Internal Revenue Service’s 1040 Form.”208 If one of the parties lived out-of-state, the other party had to complete one of two standardized forms effecting service on the spouse.

Based on the analysis of the forms themselves, the study authors concluded: “[I]t is highly doubtful that either judicial administration or public welfare considerations justify prohibition of lay advice or clerical help in the preparation of the ‘legal instruments’ required in uncontested dissolutions.”209 Lay specialists and kit-users, like the lawyers studied, made occasional, easily corrected errors.210 “[O]pportunities for truly damaging mishaps are virtually nonexistent.”211 The research could not justify the lawyer monopoly over the drafting function, especially when parties had agreed on custody, finances, and the need for the divorce.212 Sixty percent of the interviewed plaintiffs stated that they and their spouses had resolved these issues independently during the dissolution process. Only three of the interviewed plaintiffs had “restructured their agreements” based on the advice they got from an attorney.213 The data revealed that the time spent by lawyers on the formalities of the divorce process represented a “patently inefficient allocation of professional training.”214

Moreover, judges spent an average of four minutes reviewing the affidavits filed in the uncontested divorce, reviewing the facts found in the complaint, and confirming the cause for the marital breakdown. Cases in which the parties did not seek a financial award involved three minutes of hearing time, while those involving a financial claim lasted 5.5 minutes. Thus, court appearances did not justify the lawyer monopoly in divorce proceedings. As noted above, ninety-nine percent of attorneys reported waiting more than an hour for the court to hear the case.
In addition, the research revealed that very few lawyers in the study identified their legal advisory role as significant in the context of uncontested divorce. Only two percent identified “defining parental rights” as the most important function they performed in the cases they handled. In theory, the issues on which lawyers might provide advice included contract and property rights of the parties, child custody, inheritance, alimony, and debts. Lawyers could also provide tax advice, especially about the tax efficient allocation of child support and alimony. They might also prevent parties from overlooking important divorce-related issues. Instead, the surveyed lawyers identified their “most important” functions as negotiation and personal counseling. Half the surveyed lawyers labeled their most important activity as acting as a psychologist, father-figure, confidant, or psychiatrist. Given that lawyers in the study had surprisingly few contacts with their clients, the authors of the research questioned whether the benefit of requiring parties to retain counsel for this advisory role outweighed the advantages of making access to inexpensive pro se divorce more widespread.

Moreover, the need for legal advice in the divorce context did not independently justify the monopoly over form preparation. The authors pointed out that the parties still had the option to secure attorney advice, if they decided they needed it, at a cost they could afford. Maintenance of the form monopoly by lawyers was an “expensive and unreliable means of ensuring that [lawyers’] contributions [in the analysis of ancillary issues were] made.”

The study authors concluded that the data made “the case for reform . . . compelling.” If the courts found a pattern of abuse by lay specialists or harm resulting from the use of divorce kits, they could “impose civil liability or . . . licensing requirements,” which would create “ethical standards and define permissible activities” of lay specialists. They proposed an administrative rather than adversarial model in uncontested divorces, similar to those adopted in European countries. The data, the study authors concluded, “demonstrate[d] no persuasive justification for enjoining [lay] assistance [in uncontested divorce proceedings].”

*1099  F. The Fremed Disciplinary Complaint

[iffs]hen she [saw] me, then there was a change! Up went her hands, and she was turned to stone; her mouth dropped open, her eyes stared wide and timorously, she was the picture of astonished curiosity touched with fear.

Against this backdrop, the Chief Disciplinary Counsel wrote a letter to the Statewide Bar Counsel about Judge Vilardi-Leheny's complaint against Dr. Fremed, saying: I am enclosing herewith a complaint from Judge [Vilardi-]Leheny concerning a person who is allegedly engaged in the practice of law without a license. Apparently, Dr. Fremed engages in some sort of divorce mediation. However, in that context, she drafts legal documents, including the one that was presented in Judge [Vilardi-]Leheny's courtroom. In his recent remarks to the Conn. Bar Association's annual meeting, our Chief Justice raised the issue of whether non-lawyers should be engaged in this business.

I imagine that this happens more than we know, and that this case will raise interesting issues of defining the practice of law. Thus, I think it best to present the case before the Statewide Grievance Committee in the first instance . . . . Our office will prosecute.
As soon as Dr. Fremed learned of the pending investigation, she called lawyer-mediators who had served on the Standards of Practice Committee of the CCDM. In 2001, the Board of Directors of CCDM adopted the CCDM Mediation Standards that, among a few other things, focus on the unauthorized practice of law in the context of mediation. Her conversations with these colleagues alarmed her. One told her that she could face jail time. But another colleague, formerly a family law attorney and now a Connecticut judge, told Dr. Fremed she was “whistle clean” and had little to worry about.

Dr. Fremed called ACR asking for help. The organization, however, had few resources to offer. It had no legal defense fund or committee that could provide her money or sample briefs on the UPL issue. Later, she wrote ACR's director advising him that underwriters at Lloyd's of London had denied coverage of the claim under its group policy with ACR members. ACR, after the fact, shored up its ability to respond to similar situations. It also communicated to Complete Equity Markets, Inc.--the administrator for Lloyd's of London--that its regularly marketed mediator malpractice policy failed to provide the coverage needed in these sorts of circumstances.

This article does not analyze the insurance coverage issues raised by Dr. Fremed's situation. Another article by the author examines the language of six policies to determine the extent of coverage offered by each.

*1101 G. The Fremed Disciplinary Hearing

On October 3, 2005, the Statewide Bar Counsel, Michael Bowler, gave notice of the disciplinary hearing. The parties would meet on November 2, 2005, at 9:30 a.m. in the Superior Court in New Haven, Connecticut. A separate document dated October 5 advised that the hearing would determine “whether the Respondent's actions involve the unauthorized practice of law as defined by Section 51-88 of the Connecticut General Statutes.” The notice did not otherwise specify the charges against Dr. Fremed. The Respondent could bring legal counsel, call and cross-examine witnesses, and give a closing statement. The Respondent carried the responsibility of ensuring that her witnesses appeared by “subpoena or otherwise.” She could bring documentary evidence, but the Reviewing Committee could exclude irrelevant, immaterial, or unduly repetitious evidence. The parties could expect that the hearing would last no longer than a day. In fact, the notice indicated that the Reviewing Committee generally scheduled the hearing “to be conducted and completed in one hour.” Accordingly, the parties had to make all witnesses and evidence available on the scheduled day. The parties could submit certified pre-hearing briefs at least seven days in advance of the hearing. The Reviewing Committee would render a Proposed Decision. In turn, the SGC would render a final decision.

On October 11, almost three weeks before the hearing date, the Chief Disciplinary Counsel submitted a four-page Prehearing Memorandum. He advised that the record failed to reveal who had drafted the Separation Agreement the Wrights had submitted to the court for approval. The brief stated:

Disciplinary Counsel's investigator spoke with both Mr. and Ms. [Brady] Wright. Ms. [Brady] Wright reports that she prepared the [S]eparation [A]greement. Mr. Wright reports that it was Ms. Fremed who prepared the document. Discussions with counsel for Ms. Fremed reveal that Fremed may have prepared some agreement or memorandum, but it is not clear what it was, and how it related to the document that ultimately was submitted to the Court. For reasons discussed below, it will be necessary to have a hearing to determine on the record who did what here, and whether there was unauthorized practice of law.
For the first time since Judge Vilardi-Leheny referred the matter to the Chief Disciplinary Counsel, Dr. Fremed had some idea of the basis for the complaint against her. However, the Chief Disciplinary Counsel chose not to take a position on the situation. Instead, he stated in his Prehearing Memorandum that he would “wait until after the evidentiary hearing to take a position on whether there has been unauthorized practice of law.”

He continued: “[O]ne not licensed in the practice of law should not give legal advice, school or advise clients on the legal implications of their choices, and draft documents for the presentation to the courts. If it should appear that the Respondent engaged in any of this conduct, Disciplinary Counsel will request appropriate sanctions from this [Reviewing] Committee.”

The Chief Disciplinary Counsel did not discuss the typical tests for the “practice of law,” any cases arising in other states involving mediators or other ADR professionals, or any ethics opinions issued by other states about UPL in the context of mediation. Instead, he briefly captured the tests set out in Connecticut Bank and Payne, but he provided no context for either decision. He included as Exhibit C to his brief several e-mail communications from bar counsel in Maryland, Utah, Arkansas, Ohio, Indiana, Tennessee, and Florida responding to this inquiry:

We have a complaint from a judge where two divorcing parties submitted a separation agreement prepared by a non-lawyer divorce mediator. In the past, our Grievance Committee has treated mediations as not UPL as long as the mediators do not give legal advice and do not draft agreements. Anyone with some current law on what their states are doing on this issue? Can non-lawyers mediate divorce cases in your states? On all issues? Thanks!

All seven bar counsels responding said that nonlawyer-mediators could conduct mediations in their states. Bar counsel in Maryland, Utah, and Ohio advised that nonlawyer-mediators could not give legal advice. Bar counsel for Maryland, Utah, and Arkansas advised that nonlawyer-mediators could typically draft MOUs. Bar counsel for Ohio and Indiana advised that nonlawyer-mediators could not draft “agreements” or “prepare[] legal doc [ument]s,” respectively. The Chief Disciplinary Counsel for Connecticut did not discuss these e-mails in the Prehearing Memorandum except to say that they represented a national “trend” on how to handle questions involving nonlawyer-mediators. He did not discuss them at the disciplinary hearing.

At Exhibit D, he attached a copy of the Report of the Alternative Dispute Resolution Section of the Colorado Bar Association: Recommended Guidelines Regarding Unauthorized Practice of Law Issues in Mediation, adopted in October 2005. Again, he did not discuss these guidelines in his brief or at the hearing. Moreover, he did not explain why he chose to include these guidelines rather than those developed by the CCDM, or by the ADR program administrators in Virginia, Georgia, or North Carolina. He did not explain, for instance, that Colorado had adopted the test for UPL that Connecticut had adopted, which the guidelines would, in turn, reflect.

The Prehearing Memorandum of the Chief Disciplinary Counsel, as we might expect, focused on the dominant “law practice” paradigm. It did not discuss any aspirational or mandatory ethics standards for mediators or any ethics opinions interpreting the ethics standards from the perspective of the “authorized practice of mediation.”

Kate W. Haakonsen filed a sixteen-page brief on behalf of Dr. Fremed. She brought to Dr. Fremed's defense her experience as counsel for Carney, Strong, and Decker in the proceedings brought against them as nonlawyer-mediators. Haakonsen
A CONNECTICUT MEDIATOR IN A KANGAROO COURT?:..., 49 S. Tex. L. Rev. 1047

outlined what she believed to be the two issues before the Reviewing Committee: (1) “Did the respondent's conduct with respect to the Wrights' divorce mediation constitute the unauthorized practice of law?” and (2) “Does the respondent's practice of divorce mediation in general constitute the unauthorized practice of law?” She urged the Reviewing Committee to consider first that the prior decisions of the SGC had found that divorce mediation was not the per se practice of law. That question had to be resolved with a case-by-case review of the facts. She described the “commonly understood” test found in Connecticut Bank as both “tautological and vague.”

Using the CCDM Mediation Standards and ACR's Standards of Practice for Family and Divorce Mediation, she began to distinguish the roles of a lawyer and of a mediator. The lawyer: (1) advocates “exclusively for the benefit of his client,” (2) “as counselor advises client as to how the law relates to the circumstances of the specific client,” and (3) recommends “a course of action to the client.” In contrast, the mediator: (1) maintains “impartiality toward all participants”; (2) assists parties “in reaching an informed voluntary settlement”; (3) does not “coerce an agreement”; (4) does not “make a decision for any party”; (5) “raise[s] questions for the parties to consider as to the fairness, equity and feasibility of proposed options for settlement”; (6) may offer “legal information”, but does not give legal advice by attempting to tell parties “how that information would apply in their situation”; and (7) complies with a separate confidentiality statute that does not generally apply to lawyers, as does Rule 1.6 of the Rules of Professional Responsibility.

Haakonsen then discussed two alternative tests for the practice of law: the “client reliance” test and the “application of law to facts” test. No evidence existed that the Wrights had relied on Dr. Fremed for legal advice. Dr. Fremed had not advertised herself as an attorney, and in fact, had specifically disclaimed that status in several ways on numerous occasions. Dr. Fremed told the Wrights many times to seek independent legal counsel. No evidence existed that she had provided legal advice. She did not fill out legal forms or other documents that she intended the parties would file with a court. Accordingly, Dr. Fremed's acts did not qualify as the practice of law under either test.

Haakonsen focused next on the exception to the “customary function” or “commonly understood” test that allowed a non-lawyer to provide certain lawyerly-type services as long as they were “incidental” to the primary service offered by the non-lawyer. The SGC had adopted this exception in the Carney, Strong and Decker cases. She noted that many persons engaged in a profession or business may possess knowledge of the law, may apply that law in the course of their professional activities, but do not risk a UPL disciplinary proceeding because legal advice or information incidentally given during that work does not transform it into the practice of law. They include architects, bankers, liquor dealers, real estate brokers, labor relations specialists, and in some states, mediators. Limiting the activities of these persons would not serve the public interest. In closing that discussion, she quoted the further appeal following remand in Connecticut Bank:

In giving general information to customers and prospective customers on such matters as federal and state tax laws, inter-vivos and testamentary trusts, wills, etc., as well as reviewing existing wills, where the defendant gives no specific advice, charges no fee, and urges the customers to consult their own attorneys for advice on their specific situations and have them draw any necessary instruments, the defendant is not engaged in the illegal practice of law but is performing these acts as incident to its authorized fiduciary business. Mediators, she argued, find themselves in a similar situation. In addition, Dr. Fremed's effort to point parties to pertinent information available from court or off the internet also consisted of incidental activities.

Moreover, the Do it Yourself Divorce Guide and Supplement identified relevant law and procedure, defined divorce related terms, identified court personnel, identified issues divorcing parties should consider, and suggested the use of a trained mediator.
It listed directories of mediators, including those listing nonlawyer-mediators. It advised parties to consult with counsel. The forms that parties had to file in court appeared on the court's website and in the Guide. “One can only conclude that the Judicial Branch expects pro se parties to rely on the information in its publication[s].” By making this argument, Haakonsen no doubt intended the Reviewing Committee to apply its earlier decisions in Strong and Decker.

Next, Haakonsen finally shifted to a one paragraph statement of the “parallel” paradigm. She offered the definition of mediation found in ACR's Standards of Practice for Family and Divorce Mediators, which are the aspirational standards of ethics that the CCDM website offers to persons visiting its webpage. She attached to the brief as exhibits Dr. Fremed's Yellow Pages advertisement, her mediation brochure, her Mediation Services Agreement, the Waiver of Attorney-Client Privilege for both Wrights, the draft MOU dated October 2004 with some portions remaining in italics, copies of telephone messages to and from Dr. Fremed showing her communications about and to Attorney Barbara Flanagan, the fax cover sheet dated October 27, 2004 from Dr. Fremed to Barbara Flanagan conveying the draft MOU, the CCDM Mediation Standards, the ACR Standards of Practice for Family and Divorce Mediation, the final version of the Separation Agreement filed with the court, including Schedule A, the Bill of Rights for Children of Divorce, the Bill of Rights for Parent's Divorcing, and a copy of Connecticut General Statutes § 52-235d.

The Reviewing Committee held a hearing that lasted a day and a half. An annotated, abridged transcript of that hearing appears at Appendix B to this article. At the hearing, Dr. Fremed, Attorney Flanagan, and Diane Brady Wright testified. Ms. Brady Wright, who agreed to assume her maiden name after the divorce, brought to the disciplinary hearing several e-mail communications she had had with Dr. Fremed. They became the basis for further allegations of UPL against Dr. Fremed.

1. The Late-Filed E-mails

In the first exchange of e-mails, dated October 26, 2004, Mrs. Brady Wright e-mailed Dr. Fremed expressing concerns about the latest draft of the MOU. She listed seven concerns, one of which read: “Marital Assets - I will (supposedly) be buying Keith [Wright] out [of the marital home] at time of refinance not at time of divorce so however you want to word that.” Dr. Fremed replied:

I was able to incorporate most of your changes. Paying Keith for his share of the house can't be done at time of refinance - it is too ambiguous. You may want to do this by time of divorce. What happens if you refinance next week and give him his share - so long as there isn't an official divorce he can change his mind and request a different amount. Mrs. Brady Wright replied:

Thanks for making the changes! If I refinance next week and don't pay him his amount and he doesn't sign the quit claim deed I'm kind of putting myself in a bad position, aren't I? I was under the impression that if we refinanced/paid him and signed the quit claim deed all at once then he can't ever pursue anything more for the home (that's a clause that I had drawn up in the quit claim deed when we tried to do this over the spring/summer). Dr. Fremed replied:

I'm not a lawyer but I think if you quit claim the deed and give Keith his money you will be the exclusive owner of the home but since you are still married it is still marital property. Just because you have the title doesn't exclude the house from being marital property and until the divorce is final it can still be considered in the marital pot. You have to be very sure that he is going to agree with this and it is in a signed separation agreement before you assume the financial settlement has been agreed upon. Mrs. Brady Wright answered:
I agree with you 100%; that's why I had added that clause into the Quit Claim Deed - it was something to the effect of “Upon the signing of this document, James K. Wright will release all rights, title and pursuit of financial interests of (property address). I can check with an attorney that I know in Bethel but I'm pretty sure he wouldn't be able to get any more money from the sale of the house/ if it gets sold in the future. Many thanks for your responses though - it's always helpful to have another opinion!  

The Reviewing Committee also focused on two e-mails exchanged in December 2004. In the first of these e-mails, Mrs. Brady Wright asked Dr. Fremed the following question:

In your experience, have you found some couples to extend the child support to the age of 21? I am asking to do this since the agreement only calls for room/ board/ tuition/ fees/ books/etc. It doesn't allow for any living expenses/car/car insurance/sports/ clothes/etc. and I feel that Keith [Wright] should still support them in this way. He said he would but he doesn't want to put it in writing. Any ideas on how to go about this? 

Dr. Fremed replied:

Are you divorced yet? Child support usually ends when the youngest child is 19 or graduated from high school. It is up to the parent's discretion if some support is continued . . . while in college. Normally college kids work and subsidize some of their own support and each parent provides them with money directly to the extent possible. From my experience it is very rare for parents to include in the agreement a specific amount of money for support after the age of 19. College expenses, tuition, trips home, books, residence are provided by the parents.

**H. Proposed Decision and Outcome**

To kill the page was no crime--it was [his] right; and upon [his] right [he] stood, serenely and unconscious of offense. [He] was the result of generations of training in the unexamined and unassailed belief that the law which permitted [him] to kill a subject when [he] chose was a perfectly right and righteous one.

On March 9, 2006, the Reviewing Committee issued its Proposed Decision. It claimed that its decision reflected clear and convincing evidence of three acts constituting the practice of law. It focused first on the October 2004 e-mail communication in which “respondent advised Mrs. [Brady] Wright that if she quitclaimed the deed and gave her husband the money, she would be the exclusive owner of the home, but it would still be marital property. She explained that just because [Mrs. Brady Wright] would have title, the house would not be excluded from being marital property until the divorce [was] final. She further advised that this should be incorporated into a signed separation agreement.” The Reviewing Committee also characterized as “advice” the December 2004 communication in which Dr. Fremed “advised Mrs. [Brady] Wright that child support usually ends when the youngest child turns 19 or graduates from high school, that it is the parents' discretion to continue support while in college, and that it is very rare for parents to include in the agreement a specific amount of money for support after the age of 19.”

The Reviewing Committee finally noted the “detailed document” Dr. Fremed prepared which included the parties' agreement regarding marital assets, inheritance, and alimony; and, it erroneously found that: “[i]n March of 2005, a detailed Agreement which the Respondent prepared for the Wrights was submitted to the Superior Court in the matter of Wright v. Wright.” The Proposed Decision did not mention at any point the role of Attorney Flanagan in the preparation of the earlier version of the Separation Agreement or the role of Mrs. Brady Wright in drafting the final version of the Separation Agreement the Wrights filed with the court.
It concluded that Dr. Fremed had practiced law by providing the Wrights advice “regarding marital property, quitclaim deeds, and child support in connection with her preparation of the Agreement filed in Superior Court.” It cited only one case --Statewide Grievance Committee v. Patton--as grounds for making its finding. That case found, according to the Reviewing Committee, that “[t]he [practice of drafting] legal documents involves difficult or doubtful legal questions . . . which, to safeguard the public, reasonably demand the application of a trained legal mind.” The Reviewing Committee quoted language originally from Connecticut Bank, about how the welfare of the public demanded that “manifold customary functions . . . be performed by persons possessed of adequate learning and skill and of sound moral character, acting at all times under the heavy trust obligation to clients which rests on all attorneys.” In addition, the practice of law “embraces the giving of legal advice . . . and the preparation of legal instruments covering an extensive field.”

Inexplicably, the Reviewing Committee stated further: “This reviewing committee also considered . . . [that] [t]he Respondent represented that she is 69 years old and close to retirement.”

It constrained this rush to judgment in the face of credible uncontradicted evidence, by asking the SGC to forbear further proceedings if Dr. Fremed signed within fourteen days a Stipulation providing: (1) Dr. Fremed was not a licensed attorney; (2) she operates New England Counseling & Mediation in Connecticut; (3) she “provided advice to clients regarding marital property, quitclaim deeds, and child support”; (4) “[t]his action constitutes the practice of law and warrants action”; and (5) she agrees “to cease and desist from conduct constituting the practice of law, including but not limited to, the foregoing conduct” regarding marital property, quitclaim deeds, and child support.

On March 9, 2006, Maureen A. Hogan, on behalf of the SGC, notified Dr. Fremed that the SGC had voted to adopt the Proposed Decision of the Reviewing Committee. It gave Dr. Fremed fourteen days to execute the Stipulation. On March 17, 2006, Haakonsen reluctantly submitted the signed Stipulation to the SGC. Dr. Fremed could no longer afford the costs of her defense. Haakonsen, obviously dismayed with the result, stated: “I feel the Committee’s decision in this matter should not be accepted without comment. I cannot help but be baffled by the Committee finding clear and convincing evidence that the agreement filed by the Wrights in Superior Court was drafted by the Respondent.” Haakonsen then reviewed the evidence surrounding the drafting of the Separation Agreement.

She noted that the incident had “ignited a firestorm against non-attorney mediators.” Accordingly, Haakonsen thought that the question about who had drafted the Separation Agreement that the Wrights submitted to the court “deserved the most careful consideration of the evidence.”

She then turned to the two e-mails, and made an argument about them that reflects both the “law practice” paradigm and the “authorized practice of mediation” paradigm. She argued that with respect to the October 26, 2004, e-mail, Dr. Fremed had made the appropriate disclaimer: “I am not a lawyer.” She pointed out that Dr. Fremed had “raise[d] a potential problem with the Wrights' plan, something mediators often do in order to encourage clients to seek [legal] advice. If the mediator does not explain the nature of a legal issue, clients do not understand why getting legal advice is important.” Dr. Fremed appropriately alerted Mrs. Brady Wright to the legal risks of their plan. Haakonsen further explained that Mrs. Brady Wright did consult a lawyer--an attorney in Bethel--and did not rely on Dr. Fremed for legal advice.

With respect to the December 21, 2004, e-mail, Dr. Fremed had replied at a time when she thought the parties were already divorced. Accordingly, she could not have provided advice on which she intended Mrs. Brady Wright to rely. In addition, Mrs.
Brady Wright was interacting with Attorney Flanagan, “who could be presumed to understand the law regarding child support which was the subject of the e-mail.” 322

Haakonsen concluded by saying that the grievance procedures did not allow for reconsideration by the Reviewing Committee. “My client's choice, to stipulate or defend a criminal charge, is Hobsonian.” 323 She believed the decision undermined the previous decisions in Carney, Strong, and Decker “particularly with regard to the incidental exception for providing legal information.” 324 She called the decision “poorly supported by the evidence.” 325 “In creating such a hostile environment for mediation by non-lawyers, Connecticut seems to be stepping out of the mainstream of thinking on dispute resolution in family law.” 326 She asked that her letter enter the record in the case. 327

I. Analysis of the Fremed Proposed Decision

And so, well knowing that this [man], trained as [he] had been, deserved praise, even adulation [for killing the page], I was yet not able to utter it, trained as I had been. The best I could do was to fish up a compliment from outside, so to speak--and the pity of it was, that it was true: “[Sir], your people will adore you for this.” 328 The Reviewing Committee's decision in the Fremed matter clearly reflects the severe constraints of the court decisions governing UPL in Connecticut. However, it failed to appropriately apply the more liberal doctrine developed in the mediation context in Carney, Strong, and Decker. In analyzing the document drafting issue, the Reviewing Committee had to decide the following factual and legal issues as framed by the case law and the SGC decisions in the earlier matters:

1. Who drafted the document submitted by the parties in court as the Separation Agreement? Dr. Fremed? Attorney Flanagan? Mrs. Brady Wright? Or a combination of those persons? If the latter, did Attorney Flanagan review, approve, and adopt the work product of Dr. Fremed?

2. According to the decisions in Carney, Strong, and Decker, did Dr. Fremed draft a document that she intended the parties would use in court?

3. According to the decisions in Carney, Strong, and Decker, did she take sufficient precautions to ensure that the parties would not use her work product as an operative document in court?

4. According to the decision in Connecticut Bank, did lawyers customarily prepare MOUs for divorcing parties?

5. More generally, according to the decision in Connecticut Bank, did lawyers customarily engage in divorce mediation?

6. According to the decision in Connecticut Bank, did the parties need the drafting help of someone possessed of adequate learning and skill?

7. According to the decision in Dacey, did Dr. Fremed's drafting activities require the application of legal judgment?

8. According to the decision in Horwitch, did Dr. Fremed simply act as a scrivener?

9. According to the decisions in Dacey, Carey, and Strong, were Dr. Fremed's drafting activities incidental to her primary business or incidental to the mediation process and, accordingly, not the practice of law?
10. According to the decisions in Strong and Decker, were Dr. Fremed's drafting activities incidentally related to the practice of law and, accordingly, permissible?

In analyzing the legal advice issues, the Reviewing Committee had to decide the following factual and legal issues as framed by the case law and the SGC decisions in the earlier matters:

1. According to the decisions in Connecticut Bank and Dacey, did Dr. Fremed's e-mail responses provide permissible legal information?

2. According to the decision in Dacey, did Dr. Fremed's e-mail responses direct information “toward a particular person and his needs and to a particular instrument prepared for his execution” and, accordingly, fall within the definition of legal advice?

1. Defects in Factual Analysis

The Reviewing Committee's two-page decision does not carefully apply any of this precedent. It even fails to properly decide the first factual issue: Who drafted the operative legal agreement—the Separation Agreement? It ignored the clear and convincing testimony of Attorney Flanagan about her drafting role and her testimony that she had reviewed, approved, and adopted the parenting plan drafted by Dr. Fremed as Appendix A to the Separation Agreement. Otherwise, Attorney Flanagan drafted the first draft of the operative legal agreement. Mrs. Brady Wright testified that she made further changes to that draft before submitting it to the court for approval.

The Reviewing Committee's decision did not discuss the Wrights' right as pro se parties to prepare their own Separation Agreement. The Reviewing Committee's inability to even correctly decide the drafting issue suggests two things: either the members did not read the transcript before drafting the proposed opinion, or they had pre-judged the issue and, accordingly, ignored the testimony.

2. Due Process Issues

Admission of the late-filed e-mails raised substantial due process issues that the Reviewing Committee failed to consider in any meaningful way. Its members rejected Haakonsen's objection to their use. Even though they appeared incomplete, the Reviewing Committee ruled that their incomplete status only went to their weight and not to their admissibility.

However, Dr. Fremed and her counsel expected to respond to the allegations that Dr. Fremed had improperly drafted documents submitted by the parties in court. Adding concerns, so late in the process, about whether Dr. Fremed improperly gave legal advice or legal information raised issues of proper notice of the charges against her and whether her counsel had sufficient opportunity to prepare a defense to the new charges. Attorney Haakonsen “had almost no time to review the e-mails” before the testimony resumed.

How the Reviewing Committee handled these e-mails causes the author great concern, especially because its proposed decision seems especially influenced by them. In the e-mails' absence, the uncontroverted hearing testimony clearly indicated that Dr. Fremed had not drafted the documents submitted by the parties to the court, or to the extent she had (drafted the parenting plan), a lawyer had independently reviewed and approved her effort to record the parties' agreement. Accordingly, unless the Reviewing Committee intended to preclude mediators from drafting any legal instruments, including MOUs that the mediator expects a lawyer to review, the Reviewing Committee should have dismissed the charges against Dr. Fremed. If the Reviewing Committee had had only the drafting issue to consider, it would have more likely applied the “incidental services” exception it had applied in Strong and Decker.

3. Incomplete Analysis of “Law Practice” Paradigm
The Reviewing Committee's ruling on the drafting issue, while being factually incorrect, also misapplied its precedent in the Strong and Decker cases. In those cases, it viewed the mediator's MOU drafting activities as incidental to the practice of law. Also, the Reviewing Committee did not attempt to define “legal instruments” or distinguish between the MOU and the Separation Agreement the Wrights filed with the court.

In addition, the Reviewing Committee misapplied the “law practice” paradigm to the e-mails. Under that paradigm, Dr. Fremed's October 26, 2004, e-mail communication with Mrs. Brady Wright could be viewed as legal advice. The Dacey test would define the e-mail comments as legal advice if they directed the information “toward a particular person and his needs and to a particular instrument prepared for his execution.” While Dr. Fremed's comments might satisfy the first two parts of this test, she was not involved with the preparation or execution of the quitclaim deeds. In fact, Mrs. Brady Wright had retained counsel for that purpose. Moreover, Attorney Flanagan represented Mr. Wright at the December 10, 2004, hearing on the real estate transfer in Judge Vilardi-Leheny's court.

In connection with both e-mails, the Reviewing Committee's decision in Fremed made no attempt to distinguish between prohibited legal advice and permitted legal information. Instead, it simply concluded that Dr. Fremed had provided legal advice on marital property, quitclaim deeds, and child support. In reaching the decisions on both the drafting and legal advice issues, it relied on the broad statements found in Patton and Connecticut Bank about the customary functions of lawyers and the broad definition of the practice of law as covering an “extensive field.” Amazingly, the Reviewing Committee made no attempt to analyze or apply the prior precedent more directly on point in Carey, Strong, and Decker. Glaringly absent from the Fremed proposed decision is any discussion of the “incidental services” exception to the practice of law.

4. Failure to Apply “Authorized Practice of Mediation” Paradigm

The Reviewing Committee made no effort at all to cite to or consider the CCDM Mediation Standards or ACR's Standards of Practice for Family and Divorce Mediation included in Respondent's Hearing Brief. It made no attempt to understand or apply the “parallel” paradigm of the “authorized practice of mediation.” The decision fails to discuss the role of a mediator in helping parties better communicate, identify issues, generate options, evaluate options, and reach agreement. It did not respect the Wrights’ self-determination.

An analysis of the e-mails under the “authorized practice of mediation” paradigm shows that mediators have more ethical leeway in these types of conversations with parties, but that the e-mails still raise potential ethics issues. Every divorce involves the distribution of marital property, including the marital home in most cases. In most jurisdictions, a limited number of options exist for handling that distribution, each of which carry with it certain consequences or concerns. Thus, Dr. Fremed's comments could be characterized as simply providing legal information. Dr. Fremed arguably provided information about one option in the context of a set of facts that can occur in most, if not all, divorces. Dr. Fremed, as an experienced divorce mediator, would have become familiar with those issues and options by virtue of her training or experience. The author would argue that this communication provides information Dr. Fremed was qualified to give. Accordingly, the e-mail did not provide legal advice in violation of the statutes, decisions, and rules governing UPL. However, this communication shows the difficulty that either a mediator (whether lawyer or non-lawyer) or a UPL regulator faces in parsing the difference between legal information and legal advice. Nevertheless, the author believes Dr. Fremed protected herself under the requirements of the second paradigm--the “authorized practice of mediation”--by reminding Mrs. Brady Wright that Dr. Fremed was not a lawyer. This disclaimer, in turn, implicitly raised the obligation on the part of Mrs. Brady Wright to consult with a lawyer as Dr. Fremed had advised her to do on numerous occasions in the past. And, as Mrs. Brady Wright did.
In addition, the provisions of mediator ethics codes that govern option generation, option exploration, or option evaluation could also apply. While Mrs. Brady Wright had generated the quitclaim deed *1123 option, 346 Dr. Fremed's e-mail comments could be characterized as additional option generation. 347 The Virginia Standards of Ethics and Professional Responsibility for Certified Mediators, for example, permit mediators to “suggest options for the parties to consider, [but] only if the suggestions do not affect the parties’ self-determination or the mediator’s impartiality.” 348 However, a mediator “may not recommend particular solutions to any of the issues in dispute.” 349 The North Carolina Standards of Professional Conduct for Mediators take *1124 a much more liberal approach. They allow a mediator to “suggest for consideration options for settlement in addition to those conceived of by the parties themselves.” 350 Utah allows mediators to “make suggestions and . . . draft proposals for consideration by the parties and their attorneys.” 351 If Dr. Fremed intended to propose an option to a particular aspect of the dispute, the Virginia rules would preclude her from doing so. However, at least two other ethics codes permit this type of mediator assistance. The 2004 ACR Proposed Policy Statement would put a mediator's option generation activities in the “increased scrutiny” category primarily because of their risk to party self-determination and mediator neutrality. 352

Dr. Fremed's comments could also be characterized as option exploration. The quitclaim deed and its timing was one of several options the parties could consider to resolve marital property issues. 353 The 2005 Model Standards consider one of the purposes of mediation as “explor[ing] and assess [ing] possible solutions.” 354 ACR's Divorce Mediation Model Standards contemplate that the family mediator “works with the participants to explore options.” 355 The standards themselves state that a mediator “should encourage the participants to explore the range of options available” but only in the context of parenting arrangements. 356 The Florida Standards of Professional Conduct for Certified & Court-Appointed Mediators envisions the mediator's role as including an “exploration of alternatives” with the parties, so long as the parties retain ultimate control over decision-making. 357 These rules of conduct seek to protect party self-*1125 determination and prohibit a mediator from making any substantive decisions for the parties. 358 The Virginia SOEs require the mediator to describe the mediation process. In the comment to that SOE, the drafters state that the process includes “maximizing the exploration of alternatives.” 359 The comment continues: “[T]he stages of mediation should include at a minimum, an opportunity for all parties to be heard, the identification of issues to be resolved in mediation, [and] the generation of alternatives for resolution . . . .” 360 Another SOE allows the mediator to “raise issues, and help explore options.” 361 Several other ethics codes envision the role of mediator as including “maximizing the exploration of alternatives” or options. 362 Generally, they seek to protect party self-determination and preclude the mediator from making decisions for the parties. 363 The 2004 ACR Proposed Policy Statement would put a mediator's option exploration *1126 activities in the category of “proper mediation practice.” 364

Finally, Dr. Fremed's comments could be deemed option evaluation. 365 The Florida ethics rules allow a mediator to “point out possible outcomes of the case and discuss the merits of a claim or defense.” 366 The Committee Notes further explain that a mediator “may also raise issues and discuss strengths and weaknesses of positions underlying the dispute. Finally, a mediator may help the parties evaluate resolution options . . . .” 367 The Florida ethics rules state that when a mediator believes a party needs more information about how “an agreement may adversely affect legal rights or obligations,” the mediator “shall advise the party of the right to seek independent legal counsel.” 368 The Florida rules would not allow a mediator to give a personal or professional opinion if it is “intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue.” 369 The Virginia Standards require the mediator to encourage parties to seek independent legal counsel when that advice “is needed to reach an informed agreement or to protect the rights of a participant.” 370 North Carolina’s Standards of Professional Conduct take a more liberal approach. They allow a mediator to “raise questions for the participants to consider
regarding their perceptions of the dispute as well as the acceptability of proposed options for settlement.” 371 However, under the North Carolina rules, the mediator “shall not impose his/her opinion . . . about the acceptability of any proposed option for settlement . . . [and] should resist giving his/her opinions about . . . options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the . . . options for settlement.” 372 The 2004 ACR Proposed Policy Statement would put a mediator's option evaluation activities in the category of “proper mediation practice” if they “facilitate [d] the parties' discussion regarding their assessments *1127 or the strengths and/or weaknesses of their respective cases.” 373 The proposed policy statement would classify them as “improper mediation practice” if the mediator “offer[ed] any personal or professional opinion as to how the court (judge or jury) in which a case has been filed will resolve the dispute.” 374 The proposed policy statement would classify the activities as subject to “increased scrutiny” if the mediator “provid[ed] any personal or professional evaluation of the strengths or weaknesses of the case, either directly or implicitly, even when it is not intended to coerce the parties or direct a resolution.” 375 Arguably, Dr. Fremed did not perform this type of professional evaluation relating to the specific case pending before Judge Vilardi-Leheny. Accordingly, her option evaluation would fall within permitted mediation practices.

Mrs. Brady Wright's last comment in the series of e-mails about the quitclaim deed indicates that Dr. Fremed's opinion did not affect Mrs. Brady Wright's self-determination or her perception of Dr. Fremed's impartiality. 376 However, if Dr. Fremed offered this opinion because she was concerned about Mrs. Brady Wright's legal rights under the proposed option, she had an independent duty to refer Mrs. Brady Wright to legal counsel. Her disclaimer in the e-mail?“I am not a lawyer” may be enough to satisfy this requirement when coupled with her earlier advice to the parties to consult with legal counsel throughout the process. 377 In addition, Mrs. Brady Wright testified that she understood Dr. Fremed's limited role as a mediator and that she did not expect Dr. Fremed to provide legal advice. 378 Mrs. Brady Wright clearly understood that Dr. Fremed was not offering the opinion as an attorney, but simply raising issues. 379 She also did not intend to rely on the communication. 380 She saw it as just another opinion or perspective that she would further investigate with her lawyer. 381 In fact, she replied in the e-mail that she would discuss the issue with “Bethel” counsel and she soon had that conversation. 382

Professors Cooley and Love would allow this type of evaluation *1128 by a lawyer-mediator or nonlawyer-mediator so long as the mediator provided sufficient warnings about the risks of the evaluation. 383 They distinguish, however, between reality-testing questions, 384 role-reversal strategies, 385 evaluations that apply legal rules to the specific facts of the dispute, 386 and personal or professional opinions on how a court would resolve a dispute. 387 Reality-testing questions and role-reversal strategies still call for party evaluation. These types of interventions would not require the warnings Cooley and Love recommend. 388 Legal evaluations and outcome opinions, in contrast, put the neutral in the decisional role. These interventions would require prior warnings to the parties before the neutral engaged in the interventions because they (1) could affect the perception of the mediator's neutrality and so affect his or her usefulness; (2) can undermine party self-determination and problem-solving; (3) can be based on incomplete or limited information; (4) may apply only legal norms when the parties may prefer to apply family or religious norms, for example; (5) can be based on confidential caucus information that the other party has no opportunity to rebut; (6) can polarize the parties, lead to impasse, and increase the cost of resolving the dispute; and (7) lead to less candor in the negotiations between the parties. 389 Even after the neutral gives the warnings about these risks, the parties would need to invite the legal evaluation or outcome opinion. The parties should expressly consent to the specific type of evaluation, the specifically described role of the neutral, and to any additional costs charged for the evaluation process. 390

Arguably, Dr. Fremed's comments about the quit claim deed option provided reality-testing that still called for party evaluation. In fact, Mrs. Brady Wright consulted with an attorney to help her *1129 evaluate the proper approach to the marital home
transfer. On the other hand, if the statements could be characterized as a legal evaluation or an outcome opinion, Dr. Fremed’s statements would meet some, but not all of the suggested warnings. She clearly warned that her opinion could not be based on an understanding of the law, as she was not a lawyer. Also, Mrs. Brady Wright knew that Dr. Fremed based the evaluation or opinion on the limited information provided in her e-mails. She also knew that Dr. Fremed was attempting to apply legal norms. The comments did not apparently affect Mrs. Brady Wright’s perception of Dr. Fremed’s neutrality or her self-determination. But, Dr. Fremed did not make any specific warnings about these risks before giving what might be characterized as a legal evaluation or outcome opinion.

In summary, Dr. Fremed’s October 26, 2004, e-mail communication with Mrs. Brady Wright could raise some ethics issues even under the “authorized practice of mediation” paradigm depending on how someone characterizes the conversation, what ethics code applies, and what affect the conversation had on Mrs. Brady Wright to the extent the e-mail replies undermined party self-determination or her perception of the impartiality of the mediator. Dr. Fremed would have avoided some of the ethical issues raised under the Florida and Virginia standards, for instance, by disclaiming that she was not a lawyer—as she did—and also stating in the e-mail that Mrs. Brady Wright should consult independent legal counsel—which she did not. However, this sort of formalism in every communication with a party requires a “mechanical, word-precise, self-conscious, inflexible . . . exercise” that the mediator ethics codes do not necessarily require in every communication in which a party’s legal rights might be at issue. Most codes simply require the mediator to make the parties aware of their right to consult with legal counsel at the beginning of the mediation session and perhaps when the parties reach points where they cannot make an informed decision without consulting with legal counsel. Arguably, the October 2004 e-mail may have marked one of those points in the process.

The second e-mail, dated December 21, 2004, raises no ethical issues under the “authorized practice of mediation” paradigm. From a mediator’s perspective, Mrs. Brady Wright has identified an interest in ensuring that the children can attend college or technical school with the financial support of both parents. She is soliciting from Dr. Fremed either general information about the issue or possible options to satisfy this interest, specifically asking about how other divorcing parents have handled a similar situation. Dr. Fremed’s reply does not apply a body of law to the specific facts of the Wrights’ divorce. It instead provides general information about what other parents had done based on Dr. Fremed’s experience in working with them. She was competent to provide this information by virtue of her training and experience.

The application of the “authorized practice of mediation” paradigm to the e-mail communications assumes that in October and December of 2004, Dr. Fremed continued to act as a mediator for the parties, an issue that no one involved in the hearing addressed directly. Dr. Fremed testified that she had no further involvement with the Wrights after October 2004. Accordingly, she may have arguably still served as the mediator during the exchange of the October e-mails. If she continued to act in the role as mediator, the “authorized practice of mediation” paradigm would apply. However, the December e-mail relating to the post-majority educational support issue likely came after she no longer served as a mediator for the parties. In fact, she thought they were divorced by this time. However, if her response to the e-mail was nothing more than legal information, under the decisions in Connecticut Bank and Dacey, she could provide it as a mediator or, for that matter, as a private citizen. But, if she no longer acted as the parties’ mediator in December 2004, and if she gave opinions, generated options, or evaluated options in conversations with Mrs. Brady Wright only, then Dr. Fremed made herself more vulnerable to charges of UPL.

The application of the “authorized practice of mediation” paradigm also could have affected the decision in the Fremed case about the mediator’s drafting activities. The report of the Hewlett-NIDR Test Design Project identified one of the mediator’s tasks as helping document any agreement reached by the parties. The 2004 ACR Proposed Policy Statement characterizes several drafting activities as “proper mediation practice.” Under this policy statement, a mediator may “provide . . . written summaries to the parties of discussion during the process . . . prepare agreements that incorporate only the terms agreed to by the parties . . . [and] in the context of family mediation, work with parties to complete child support worksheets.”
The proposed policy statement would characterize as “improper mediation practice” the activities of the mediator to “draft an agreement that goes beyond the terms specified by the parties.”

States with mandatory ethics codes for mediators take a number of approaches to the role of the mediator in drafting proposals or the parties' agreement. Iowa, Kansas, South Dakota, and North Dakota go the furthest by statutorily requiring the mediator to draft the mediated settlement agreement. Similarly, a Virginia statute defines “dispute resolution services” as including the “screening and intake of disputants, conducting dispute resolution proceedings, drafting agreements and providing information or referral services.” However, the Virginia UPL Guidelines interpret this statutory drafting role more narrowly. Virginia requires mediators to disclose to parties, by reciting the “four legals”: “Each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.” The comments to the SOEs state, “[T]he stages of mediation should include at a minimum, an opportunity for all the parties to be heard, the identification of issues to be resolved in mediation, generation of alternatives for resolution, and, if the parties so desire, the development of a Memorandum of Understanding.” Georgia implicitly recognizes a drafting role for the mediator. A provision governing fairness in the process states that “[a] mediator may refuse to draft or sign an agreement which seems fundamentally unfair to one party.” Accordingly, if a mediator may refuse to draft an agreement, the ethics code contemplates that he or she has a drafting role in the normal course of mediation practice.

Similarly, Florida requires its certified mediators to appropriately memorialize “the terms of any agreement reached” and to “discuss with the parties and counsel the process for formalization and implementation of the agreement.” The Committee Notes to the rule make clear, however, that while “[m]ediators have an obligation to ensure these rules are complied with, [they] are not required to write the agreement themselves.” Another Committee Note makes clear that mediators “may . . . draft settlement proposals.” Tennessee, like Florida, wants the mediator to help the parties get the agreement drafted, but does not require the mediator to do it. Its code provides the following: “The Neutral shall request that the terms of any settlement agreement reached be memorialized appropriately and shall discuss with the participants the process for formalization and implementation of the agreement.” Massachusetts also explicitly gives the mediator a drafting role, but does not require the mediator to serve as the drafter. Its code states, “The neutral may participate in the preparation of the written agreement.”

Utah, as noted above, allows mediators to “draft proposals for consideration by the parties” but does not otherwise discuss the mediator's drafting role. Like Utah, Oregon allows mediators in civil cases to “propose settlement terms either orally or in writing.” Most mandatory ethics codes do not address the drafting role of the mediator. In other words, the mediation field has not asserted a more uniform “parallel” paradigm on the drafting issue.

*1133 As a practical matter, the Reviewing Committee did not consider the effect its ruling might have on the parties to mediation. If mediators cannot memorialize in a document the terms of the parties' mediated agreement, especially in more complicated matters with multiple issues, parties would have difficulty keeping track of the agreements they had reached. The states that have statutorily mandated a drafting role for mediators and the states that have issued UPL guidelines for mediators acknowledge this problem. Leaving the terms unwritten at the end of the mediation would undoubtedly create more post-mediation conflict about the nature of the parties' agreement.

While the Reviewing Committee mentioned the need to safeguard the public, it made no serious attempt to assess whether the Wrights had been harmed in any way by Dr. Fremed's activities as a mediator. In fact, the clear and convincing evidence offered by Mrs. Brady Wright's testimony showed that she had been especially grateful for and appreciative of Dr. Fremed's help. Moreover, she felt badly that she had somehow gotten Dr. Fremed in to trouble with the state bar. The Reviewing
Committee never discussed the testimony of Attorney Flanagan about her role in protecting the interests of Mr. Wright or the testimony of Mrs. Brady Wright about her use of lawyers during the divorce process. It never mentioned Dr. Fremed's frequent disclaimers about her role as a mediator or her repeated efforts to ensure that the parties consulted with independent legal counsel throughout the mediation process. The Reviewing Committee did not discuss whether any evidence existed that the Wrights ever solely relied on Dr. Fremed's advice, whether legal or otherwise. Accordingly, the decision stinks of turf protection rather than true consumer protection.

In the end, the Fremed decision turns back the clock to 1999, when the Reviewing Committee in Carney found that the mediator had engaged in UPL “by performing divorce mediation, which the committee conclude[d] [was], per se, the practice of law.” *415* Luckily *1134* for nonlawyer-mediators in the state and for the parties who wish to use them, the Connecticut court created a new court rule in June 2007, about a year later, exempting services provided by a mediator from the definition of the practice of law. It also expressly allows persons “to provide information of a general nature about the law and legal procedures to members of the public.” *416* Accordingly, Dr. Fremed could be the last mediator in Connecticut to face UPL disciplinary proceedings.

IV. The “Law Practice” Paradigm

A. Definition of the Practice of Law

Statutes, court decisions, and court rules *417* proscribe the unauthorized practice of law in three typical ways: (1) by proscribing it without defining the “practice of law”; *418* (2) by using a circular *1135* definition in which the practice of law is what lawyers do or have done or have the skills and training to do; *419* or (3) by listing activities that *1136* constitute the practice of law. *420* The listed activities typically include *1139* (1) the drafting of legal instruments, forms, and pleadings; (2) giving legal advice; and (3) appearing in court on behalf of a person. One court called the varying tests “consistent only in their inconsistency.” *421* Professor Rhode calls the UPL prohibitions “broad and largely undefined [in] scope” *422* and covering a “breathtaking amount of common commercial activity.” *423* She also asserts that states make “[n]o attempt . . . to justify prevailing definitions.” *424* UPL doctrine, she asserts, is “inconsistent, incoherent, and, from a policy perspective, indefensible.” *425*

1. American Bar Association Model Definition of the Practice of Law

In 2002, the ABA attempted to develop a model definition of the practice of law. *426* The draft definition that circulated for comments defined the practice of law as “the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.” *427* *1140* This draft definition therefore seemed to adopt the “application of law to specific facts” test discussed below. *428* The draft definition also provided a list of activities which raised the presumption that a person who engaged in them also engaged in the practice of law. The activities listed included the following:

(1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;

(2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;

(3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or

(4) Negotiating legal rights or responsibilities on behalf of a person. *429*
On its face, the list would preclude some of the activities the mediation field generally views as within the “authorized practice of mediation.” While most mediator ethics codes limit a mediator's ability to provide advice or counsel about a person's legal rights, the codes typically permit mediators to provide legal information and to draft or complete mediated agreements and some court forms. In addition, negotiation plays the central role in the mediation process. Does a mediator negotiate on behalf of either party? The mediation community would say “no.” A mediator simply facilitates negotiation between the parties who each bargain on his or her own behalf. This Model Definition may not make that distinction.

However, the ABA Task Force created four safe-harbors, including one that exempts from the definition “[s]erving as a mediator, arbitrator, conciliator or facilitator.” In creating this exemption, the Task Force apparently followed the recommendations of the Section of Dispute Resolution, discussed below. The Model Definition also imposed disclosure requirements for non-lawyers subject to one of the four exemptions. Non-lawyers had to disclose in writing that they were not lawyers.

After the committee received over sixty comments to the Model Definition, including comments from the mediation community and the Federal Trade Commission, it abandoned the effort. Instead, it recommended that every state develop its own definition reflecting its laws, practice culture, and specific UPL problems. It further recommended that each state's definition include “the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.” It also recommended that each state determine who could provide services that fell within the state's definition and what “minimum qualifications, competence, and accountability” should apply to those persons.

B. The UPL Tests

UPL statutes and court decisions regulate (1) non-lawyers; (2) lawyers who are not licensed in the enforcing state; and (3) persons who assist other persons in practicing law without a license. Restrictions of UPL appeared in the colonial period, but enforcement escalated during the hard economic times of the 1930s. Lawyers made peace with some competing professionals, until the Federal Trade Commission began to look at UPL enforcement as an antitrust or market segmentation issue.

Several scholars have considered, in a number of contexts, whether a person not licensed in a particular state has engaged in the practice of law. The statutes and court decisions creating this body of law supposedly seek to protect consumers by delivering high quality legal services through practitioners who have proved they have good moral character, a legal education, professional values and ethics, and the ability successfully to apply legal knowledge in the context of a bar exam. The UPL constraints may also ensure the existence of confidentiality under the attorney-client privilege, and the lawyer's undivided loyalty to the client. Lawyers may also face bar disciplinary proceedings or tort claims for failing to provide legal services appropriately. UPL constraints also have the intended or unintended effect of “carving out specific tasks exclusively for lawyers, eliminating competition, and protecting income.”
The specific UPL tests go by a number of different names, but they tend to fall into a few analytical schemes. This article briefly describes these tests below, simply to provide some outline of the “law practice” paradigm that can operate in the field of mediation.

The tests from most expansive to least expansive are (1) the “affecting legal rights” test, (2) the “commonly understood” or “customary practice” test, (3) the “relating law to specific facts” test, (4) the “client reliance” test, and (5) the “attorney-client relationship” test.

The first two tests nearly create strict liability for engaging in any act that might be deemed lawyer-like. The third and fourth tests put some control into the practitioner’s hands in terms of creating potential liability for UPL. The fourth test requires practitioners to take precautions, typically in the form of disclaimers, that influence how the “client” perceives the services rendered by the practitioner. The fifth test creates the most predictable standard because it looks for traditional indicia of the attorney-client relationship and its creation. These tests may also reflect an effort to define “legal advice.” As one scholar notes, “Answering a question about the law becomes legal advice when the answer requires skill and familiarity with the law, or when the listener relies on the answer as an accurate statement of his rights and obligations, or when the answer is directed to the specific legal problem of an individual rather than to common problems of the public generally.”

1. “Incidental Services” Exception to UPL

Some states tolerate practice by non-lawyers “that is common in the community, ancillary to another established business, or restricted to ‘routine’ tasks.” In the real estate broker context, the following was recognized by one scholar:

[an overlapping area of activities exists between the commercial and professional sectors of our economy wherein acts, legal in nature, are performed by both sectors concurrently . . . .] Certain activities are inherently essential to the continued existence and operation of a legitimate business, and to preclude such acts would effectively disable the function of the business in the commercial world and destroy its value to society.

Legal assistants, accountants, financial planners, real estate agents, trust officers, insurance adjusters, stock and securities brokers, collection agencies, court clerks, credit counselors, social workers, title companies, and law librarians may fall within the UPL law’s incidental services exemption. The exception may not apply, however, to professionals who charge a separate fee for the incidental service. In addition, some courts look to whether the service involves simple, clerical tasks or complex legal issues. At least in the real estate broker context, the majority of courts allow some document drafting, but a majority of courts do not allow a broker to give legal advice or appear in judicial or administrative tribunals on behalf of another person. One scholar, writing in 1979, asserted that courts usually reject a defense based on the incidental services exception. Other courts, he suggested, severely limit its scope.

In 1995, the ABA Taskforce on NonLawyer Practice, found that twenty-one of the surveyed jurisdictions allow non-lawyers to perform some legal services. In sixteen states, legal assistants or paralegals may perform some legal services under the supervision of an attorney. Eight states allow real estate agents or brokers to draft legal documents, and twelve states permit
non-lawyers to participate in administrative or dispute resolution proceedings. Seven states permit non-lawyers to draft legal documents on a general basis.

a. Drafting Activities of Non-lawyers

In analyzing the document drafting issue, courts may consider (1) the degree of skill or knowledge required to prepare the document; (2) whether the documents involve or affect the binding legal rights of the recipient; or (3) whether the drafting activity is one customarily performed, or commonly understood to be performed, by lawyers. Under these factors, if applied together, Dr. Fremed's drafting activities would likely constitute the practice of law. The testimony proved that while she had drafted the parenting plan that the Wrights submitted to court as Appendix A to the Separation Agreement, she also had memorialized in a computer generated document the other issues on which the parties had agreed or were still negotiating. She had sufficient skill and knowledge to draft the parenting plan, which (by its nature) involves a limited number of options or issues. But the parenting plan affects both parties' legal rights. In addition, lawyers have customarily drafted separation agreements, including parenting plans. The last factor in this test simply reflects the test the Reviewing Committee applied to Dr. Fremed's drafting activities. It would proscribe efforts to record or draft any of the agreements the parties reached because the Reviewing Committee drew no distinction between the activities of a drafter exercising judgment and a scrivener simply recording the terms agreed by the parties.

The ABA's Commission on Non-Lawyer Practice recommended in 1995 the use of a balancing test. Under this test a court would analyze the drafting activity by considering “(1) the risk of harm to the consumer; (2) the ability of the service's recipient to evaluate the provider's qualifications; and (3) whether regulation would produce a net public benefit.” Under the ABA's balancing test, Dr. Fremed's drafting activities would likely not be considered the practice of law. First, as a well-trained mediator with substantial experience as a family mediator, her drafting activities would pose little risk to consumers, especially if the parties consulted with legal counsel about the mediator's work-product. In addition, her frequent disclaimers about the limits of her role as a mediator, about the need for the parties to consult lawyers, and the other precautions she took to encourage the parties to seek legal advice, reduced the risk of harm to the parties from her drafting activities. Second, the Wrights easily assessed Dr. Fremed's qualifications to give legal advice. She had specifically disclaimed that role and had fully disclosed that she was not a lawyer.

b. Consumer Protection Rationale

Imposing UPL regulation in Dr. Fremed's circumstance produced no net public benefit. The Wrights made informed choices about consulting a lawyer, both parties did consult with lawyers, they were pleased with the help Dr. Fremed provided, and they moved through the divorce process with information they would not have otherwise had. By requiring the Stipulation from Dr. Fremed, the Reviewing Committee ran a high quality mediator out of the state and made her unavailable to parties who might want to use her services in the future. The courts, who face rising numbers of pro se parties, also lost the benefit of her skill and training. The Georgia Commission on Dispute Resolution acknowledged that zealous UPL enforcement would “paralyze domestic relations mediation.” It further acknowledged the following:

[M]ost unrepresented couples have no intention or means to engage an attorney for the calculation of child support. Therefore, they are likely better off working with the help of a mediator who has some experience and knowledge in working with this complicated [50-page] statute than trying to do the calculations alone. The results of a mediator-assisted child support calculation are more likely to be accurate and complete, thus making it easier for the courts to serve the best interests of the children and advance
the policy behind the legislation. If mediators are expected to help parties more accurately calculate child support, then it is critical that mediators be well trained to perform this service.\textsuperscript{487}

Similarly, the UPL guidelines for Virginia mediators state: “[a]llowing mediators to prepare written agreements for the parties facilitates the efficient resolution of disputes and minimizes the costs to the parties, who may not desire or be able to afford their own attorneys.”\textsuperscript{488} In addition, allowing mediators to provide parties with relevant legal materials and information “facilitates settlements by assisting the disputants in making fully-informed decisions.”\textsuperscript{489} As noted above, several other mediator ethics codes or statutes envision a drafting role for mediators.

Nolan-Haley calls UPL doctrine “ill-suited to what needs to be regulated in the mediation field.”\textsuperscript{490} Instead, she suggests that the legal and mediation communities should work collaboratively to design regulatory systems that truly respond to the consumer protection rationale of professional regulation. In doing so, the legal and mediation community must consider parties' needs and interests\textsuperscript{491} which will achieve justice and fairness in the mediation process for them.\textsuperscript{492}

C. UPL Disciplinary Bodies

In 2004, the ABA surveyed the bodies charged with UPL disciplinary enforcement,\textsuperscript{493} and thirty-six disciplinary bodies responded.\textsuperscript{494} Twenty-three jurisdictions actively enforce UPL laws and regulations.\textsuperscript{495} Ten jurisdictions, including California and New York, do not actively enforce UPL laws and regulations.\textsuperscript{496} Some states use bar-sponsored committees or counsel (fifteen jurisdictions),\textsuperscript{497} supreme court-appointed committees or commissions (ten jurisdictions), county attorneys, district attorneys, or states attorney generals (seventeen jurisdictions) to handle UPL complaints.\textsuperscript{498} Some jurisdictions have more than one body authorized to enforce UPL laws and regulations.\textsuperscript{499} Authority to discipline UPL violations derives from court rule in eleven jurisdictions, by statute in fourteen jurisdictions, and by both statute and court rule in ten jurisdictions.\textsuperscript{500} In Connecticut, the SGC--the UPL disciplinary body--consists of twenty-one members, fourteen lawyers and seven non-lawyers, whom the judges of the Superior Court appoint. Statewide Bar Counsel assists the SGC in exercising its responsibilities to investigate and decide matters involving lawyer ethics.\textsuperscript{501}

Penalties or sanctions for UPL violations include civil injunction in thirty jurisdictions; criminal fines in twenty-five jurisdictions; prison sentences in twenty-two jurisdictions; civil contempt in twenty jurisdictions; restitution in fifteen jurisdictions; civil fines in eight jurisdictions; and cease and desist orders in three jurisdictions. Some statutes or rules provide for a number of different remedies.\textsuperscript{502}

The chair of the ABA committee at the time of the survey, Robert D. Welden, noted two “divergent but interrelated trends.”\textsuperscript{503} State enforcement of UPL laws and regulations has increased, but increasingly more states allow non-lawyers to provide limited legal services.\textsuperscript{504} Welden also recognized a growing need for legal services by low- and moderate-income people at a time when publicly funded legal services are diminishing. As a result, states are increasing their UPL enforcement to protect the public . . . and also are exploring ways to improve and regulate the provision of law-related services by non-lawyers.\textsuperscript{505}
Nearly fifteen years earlier, in 1981, Professor Rhode characterized the UPL enforcement strategy of states as a largely informal, unchecked, biased, low-visibility enforcement effort attended by as little public discussion as possible. Laypersons rarely participated in the UPL disciplinary process. In the few states that valued their participation, none made them a majority on the UPL disciplinary bodies. Their influence, Professor Rhode cautioned, should not be overestimated. Commentators had expressed concern that their appointment could even be counter-productive because “lending a veneer of nonpartisanship . . . may deflect attention from more meaningful reform.”

Some of Rhode's survey interviews with the chairs of the disciplinary bodies revealed that many bodies lacked the authority to initiate criminal proceedings. Instead, disciplinary bodies on occasion made referrals to state and local prosecutors, who then made the decision to pursue the complaint. She found that prosecutions rarely occur. Prosecutors in only three of thirty-eight states she surveyed initiated civil UPL cases. In eighty-eight percent of states, prosecutors brought suits either rarely or virtually never. Prosecutors in only four surveyed states “occasionally” sought criminal sanctions, which carried only the risk of misdemeanor penalties. But that reality did not prevent disciplinary bodies from extracting a settlement or informal agreement from the accused non-lawyer respondent by threatening prosecution. Of the 791 dispositions she analyzed in her research, forty-five percent resulted in no action. In the remaining cases, eighty-two percent of the proceedings terminated in an informal agreement. Only ten percent of complaints resulted in a formal disciplinary process. Parties reached out-of-court settlements in one percent of cases in which the disciplinary body took some formal action. Only five percent led to a judicial determination, all of which resulted in a finding of a UPL violation. She found that very few disciplinary bodies kept robust statistics on their activities. About half of the states she surveyed in 1981 kept no statistics and only twelve states published information about their dispositions. She concluded that “bar committees have proved quite successful in terminating objectionable lay practice without judicial or outside prosecutorial involvement.”

Professor Rhode's empirical research also revealed that UPL complaints focus on document preparation and related advice, which constitute seventy-two percent of disciplinary body inquiries, investigations, and complaints. These complaints also skew the data by appearing more frequently as the focus of sixty-eight percent of reported UPL cases. Seventy-two percent of enforcement actions outside California involved real estate (twenty-two percent), divorce (fourteen percent), debt collection (twelve percent), trusts (eleven percent), incorporation (six percent), administrative agency appearances (five percent) and probate (five percent) activities conducted by non-lawyers. Other activities drew less scrutiny from the disciplinary bodies: immigration (three percent), insurance (three percent), other forms of legal advice (three percent), “persons holding themselves out as lawyers” (three percent), or persons making court appearances and filing papers (two percent). Interestingly, eighty-six percent of the chairs of the disciplinary bodies thought non-lawyer competition posed no threat to lawyers. Fifteen percent of respondents thought the activities of non-lawyer practitioners generated business for lawyers. Many respondents candidly admitted that non-lawyer practitioners typically took matters lawyers either did not want or did not take.

In Professor Rhode's survey, only thirty-nine percent of disciplinary bodies reported any complaints received directly from consumers in 1979, and only twenty-one percent identified a specific injury. Yet, this data did not match the other data she received from the responding states. Of 1188 inquiries, investigations, or complaints she analyzed, only twenty-seven (two percent) arose from a consumer complaint about a specific injury. Reported judicial cases decided in 1979-1980 contained references to consumer injury from the UPL activity analyzed by the court, but courts identified allegations of specific injury in only nine of eighty-four (eleven percent) decisions involving non-lawyers. Some chairs of the disciplinary bodies expressed
concerns that consumers would not have the protections afforded by client security funds, ethical codes, or professional disciplinary bodies that otherwise regulated the activity of the attorneys. 523

But, a third of the respondents to her survey did not perceive UPL as a threat to consumers. 524 Some respondents thought non-lawyer practitioners posed no greater threat to the public than unqualified or unprepared attorneys. 525 Five respondents thought lay specialists could handle matters within their expertise better than most attorneys. 526 Two respondents thought consumers should be free to make a balanced choice between cost and expertise. 527 The Virginia respondent admitted, “it’s difficult to justify unauthorized practice enforcement on the basis of harm. In most areas there are better people to protect the public . . . .” 528

Chairs of the disciplinary bodies also expressed concern to Rhode that the public perceived their enforcement actions as self-protective, monopolistic, or greedy. 529 They also perceived the public as resentful that consumers could not have easier access to non-lawyer services. Some respondents believed the public resented high attorneys' fees especially for simple uncontested matters. 530 Not one disciplinary body chair thought the public generally supported their UPL enforcement efforts. 531

Rhode raised several concerns about the due process afforded non-lawyers caught up in the UPL disciplinary process. Most disciplinary bodies unilaterally made the decision about proceeding in response to a UPL complaint. To do so, they unilaterally determined whether the complaint stated a claim of UPL by determining whether the non-lawyer had practiced law under the vague definitions available. 532 Judges and prosecutors exercised little oversight of this, or any, step in the disciplinary process. 533 She therefore characterized the authority of disciplinary bodies as “largely unchecked.” 534 Disciplinary bodies, almost always composed of lawyers with economic and psychological interests in the outcome, also had an inherent bias to enforce the UPL statutes, decisions, and rules. 535 She recommended that prosecutors and consumer protection agencies instead play the dominant role in UPL enforcement, both of which were politically accountable. 536

Rhode also raised other concerns about the constitutionality of the enforcement system. The restrictions may be impermissibly broad and vague, 537 may raise due process concerns, 538 and may impinge on first amendment rights of free speech. 539 Her research, however, revealed that in cases involving non-lawyers reported from 1970 to 1980, only ten considered the first amendment claims and three involved due process concerns. 540

V. UPL in the Mediation Context

Nolan-Haley characterizes the doctrine courts have developed about the unauthorized practice of law by mediators as “not at all coherent.” 541 The case law has imposed two sets of practice rules—one for lawyer-mediators and one for nonlawyer-mediators. 542 While courts infrequently face the issue of UPL in the mediation context, 543 disciplined mediators can face civil and criminal liability. 544 Accordingly, nonlawyer-mediators offer mediation “under the haunting shadows of UPL regulation.” 545 The court decisions, 546 and the surrounding debates, do not specifically focus on the “parties being served [or] the goals of justice and fairness.” 547 From Professor Nolan-Haley’s perspective:

[the question is not about who owns or controls mediation but rather how we should regulate it and protect parties in ways that safeguard the core values of both the legal profession and the emerging mediation professions as well as the public . . . .] 548 [W]e can develop policies and practices that truly respond to [parties’] needs.
She recommends that we develop regulation of mediation that “(1) satisf[ies] legitimate consumer protection concerns of UPL regulation, (2) encourage[s] creativity problem-solving in resolving conflict; and (3) to the extent that legal rights, are involved, keep[s] the quality of justice at a high level.”

She asserts that if “competent, [nonlawyer-mediators have] wander [ed] close to the boundaries of law practice that should be the beginning, not the end, of the UPL *1163 inquiry.” This approach assumes that mediators will carefully identify the limits of their roles and offer information, opinions, or evaluations only when competent to do so. Moreover, it views borderline activities as incidental to the primary purpose of mediation services.

Scholars and ADR professional organizations have considered questions about UPL in the mediation context. Overall, they conclude that mediation conducted consistently with the ethical guidelines for mediators should not be considered the practice of law.

*1165  A. 2002 Resolution of the ABA’s Dispute Resolution Section

The 2002 Resolution on Mediation and the Unauthorized Practice of Law reached several conclusions. First, mediation is not the practice of law and that when mediators discuss legal issues with parties the discussion does not create an attorney-client relationship. Second, when mediators discuss legal issues with parties, that discussion does not constitute legal advice. Third, mediators may memorialize the parties' mediated agreement, but must take care not to “go beyond the terms specified by the parties.” Further, drafting MOU’s does not constitute the practice of law, even if the mediator adds terms to an MOU not specified by the parties so long as the parties have retained counsel and the mediator has advised the parties to review the proposed additional terms with their counsels. Fourth, as additional precautions, consistent with most mandatory and aspirational mediator ethics codes, the mediator must inform the parties:

(a) that the mediator’s role is not to provide them with legal representation, but rather assist them in reaching a voluntary agreement; (b) that a settlement agreement may affect the parties’ legal rights; and (c) that each of the parties has the right to seek the advice of independent legal counsel throughout the mediation process and should seek such counsel before signing a settlement agreement.

This formulation of the “authorized practice of mediation” seems to assume that the narrowest test for UPL--the “Attorney-Client Relationship” test--should apply. Comment one to the Resolution notes: Because mediators do not establish an attorney-client relationship, they are not engaged in the practice of law . . . . In mediations where the parties are represented by counsel or where the mediator properly explains (and preferably documents) his/her role, it would appear unlikely that either party in mediation could ever reasonably assume that the mediator was the person’s attorney.

*1166 This approach focuses on consumer protection without unnecessarily limiting the primary role of mediators as facilitators of a communication, interest identification, and the negotiation process. As Comment six notes: “[t]his Resolution seeks to avoid the problem of a mediator determining, in the midst of a discussion of relevant legal issues, which particular phrasings would constitute legal advice and which would not.”

In addition, the 2002 Resolution acknowledges the growing number of mandatory and aspirational mediator ethics codes. The ethics codes constrain mediator behavior that may injure consumers of mediation services by precluding legal advice, by limiting drafting activities, by requiring disclosures about the role of the mediator and any limitations on that role, by requiring
mediator neutrality, and by requiring mediators to limit the information they are qualified to give through experience or training. The drafters also warn that characterizing mediation as the practice of law exposes lawyer-mediators to incompatible standards of the ethics rules governing lawyers, and subjects them to UPL disciplinary proceedings if they mediate in a state in which they are not licensed to practice law.

*1167 B. ACR's 2004 Proposed Policy Statement on the “Authorized Practice of Mediation”

As of February 2007, ACR's home webpage prominently features a story that seems related to the concern the organization's leadership has had about the outcome of the proceeding involving Dr. Fremed. The story reports that ACR adopted a resolution on UPL in October 2006 affirming:

that mediation is a distinct practice with its own body of knowledge, foundational principles, values and standards of practice. While ACR recognizes that the definition of and penalties associated with the unauthorized practice of law are matters of state law, ACR affirms that mediators who practice mediation consistent with standards of conduct approved by ACR should not be considered to have engaged in the unauthorized practice of law. If an ACR member is charged with unauthorized practice of law, ACR will provide assistance and/or support as may be appropriate.

The second story links web users to ACR's 2004 Proposed Policy Statement on the unauthorized practice of law/authorized practice of mediation. That statement concluded that mediators should be judged by their peers using standards delineating proper mediation practice. The ACR Board of Directors then took a novel approach by categorizing mediation-related activities into three categories:

1) activities that are fully consistent with the values of mediation are generally considered proper mediation practice;
2) certain activities that are commonly understood to fall outside the realm of proper mediation practice; and
3) activities that are so highly contextual that they evade clear categorization and require additional scrutiny.

The ACR Board also offered the opinion that mediators could draft documents memorializing the terms of the parties' settlement, so long as the document reflected terms specified by the parties. These acts “d[id] not constitute the practice of law.”

In the ACR Board's opinion “[m]erely including language required by statute, court rule, or a mediation program as part of a writtenmediation document should [also] not . . . be perceived as the practice of law.” It cautioned mediators to avoid filing with courts “formal” documents that “b[ore] the name or format of legal documents.”

C. State Ethics Advisory and Grievance Opinions on the UPL Issue in the Mediation Context

In addition, regulatory bodies of the bar have issued a few ethics opinions in the mediation context as it relates to UPL. The opinions generally fall into three categories: (1) associating with nonlawyer-mediators in mediation practices or programs with lawyer-mediators; (2) advertising and solicitation issues; and (3) drafting settlement agreements, memoranda of understanding, pleadings, or court forms. A few opinions deal with other UPL related issues.
In addition, the Florida Mediator Ethics Advisory Committee, charged with issuing ethics advisory opinions that interpret a mandatory mediation ethics code, has identified situations in which the activities of a mediator may cross over to UPL. A few other states have also issued mediator ethics advisory opinions that may implicate UPL issues. In an even fewer number of states, mediator grievance systems have identified activities that might be deemed UPL.

VI. Developing the “Parallel” Paradigm: The “Authorized Practice of Mediation”

John Cooley suggests that to create the “parallel” paradigm, the mediation field must first define certain terms: “mediation; the practice of mediation; the authorized practice of mediation; ADR; and the practice of ADR.” In that way, the mediation field can “optimally” reframe the UPL issue as “what is the authorized practice of mediation within the larger practice of ADR?” This article focuses on the first three definitions. In doing so, it relies heavily on statements from the two leading national mediator organizations--the ABA’s Dispute Resolution Section and ACR. It also relies on the mandatory ethics codes promulgated by Florida and Virginia, two of the few states that have well-developed infrastructures supporting mediation in those states. It also analyzes the UPL best practice statements developed by the CCDM.

A. Definitions of Mediation

In 2005, the American Arbitration Association (AAA), the ABA, and ACR approved a revision to the Model Standards of Conduct for Mediators. These aspirational standards of ethics define mediation as “serv[ing] various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.” The Florida Supreme Court defines mediation as “a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.” Virginia statutes define mediation as “a process in which a mediator facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.” These definitions emphasize the facilitative nature of the mediator's process, interventions, and party self-determination over the outcome.

Connecticut takes a different approach by focusing on the law practice paradigm, even in its definition of mediation. Connecticut statutes define mediation as:

*a1175 a process, or any part of a process, which is not court-ordered, in which a person not affiliated with either party to a lawsuit facilitates communications between such parties, and, without deciding the legal issues in dispute or imposing a resolution of the legal issues, which assists the parties in understanding and resolving the legal dispute of the parties.* The emphasis here is on the communication, understanding, and resolution of the parties' legal disputes.

Ken Cloke, a masterful mediator, would characterize this definition as embodying a more superficial level of intervention in the dispute. Cloke describes five levels of dispute resolution: (1) stopping the fighting; (2) settling the issues; (3) resolving the underlying reasons that generated those issues, and unless resolved, will continue to generate the same issues; (4) finding forgiveness; and (5) reconciling.
A CONNECTICUT MEDIATOR IN A KANGAROO COURT?:..., 49 S. Tex. L. Rev. 1047

He suggests the first level of dispute resolution is a fundamentally physical response to the conflict. It separates people and keeps them from hurting each other. He describes this level of intervention as “addressing the body.” Litigation and arbitration function at this level of conflict resolution. The second level of dispute resolution “engages the mind.” It involves a logical analysis of the underlying interests of the parties as they relate to the conflict-generating issues between them. Most mediators engage in this type of intervention the majority of the time. Law school dispute resolution programs largely focus on this type of facilitated intervention. Even so, Cloke suggests that this level of intervention resolves perhaps only forty percent of the underlying conflict.

Only deeper interventions will relieve parties completely of the pain associated with the conflict. Cloke describes the third level of intervention as dealing with the emotions fueling the conflict. A mediator must allow the parties to express emotion authentically. The parties must then process the emotions. This level of intervention “touches the heart.” The mediator may ask: “Who cares? Why? What does it matter?” Forgiveness, the next level of intervention, allows a party to give up the conflict and re-claim energy that he or she has devoted to the conflict. At this level of intervention, the party undergoes a transformation. Cloke suggests this intervention has a “spiritual” component, in that it taps a party’s compassion and highest intentions. Cloke says this process allows a party to release himself and others from the burden of that party’s unrealistic expectations. Reconciliation, the final step in dispute resolution, allows a party to completely transcend the conflict. It is over. Its hold on the party disappears. This final stage, Cloke suggests, makes growth, learning, and change possible. Our reconciled conflicts become our greatest teachers.

These stages also coincide to some extent with the now out-dated discussion of the various mediator styles--evaluative, facilitative, and transformative. The evaluative mediator works somewhere between the first and second levels of dispute resolution. The facilitative mediator works mostly within the second level of dispute resolution. The transformative mediator focuses on the third and fourth levels of intervention seeking “recognition and empowerment.” Mediators working in the restorative justice field address the fourth and fifth levels of dispute resolution: forgiveness and reconciliation.

Another mediator’s definition of mediation captures the complexity of working at these deeper levels of intervention, commenting:

> [f]or some of us, mediation means negotiating a cease-fire, while for others it is facilitating a settlement, ending a dispute, resolving the underlying reasons people are fighting in the first place, transforming the parties, dismantling dysfunctional systems, promoting compromise, encouraging dialogue, ending litigation, coaching parties to let go and move on, promoting forgiveness, empowering dialogue, recommending solutions, or achieving reconciliation.

This definition captures some of the broader goals of mediation, especially as they relate to improving communication, restoring relationships, or meeting important emotional and psychological needs of the parties.

**B. Role of the Mediator and the Practice of Mediation**

1. Styles, Orientations, and Tasks of Mediators

Other scholars have analyzed the style, orientation, or role of mediators in the process. Leonard Riskin began this discussion using the terms “facilitative” and “evaluative.” Robert Baruch Bush and Joseph P. Folger added the term
“transformative” to the discussion. Riskin revisited the discussion later in his career and added the terms “elicitive” and “directive.” This article assumes that mediators are familiar with this discussion. This author assumes that UPL regulators are not familiar with the discussion and so this article provides several citations that summarize the discussion (some say debate) about the most effective styles of mediation.

As Cooley notes, “substantial differences of opinion [exist] as to how even the basic processes of mediation . . . should be defined.” However, some consensus exists about the typical tasks a mediator performs: (1) gathering background information; (2) facilitating communication; (3) communicating information to others; (4) analyzing information; (5) facilitating agreement; (6) managing cases; and (7) helping document any agreement by the parties. Several state statutes recognize these roles. Mediator ethics rules also recognize these tasks. Mediators can cross the line under most UPL statutes and case law by two principle activities: drafting documents deemed “legal” and giving legal advice, however the statutes, courts, or bar disciplinary committees define that term, assuming they do. Mediators may find themselves giving legal advice when parties expect them to engage in a more evaluative style of mediation. Evaluative mediators are often defined as focusing on the substance of the dispute. They assume the parties need more help in assessing or predicting litigation outcomes and formulating solutions to the dispute. The techniques of evaluative mediators often include review of the underlying legal documents, assessment of the law or facts underlying the dispute, and active participation in the resolution of the dispute through case evaluation, the prediction of outcomes at trial, or other substance-oriented assistance. Often, these mediators use more caucuses, in which the mediator attempts to convince the parties to accept a recommended solution. They often apply pressure to settle. They typically control the expression of emotion as not being helpful or as actually hindering the process. The style looks a lot like shuttle diplomacy and makes the mediator more responsible for correctly translating for the other party the verbal, non-verbal, emotional, and psychological communication of the other side expressed during caucus.

These mediators see themselves as “dealmakers willingly deciding what is best or fair for the parties.” One author suggests that most evaluative mediators are lawyers or retired judges who tend to “revert to their default adversarial mode, analyzing the legal merits of the case to move towards settlement.” This same author “suggests this ‘legalized’ style is more akin to early neutral evaluation or non-binding arbitration.”

Some empirical research suggests that parties prefer a more evaluative style of mediation, including the recently published report of the ABA’s Dispute Resolution Section’s Task Force on Improving the Quality of Mediation. Other research suggests that other skills and attributes play a bigger role in the success of mediation. Professor Stephen B. Goldberg conducted three studies in 2004 and 2006 of successful mediators and their mediation parties. In the first study, Goldberg asked thirty experienced mediators to identify what skills and techniques they had that contributed to the settlement of disputes. More generally, he asked them to account for their success as mediators. More than seventy-five percent of the mediators reported that they attributed their success to “their ability to build rapport with the parties.” They built a relationship of “understanding, empathy, and trust.” This relationship, in turn, encouraged parties to communicate candidly and thereby provided mediators with the information they needed to forge a settlement. They developed this rapport primarily through empathetic listening. Nearly fifty percent of the mediators also said that “their ability to generate novel or creative solutions to the dispute” contributed to their success. Other important attributes included patience and persistence.
The second study asked advocates in mediation to identify the personal qualities, skills, or techniques mediators used to help parties reach agreement. The survey participants included lawyers, labor union or management representatives, and representatives of governmental agencies or public interests groups. The researchers coded the survey data into three major categories: confidence-building attributes, process skills, and evaluative skills. The top six responses were:

Confidence-building attributes • Friendly, empathetic, likable, relates to all, respectful, conveys sense of caring, wants to find solutions (60 percent) • High integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional (53 percent) • Smart, quick study, educates self on dispute, well prepared, knows contract/law (47 percent)

Process skills • Patient, persistent, never quits (35 percent) • Asks good questions, listens carefully to responses (28 percent)

Evaluative skills • Does useful reality testing regarding legal/contractual weaknesses, evaluates likely outcome in court/arbitration, candid regarding same (33 percent)

Goldberg notes that mediators in Study One and advocates in Table One “differed notably in the importance they assigned to mediator evaluation skills, a factor regarded as important by [thirty-three] percent of the advocates but by fewer than [ten] percent of the mediators. Advocates then, appear to regard evaluation skills as more relevant to mediation success than do the mediators themselves.”

The third Goldberg study asked advocates in mediation what conduct by mediators they viewed as counter-productive or that reduced the likelihood of settlement. The field should be happy to hear that twenty-three percent of the survey respondents reported that they had not experienced counter-productive behavior on the part of a mediator. Those reporting counter-productive behavior mentioned the following behaviors:

Lack of Confidence-Building Attributes: • Lack of integrity, not neutral, disclosed confidential information, failed to accurately convey position, inconsistent evaluations, interested in settlement at all costs, too quick to reach conclusions (48 percent)
Self-absorbed, self-important, not empathic, not respectful, did not care, not interested, did not listen (20 *1184 percent)

* * *

Lack of process skills •

Not firm/forceful, just went through the motions, just delivered messages (24 percent)

* * *

Lack of evaluative skills

* * * •

Faulty/no evaluation (7 percent) 628 * While rapport and integrity play a key role in a mediator's success, on the flip side, lack of integrity tops the list of counter-productive behavior. 629 This counter-productive behavior apparently undermines the relationship on which mediators build to reach settlement.

Goldberg noted the “rare criticisms of mediators for poor evaluative skills.” Seven percent of the Study Three advocates identified it as a counter-productive behavior, but thirty-three percent of the Study Two advocates regarded good evaluation skills “as an important element of mediator success.” 630 Goldberg hypothesized that poor evaluation skills surfaced as a rare criticism because they “pale into insignificance when compared to the central Study Three criticisms.” 631

2. Background, Training, and Skill Diversity Among Mediators in the Field: The Role of Nonlawyer-Mediators

Goldberg's data strongly suggests that mediators do not need the ability to evaluate the strengths and weaknesses of a legal case or position to help parties reach settlement of their dispute. Instead, skills expressing social and emotional intelligence play a much more significant role. 632 If true, nonlawyer-mediators may more often *1185 possess the skills required of successful mediators. 633

One author calls it a debate over “whether process or substantive expertise is most important to dispute resolution.” 634 One author suggests that “attorneys do not make the best mediators” because they are “predisposed to have an ‘advocacy’ perspective on disputes.” 635 Another author states that “different disciplines have different understandings of conflict, so mediation means different things to mediators with different professional backgrounds.” 636 That author discusses a study in which lawyer-mediators stressed legal knowledge and drawing out the facts of the dispute often at the expense of relationship and communications issues. Social worker- *1186 mediators, in contrast, “emphasize[d] conflict resolution theory, interviewing, and problem-solving.” 637 We do know that nonlawyer-mediators, many of whom entered the field long-before it became an attractive option for lawyers, “show no signs of retreat from the business of ADR.” 638
Some scholars have considered the attributes that predict mediator competency. Margaret Shaw, a well-known New York mediator and co-author of the Goldberg study mentioned above, found that the following attributes predict mediator competency: (1) innate personal characteristics; (2) education and training in mediation theory and skills; and (3) experience as a mediator. Clearly, no lawyer has these attributes by the simple fact he or she has a law degree. At the same time, nonlawyer-mediators may possess these attributes more frequently than lawyer-mediators.

In the video-taped role-plays available to those of us who came too late to the mediation field to study in John Haynes' mediation classes, Haynes seems to suggest that the law is one normative value, among many, that parties consider in mediation. For lawyer-mediators and UPL disciplinary panels, an approach to conflict resolution that does not elevate law above other normative values, like the best interests of the child or religious values, may seem blasphemous. Lawyers may discount or ignore the contributions that nonlawyer-mediators bring to the field of mediation, especially divorce-related mediation. In the context of family law, lawyers and lawyer-mediators may not have the best skill-set to help parties resolve the conflict that accompanies divorce. Mediators with therapeutic training may have the broader skills parties require to manage the interpersonal conflicts they confront in the transition from the marital family unit to the newly defined and negotiated post-divorce family relationship. Accordingly, narrow interpretations of UPL standards may unnecessarily undermine the quality of mediation services available to parties. Narrow interpretations may drive from the field highly qualified nonlawyer-mediators at a time when many courts report that increasingly parties appear in divorce proceedings on a pro se basis with little help from any professional--whether, lawyer, mediator, accountant, financial planner, child psychologist, family counselor, or parenting coordinator.

*1188 In January 2008, the author solicited from nonlawyer-mediators responses to four questions designed to gain some insight into the process skills, personal attributes or characteristics, and professional background skills that they use in mediation to make themselves effective. Nonlawyer-mediators emphasized the process skills of communication, managing emotions, and helping the parties negotiate. Nonlawyer-mediators also identified helpful personal characteristics, helpful attitudes they take about the parties to the mediation, and helpful attitudes they have about the process of mediation. They also identified training, knowledge, or experience that made them effective mediators. With the exception of the Virginia mediator's statement that her ability to write concise agreements gave her a helpful skill, none of the skills, personal qualities, or attitudes identified by responding nonlawyer-mediators should raise the concern of UPL regulators. None of the nonlawyer-mediators identified giving legal advice as a helpful skill. Instead, they focused on communication and relational skills.

3. Nonlawyer-Mediators in Court-Connected Mediation Programs

Despite strong evidence that nonlawyer-mediators can competently provide mediation services without ever engaging in UPL, some lawyers and judges might easily conclude that the way to solve the perceived UPL problem is simply to limit mediation practice to lawyers. Most members of the mediation community would find this idea abhorrent for two reasons. First, as a field we value and accept diversity. The field began in community mediation and other non-court contexts that held little interest for lawyers. Only as mediation became institutionalized as one more dispute resolution process available to litigating parties, did lawyers begin to see the field as an attractive source of income and personal satisfaction. Second, party self-determination remains a core value of mediation. It includes not only control over the outcome of the facilitated negotiation, but also control over many elements of the process, including the choice of mediator. Most members of the mediation field believe that parties should be free to choose a mediator with competencies and attributes they feel best address their situation. Those competencies and attributes may not include legal training.
Recently, the Florida Supreme Court revised its rules governing the certification of mediators who participate in court-referred circuit court cases. It removed the requirement of Florida Bar membership for certified circuit court mediators. Instead, it adopted a point-based system that elevates training, experience, and mentorship over earned degrees, whether law or other professional degrees. The court recognized that “the general consensus in the alternative dispute resolution field is that possession of academic degrees, including law degrees, does not necessarily predict an individual's ability to be a good mediator.” It recognized that Florida had been among a minority of states that required legal training or a law degree as a prerequisite for circuit court mediators. The court had previously allowed nonlawyer-mediators to conduct county, family and dependency mediations. It made the change for two reasons. First, [T]he practical effect of this new point system is to remove the more formal mandatory education and profession-based requirements . . and to allow applicants to obtain certification in a variety of different ways more directly related to the actual skills and experience the Committee determined to be necessary for service as an effective mediator.

Second, the change would “ensure that Florida maintain[ed] its place of preeminence in the alternative dispute resolution field in the United States.” The court did not discuss the issue of diversity raised by the Committee on Alternative Dispute Resolution Rules and Policy (Rules Committee) in its petition for the rule change. The Rules Committee expressed concern that the current mediator pool for circuit court cases did not reflect the increasing diversity of Florida's population.

*1194 The Florida Bar filed a very tepid response to the proposed rule change at the order of the Florida Supreme Court. It could not suggest a principled basis for retaining the bar membership requirement except to say: “It is the uniform relief [sic] of the bar that circuit court mediation in the state is extremely effective, that its effectiveness is due in large part to the quality of mediators, and that the quality of mediators is greatly dependent on the minimal qualification contained in the rules.” The Rules Committee characterized this response as: “If it ain't broke, don't fix it.”

The Rules Committee's response to the comments of the organized bar argued that members of the Rules Committee had more experience in mediation and could provide the court with reliable advice, as it had done in the past. In addition, in circuit court cases, involving claims of higher value, lawyers typically represented parties in mediation. “It is counsel's responsibility to provide appropriate legal advice to their clients and to protect the legal rights of their clients. The mediator's roles are completely different.” It also noted that the court had not required a law degree or bar membership as a prerequisite for certified family mediators, even though those cases could involve complex questions about asset distributions, tax, and children. In this practice context, “[t]here is no evidence, including grievance activity, to suggest that attorney or nonattorney professionals are superior to the other.” The Rules Committee believed that its regulatory infrastructure guaranteed mediator competence without regard for the degree a mediator may or may not have earned. The Rules Committee asserted that “[t]o exclude persons from certification who meet all of the requirements would constitute an inappropriate exclusion of qualified individuals.”

The Georgia Requirements for Qualification and Training of Neutrals, created by the Georgia Office of Dispute Resolution (GODR), expressly provides: “Although mediators do not need subject matter expertise, they must have process expertise.” The qualifications also state that Georgia will use mediators “from a variety of disciplines and [they] should reflect the racial, ethnic and cultural diversity of our society.” They must have “the ability to listen actively, to isolate issues, and to focus discussion on issues.” The requirements list six skill-specific competencies. Mediators handling general mediation
cases need not have any specific educational or work experience. Mediators handling divorce and custody cases must have a baccalaureate degree. However, like Virginia, Georgia imposes relatively high barriers to entry to the field by requiring candidates to complete observations and co-mediations with experienced mediators.681

Many states allow nonlawyer-mediators to participate in court-connected mediation programs, especially family law cases, especially if the nonlawyer-mediator has a mental health or accounting background.682

ACR's Task Force on Mediator Certification designed a voluntary, national certification program.683 It sought a program design that “allow[ed] diversity of practice and people” and “validat[ed] members' knowledge and experience.”684 The Task Force designed it with “heightened attention and respect for all manner of diversity in the broadest sense” and defined diversity as including “differences in race, gender, ethnicity, cultural background, religious affiliation, socioeconomic status, sexual orientation, disability, and language.”685 It found training, knowledge, and experience “strong predictors of [mediator] competency.”686 The program permitted applications from ACR members and non-members, planned to accommodate different approaches to mediation, and sought to “intrude as little as possible on the creative practice style choices” of mediators.687 Similarly, the ABA's Dispute Resolution Section supports diversity in the field.688 In addition, its Task Force on Credentialing recommended that any policy statement about quality mediation practice “be in accord with the principles that preserve the integrity and diversity of the practice of mediation (e.g., participant backgrounds, subject matter, mediators, practice, and professional background).”689 Thus, the mediation community supports the maintenance of a diverse mediator pool, whether it defines that diversity in terms of race, gender, ethnicity, experience, background, training, profession, or worldview.690

C. Constraints of Mediator Ethics Codes

Most ethics codes or standards of conduct do not allow a mediator to give legal or other professional advice.691 Some ethics codes or standards of conduct expressly permit the mediator to provide “legal information” the mediator is qualified by training or expertise to provide.692 A few ethics codes or standards of conduct expressly permit certain types of evaluations by mediators.693 Some ethics codes also permit mediators to suggest options to parties.694 However, the codes may constrain when and how a mediator may conduct these types of interventions. For instance in Virginia, the mediator may provide legal information the mediator is qualified by training or expertise to provide only if (1) all parties are present, or (2) separately to the parties if they consent.695 In Virginia, lawyer-mediators may (1) evaluate the strengths and weaknesses of legal positions; (2) “assess the value and cost of alternatives to settlement; and (3) assess of the barriers to settlement, but only if such evaluation
*1198 is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.”696 The Virginia SOEs also permits mediators to “suggest options for the parties to consider, [but] only if the suggestions do not affect the parties' self-determination or the mediator's impartiality.”697 However, a mediator “may not recommend particular solutions to any of the issues in dispute.”698

Most ethics codes or standards of conduct for mediators do not define the practice of law or legal advice.699 Some scholars assert they do not offer a meaningful distinction between legal advice and legal information.700

Lastly, most states do not provide a mandatory code of ethics for their mediators. Only seventeen states offer this type of guidance to their mediators.701 Even fewer regulate the field through a formal *1199 disciplinary process.702 In short, most
states have failed to create this important aspect of the parallel paradigm.  

Because most states do not provide their mediators ethical guidance, the ABA’s Dispute Resolution Section created in 2005 a twelve member Standing Committee on Ethical Guidance. The committee provides advisory ethics opinions to questions posed by practicing mediators who face ethical dilemmas not clearly resolved by the 2005 Model Standards. Many members of the mediation field, including critics of the 2005 Model Standards, suggest that the next step in building a support structure for mediators is to offer advisory opinions interpreting the 2005 Model Standards. The new Standing Committee will take this next step.

The ABA’s Dispute Resolution Section also created the Ethics Advisory Opinions Database Subcommittee of the Standing Committee. This committee will assemble, in an easily accessed database, ethics advisory opinions issued in the few states providing them relating to mediation and the unauthorized practice of law in the context of mediation. It will also assemble and post the disciplinary grievances filed against mediators in states with mediator grievance systems. This database will include information about the disposition of the grievance and the sanctions, if any, imposed on mediators. The subcommittee hopes this database will provide ethical guidance to practicing mediators. It could also serve as a source of training materials for programs focused on mediator ethics.

In short, the mediation field has taken many steps to create the “parallel” paradigm, even since 2002 when Nolan-Haley last took a comprehensive look at the UPL issue in the context of mediation.

C. Little Evidence of Harm to the Public from Services Provided by Mediators

In 2005, the Florida Committee on Alternative Dispute Resolution Rules and Policy disclosed to the Florida Supreme Court that, based on grievance data, lawyers and non-lawyers handle divorce mediation competently. Of twenty-six grievances filed against family mediators since 1992, 77% involved lawyer-mediators and 23% involved nonlawyer-mediators, even though 58% of all family mediators are lawyers. The disciplinary body dismissed all the grievances filed against the nonlawyer-mediators, but imposed sanctions, by order or agreement, on seven lawyer-mediators. Florida maintains a roster of approximately 7,000 certified mediators who handle annually about 100,000 cases referred by courts to mediation. From May 1992 to April 2005, the Florida disciplinary body handled only seventy-four grievances filed against mediators, strongly suggesting that parties and their attorneys find mediation safe, helpful, and free of problems.

Of the nearly 9,000 mediators regulated by the states analyzed in Take It or Leave It, Lump It or Grieve It, less than 100 mediators received any type of sanction, remedial recommendation, or intervention for conduct inconsistent with ethical standards. As of December 2005, over 18,000 people in Florida had completed certified mediation training programs. In August 2005, 1391 county mediators, 1682 family mediators, 2166 circuit mediators, and 138 dependency mediators operated as certified mediators in the state. As noted above, from May 1992 to April 2005, the Florida Dispute Resolution Center processed seventy-four grievances against certified mediators. Accordingly, an individual mediator’s risk that he or she would have to defend a grievance complaint in Florida remains extremely low.

Virginia, with less than half the population of Florida, has approximately 1000 certified mediators providing services to its citizens. The Virginia Department of Dispute Resolution Services (Virginia’s DRS) estimates that the Virginia courts refer 10,000 cases to mediation each year. From 1992 to December 2005, her office has received sixty-eight informal
grievance complaints against mediators. In fifty-five of those situations, the complaining party did not file a formal complaint. Of the remaining thirteen complaints, four fell outside the jurisdiction of Virginia's DRS because the alleged conduct did not fall within the role of a certified mediator. The Mediator Complaint Panel dismissed three complaints for failure to state a claim under the SOEs. The Complaint Panel dismissed another three complaints, but with a recommendation that the mediator obtain additional training or mentorship from a more experienced mediator. The Mediator Review Committee heard two complaints. It dismissed one complaint, again with a recommendation that the mediator obtain additional training or supervised mediation experience. In the other case, it sanctioned the mediator. “As of April 2005, the Virginia Supreme Court has not taken any mediator off its certified mediator roster based on a grievance complaint.”

Georgia, with a million more people in the state than Virginia, has 1,400 registered mediators serving the people of its state. Georgia courts referred 28,681 cases to mediation in fiscal year 2005. The number of referrals has increased every year. Yet, the Georgia Committee on Ethics has processed only four formal complaints against mediators from 2002 to 2005 under its ethical standards. Most of the parties complaining about a mediator do not convert an informal complaint into a formal complaint that complies with the rule.

Minnesota has a population of approximately 4.9 million people. About 1,000 mediators serve this population, covering a statewide docket of approximately 49,000 family cases and 35,000 major civil cases. Rule 114 of the Minnesota General Rules of Practice requires the parties to participate in ADR for all civil cases, except certain cases expressly exempted. “The Minnesota ADR Review Board has received thirty-three complaints against neutrals, one of which was not converted by the complaining party to a formal complaint. Parties lodged complaints against fourteen parenting time expeditors, eight complaints against mediators, seven complaints against “parenting consultants,” one complaint against a financial neutral, one complaint against an arbitrator, and one complaint against a neutral conducting a summary jury trial.”

Finally, “Maine has approximately 140 rostered mediators that serve a statewide population of approximately 1.27 million people. The Director of the Office of Court ADR for Maine has received or raised twenty-nine complaints against mediators since 1997.”

Professor Rhode asserts that absent any evidence of significant harm to the public using the services of non-lawyers, courts should allow individuals to choose service providers by balancing their interests in quality and cost in light of their needs. Where the bar cannot demonstrate the need for paternalistic intervention by UPL disciplinary bodies, regulation should “emanate from institutions other than the organized bar.” The empirical data on mediator misconduct shows that, at least in states with well-developed regulatory infrastructures that govern mediation, mediators provide consistently high-quality services to parties.

**VII. The “Interim” Paradigm?: UPL Guidelines for Mediators**

In his 2000 article, Professor Cooley strongly criticized the efforts of Virginia and North Carolina to outline for the states' mediators the boundaries of the law practice paradigm in the context of mediation. Cooley thinly veiled his contempt for the efforts of Virginia and North Carolina. He said, “In case you have not noticed, the very foundations of our fledgling ADR profession are under attack. Two states--Virginia and North Carolina--have already implemented guidelines defining certain mediator activities to be the practice of law.” Cooley expressed concern that a mediator could be criminally prosecuted in Virginia for phrasing questions one way, while escaping prosecution if asking them in the recommended way. Accordingly, as noted above, Cooley feared that the guidelines will “muzzle mediators, [and] discourage talented non-lawyers from entering the ADR profession, [and] reduce the mediation process to a mechanical, word-precise, self-conscious, inflexible, content-void exercise.”
As the Virginia UPL Guidelines admit:

The challenge in regulating [UPL] by non-attorney mediators is to craft rules that recognize the value of services provided by these persons (both in divorce settings and otherwise) and that provide them the flexibility to engage in meaningful mediation practice. At the same time, the public must also be protected from inaccurate and potentially harmful legal services rendered by untrained and unqualified mediators.

The [Virginia UPL Guidelines] developed during this project attempted to tread this very narrow path. 728

Cooley's comments ignore the reality of mediation practice in states with aggressive UPL enforcement (like Georgia, Wisconsin, Kentucky, Colorado, 729 or Connecticut 730), with especially fuzzy or broad definitions of the practice of law (like Connecticut, Montana, or Nebraska), 731 or with ethics opinions on UPL in the mediation context (like Virginia, Connecticut, and Tennessee). 732 While Cooley asks us to develop an interim paradigm while we wait for the complete development of the "authorized practice of mediation" paradigm, the author of this article asserts that these types of UPL guidelines are the interim paradigm. State courts with more developed regulatory infrastructures have carefully considered where competing public policies overlap and they have attempted to fashion some *1205 accommodation between the two. Until states exempt mediation by statute, rule, court order, or court decision, from the definition of the practice of law--as Connecticut, D.C. and Washington have done 733--the UPL guidelines offer mediators some help in thinking about activities that a UPL disciplinary body might find problematic.

The author of this article has operated under the Virginia UPL Guidelines for six years as a General District Court mediator not authorized to practice law in Virginia, working mostly with pro se parties in highly distributive negotiations. Despite Cooley's concerns, the author has found the guidelines helpful and workable. More importantly, compliance with them, she believes, has improved her mediation skills, enhanced party self-determination, and protected her neutrality in mediation. 734

A. Context Is Everything

Virginia, North Carolina, Georgia, and Colorado have developed UPL guidelines for mediators. 735 Persons referring to them should also *1206 understand the law practice definitions in which they operate their mediation practices. 736 Persons reading these guidelines should also consider whether any of the safe-harbors outlined in them reflect UPL statutes giving mediation special recognition or treatment. If the UPL guidelines rely solely on court decisions or, worse, decisions of bar committees or UPL disciplinary bodies, the advice may be no more firm than shifting sand, as Dr. Fremed's proceeding painfully shows.

In 1998, the State Justice Institute 737 gave the then-Department of Dispute Resolution Services a grant to support a survey and further research on the UPL rules applicable nationally. 738 Out of that project, Virginia's DRS researched and developed for Virginia mediators UPL guidelines based on limited case law and ethics advisory opinions that have not involved the mediation context. 739 The guidelines reflect state UPL law, which applies the "application of law to facts" test as the "practice of law." 740 Accordingly, the recommendations of the guidelines may not create safe-harbors for mediators operating in states with broader definitions of the "practice of law." 741

A Supreme Court of Virginia rule states that "the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge." 742 More specifically, a person is practicing law whenever he or she gives advice that involves applying legal
principles to facts, purposes or desires, drafts legal instruments, or appears before a tribunal, except under narrowly defined exceptions. Based on its research, Virginia's DRS concluded that the two exemptions found in the rule would not apply to mediators, even if certified by the state. They could not be deemed “regular employees acting for [an] employer.” Also, they would not be “drafting legal instruments . . . incident to the regular course of conducting a licensed business."

Despite these limitations, Virginia’s DRS has interpreted the applicable law to allow mediators to engage actively in the preparation of mediated agreements, child support calculations, and the completion of court forms. They may also provide parties a broad range of legal information, not only in written form but by stating general principles of law if competent to do so. In doing so, Virginia's DRS relies on the statute that defines mediation and the role of mediators. It defines “dispute resolution services as including the screening and intake of disputants[,] conducting dispute resolution proceedings, drafting agreements, and providing information or referral services.”

In North Carolina, a statute defines the practice of law as “advis[ing] or giv [ing] opinion upon the legal rights of any . . . firm or corporation.” The Dispute Resolution Commission, under the supervision of the state supreme court, has issued Standards of Professional Conduct that apply to mediators. The standards define mediation as a facilitative process in which the mediator’s “role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute.” Under these standards, the mediator may assist the parties in “identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives.” In addition, in 1999 the North Carolina Bar Association Dispute Resolution Section's Task Force on Mediation and the Practice of Law issued Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law. The Board of Governors of the organized bar approved them in June 1999. They, therefore, represent a consensus of the lawyer-mediator community and the organized bar in the state.

In Georgia, a statute defines the practice of law as: (1) representing litigants; (2) conveyancing; (3) preparing legal instruments; (4) rendering opinions on titles to property; (5) giving legal advice; and (6) taking any action “for others in any matter connected with the law.” The statutes do not specifically define mediation, but the Georgia Supreme Court Alternative Dispute Resolution Rules define mediation as “a process in which a neutral facilitates settlement discussions between parties. “The neutral has no authority to make a decision or impose a settlement upon the parties: the neutral attempts to focus the attention of the parties upon their needs and interests rather than upon rights and positions.” The GODR provided UPL guidelines for its family law mediators in a 2007 advisory ethics opinion. It calls mediation the “antithesis of [the] practice of law,” because mediators do not function as advocates for a party.

In Colorado, no statute or rule defines the practice of law, but court decisions do. The Colorado Supreme Court stated that “generally one who acts in a representative capacity in protecting, enforcing or defending the legal rights and duties of another and in counseling, advising, and assisting [another] in connection with these rights and duties is engaged in the practice of law.” Another case, People v. Bennett, suggests that the client-reliance test may apply in the state. Colorado permits the practice of law by certain persons if that practice poses little risk of harm to consumers, including out-of-state lawyers, real estate brokers, officers of closely held entities, licensed collection agency employees, non-lawyers acting in connection with immigration, and persons appearing before certain state and local agencies, including business organizations, labor unions, engineers, and development planners. Also, Colorado courts may specifically allow by court order or other supervision activities that otherwise might fall within the definition of the practice of law in the context of probation, the protection of children, or mediation.
Like Connecticut--and unlike Virginia, North Carolina and Georgia--the Colorado Supreme Court has not played a significant role in building a regulatory infrastructure for mediation. It defines mediation as “an intervention in dispute negotiations by a trained neutral third party with the purpose of assisting the parties to reach their own solution.” The statute includes in the role of mediator the activities of “identifying and evaluating alternatives.” Arguably, this statutory definition of the role--including “intervention in dispute negotiations”--contemplates activities that other states would consider the practice of law. The state impliedly permits mediation by non-lawyers in court-connected mediation programs. To supplement these extremely meager aspects of a support infrastructure for mediators, the Colorado Council of Mediators has provided its members with an aspirational code of ethics. Also, the Colorado Bar Association's Alternative Dispute Resolution Section provided UPL guidelines to mediators in October 2005.

In Connecticut, the CCDM--as a member organization--has provided some guidance to the state's mediators in connection with UPL. To its credit, the CCDM also has provided the state's mediation community with a careful analysis of the applicable law that gives insight to UPL in the context of mediation. The CCDM Mediation Standards analyze statutes, case law, ethics advisory opinions from Connecticut and other states, grievance proceedings, and the UPL guidelines provided by state regulators in Virginia, Georgia, and North Carolina. The standards also briefly discuss the three unpublished decisions of the SGC in Carney, Strong, and Decker.

Unlike Georgia and North Carolina, the CCDM guidelines do not have the explicit support of the judicial system of the state. As noted above, the Connecticut judicial system, unlike the judicial systems in Florida, Virginia, Georgia, North Carolina, Minnesota, and Maine, has provided very little regulatory infrastructure to support mediation, including an ethics code for mediators and court-approved guidelines on UPL. The CCDM guidelines seem to have so little influence in Connecticut that in Dr. Fremed's disciplinary proceeding, the Chief Disciplinary Counsel did not bother to attach them to his Pre-Hearing Memorandum.

The guidelines issued by Virginia, North Carolina, Colorado, and CCDM focus on advice giving and document or form drafting. The guidelines issued by Georgia focus on child custody calculations under a new fifty page statute. Mediators assisting parties with completion of the child custody forms in Georgia could arguably be giving advice and drafting legal instruments.

B. Distinction Between Legal Advice and Legal Information

The guidelines of Virginia, North Carolina, Georgia, and Colorado uniformly recommend that a mediator, whether lawyer or non-lawyer, avoid giving legal advice. Similarly, the mediator ethics codes also preclude a mediator from giving legal advice or otherwise mixing professional roles. The prohibitions do not necessarily reflect a concern about UPL. Instead, they reflect a concern for party self-determination and mediator neutrality.

*1212 1. Virginia UPL Guidelines

Based on the Virginia Supreme Court rule defining the practice of law, the Virginia UPL Guidelines advise that a mediator provides legal advice when “he or she applies legal principles to facts in a manner that (1) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges, or recommends a course of action by a disputant or disputants as a means of resolving a legal issue.” Even so, the Virginia UPL Guidelines take the most liberal approach in defining activities that do not constitute the practice of law. The guidelines suggest a mediator may (1) “provide legal resources and procedural information
to disputants”; (2) make statements that declare the law on a given topic so long as the mediator is competent to do so by training or experience; (3) ask “reality-testing questions, even if they raise legal issues,” so long as they do not predict the specific resolution of a legal issue; (4) inform the parties about outcomes in a particular court or type of case based on personal observation or empirical research, so long as the mediator does not make a specific prediction in a specific case; and (5) inform the parties about the general enforceability of mediated agreements. 779

Virginia’s DRS takes a very liberal view of the scope of these activities, as its examples indicate. Virginia mediators can provide parties with copies of relevant statutes or court cases, with reference information that will allow parties to do their own legal research, or with printed brochures. Virginia’s DRS sees these activities as supporting the parties’ abilities to make fully-informed decisions. 780 Mediators may provide parties information about local court procedures for scheduling matters, required fees, or the steps parties must follow to have the “mediated agreement entered as a court order.” 781 Like Georgia, the guidelines recognize that for many parties in court-connected or community mediation programs, the mediator will be the principle source for this type of information. 782

The Virginia UPL Guidelines provide several examples of the types of general statements mediators may make about the law if they are competent to give the information and the information is accurate and complete. 783 For example, mediators may state: “In Virginia, a *1213 plaintiff is usually barred from recovering damages in a negligence suit if the plaintiff was guilty of any negligence that contributed to his or her injuries.” 784 General statements about the law may still violate UPL proscriptions depending on the “totality of the circumstances,” especially if the statement tends to predict or suggest a specific resolution of the legal issue. 785 When the parties’ lawyers attend the mediation, the guidelines suggest that the mediator has more leeway in providing this type of information because parties will be less likely influenced by the mediator’s statements. 786 Instead, they will rely on the advice of their lawyers.

The Virginia UPL Guidelines cautiously permit reality-testing questions that allow the parties to “reflect on the viability, fairness, or the strengths and weaknesses of their respective positions.” 787 Thus, a mediator working with divorcing parties may ask: “Have you both considered whether a court would allow Mary to take the children to Florida?” 788 The mediator potentially crosses the line drawn by the constraints of UPL and mediator ethics if he or she said instead: “Mary, do you realize that the court that would hear this case would not allow you to take the children to Florida over Bill’s objections?” 789 The guidelines characterize this second statement as predicting the specific resolution by a court of a specific legal issue. 790 The guidelines *1214 note that the boundary between permissible and impermissible statements is very narrow in the reality-testing context. 791

Unlike any other set of UPL guidelines, the Virginia UPL Guidelines allow mediators to give parties a sense of the range of verdicts juries award in similar types of cases. 792 The mediator, however, must be sufficiently familiar with the awards in a given type of case and in a particular location by virtue of his or her experience or his or her familiarity with empirical evidence. 793 Also, the mediator should not make specific outcome predictions in a case. The mediator may also provide a “range of possible outcomes.” 794 As a matter of good practice, the mediator should advise parties that no two cases are identical. The mediator should also take care that this type of intervention does not undermine party self-determination or the mediator’s impartiality. 795

Finally, the Virginia mediator may advise that, as a general matter, parties may enforce mediated agreements like any other agreements. They may not advise, however, whether a court would enforce the particular agreement of the parties. Similarly, the
mediator may include in a written agreement (presumably the agreement to mediate) information about the mediation process, including the “four legals,” and an explanation of confidentiality in the mediation process. 796

The Virginia UPL Guidelines also provide that: “An attorney-client relationship exists and one is deemed to be practicing law whenever ‘one undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.’” 797 The Virginia UPL Guidelines further state that a mediator who predicts the outcome of a disputed legal issue is engaged in the practice of law. 798 Virginia’s Legal Ethics Committee, in UPL Opinion 104, made an important distinction, often missing in other states. It said that “general legal information is distinguished from specific legal advice to specific clients with regard to their respective problems.” 799

2. Georgia UPL Guidelines

The Georgia UPL Guidelines also take a substantially more liberal approach to the line between legal advice and legal information. They essentially declare the scope of the authorized practice of law in the mediation context, while invoking the parallel paradigm in doing so. The GODR expresses concern that to do otherwise could “paralyze domestic relations mediation.” 800 Thus, like Virginia, family mediators can guide or help parties to use the child support tables and calculators because those activities are not the same as “making judgments for the parties as to how their particular circumstances dictate the inputs to the calculations and deviations.” 802 The mediator’s role is to help the parties negotiate the issues they face. It does not include “provid[ing] advice or evaluations of strengths and weaknesses of various courses of action.” 803 In other words, mediators must nonetheless act within the constraints of the mediator ethics code. 804 Like Virginia, the Georgia UPL Guidelines give specific examples of permissible and impermissible statements in mediation that attempt to illustrate the distinction between giving legal advice and giving legal information. 805 They also uniformly allow mediators to give parties legal information, but they define what constitutes information differently.

The Georgia UPL Guidelines note that nonlawyer-mediators had engaged in family law mediation since at least 1992 and that they had helped parties with the child support calculations under the older, less complicated statute. The revised law, despite its greater complexity, does not require substantially different behavior from mediators. They could work with it consistent with UPL proscriptions. 806

3. Colorado UPL Guidelines

The Colorado UPL Guidelines take the narrowest approach by advising mediators that they cannot tell a party which statutes might apply to an issue, “because the mere process of identification is a legal determination that some statutes apply and others do not.” 807 Colorado mediators cannot predict how a court might resolve a particular issue. By analogy to the impermissible activities of court clerks, mediators cannot “explain judicial decisions”; give legal advice; advise how a court might apply its rules and procedures to a particular case or situation; advise whether a party should bring litigation; advise a party what would happen if the party brought litigation; complete forms for a party; tell parties how to complete or correct forms; advise what corrections a party should make to a form; advise a party “what to say in court”; or “talk to the judge” for a party. 808

By analogy to permissible activities of court clerks, Colorado mediators can give a party a copy of a statute referenced in any form that appears on a court website. They can also provide the same type of information the court has allowed court clerks to provide to parties, including how the court works, contact information for legal services programs, and general information about court rules, terminology, procedures, and practices. They may also provide parties with information about scheduling cases on the court’s docket; court deadlines and schedules; whether the court has issued an order; and the contents of
the order. They can “give feedback from the perspective of how the mediator would react if he or she were a juror hearing this information.” They can “ask questions to reality-test a party’s expectations and understanding of the best, or worst, alternative to a negotiated agreement.”

4. North Carolina UPL Guidelines

The North Carolina Guidelines fall somewhere in between in the approach they take. They define legal advice as “taking the facts of a particular case, applying the governing law and then giving advice based on these considerations.” The mediator ethics rules prohibit a mediator from “giving legal or other professional advice in mediation.” A mediator may ethically provide legal information. By example, the guidelines suggest that a mediator can provide general printed legal information, including brochures prepared by lawyers. But if the mediator applies that information to specific facts, he or she has likely crossed the UPL border. The ethics code also provides: “A mediator may, in areas where he/she is qualified by training or experience, raise questions regarding the information presented by the parties in the mediation session.” The guidelines concede that “[t]here are no bright lines.”

5. CCDM Mediation Standards

The CCDM Mediation Standards make the following recommendations about giving legal information, evaluation, and legal advice: “Under established Connecticut law, when a non-lawyer applies legal principles to the facts of a particular case, by assessing the strengths and weaknesses of a party’s legal position or making predictions of what a court might do, he or she is engaged in the practice of law.” The standards do not attempt to help mediators make the distinction between legal advice and legal information, but they note that “providing general information about the law is not the practice of law, if coupled with the advice to consult a lawyer.”

The standards recommend that:

Private divorce mediation is fundamentally contractual in nature and CCDM believes that mediation clients should be able to contract for evaluative divorce mediation services so long as a mediator is competent to provide such services and the clients, properly advised of the mediation options, so desire.

While CCDM may support this policy statement, evaluative mediation could easily run afoul of the UPL laws in Connecticut if performed by nonlawyer-mediators or lawyer-mediators not licensed to practice law in the state. Inclusion of this statement in the CCDM guidelines could confuse mediators about permitted acts.

On the question of whether a mediator should recommend independent legal advice, the CCDM standards advise that: “In evaluating whether a nonlawyer’s conduct constitutes the unauthorized practice of law, the courts pay close attention to whether clients are advised to consult an attorney for independent legal advice.” It suggests that mediators can meet this requirement by (1) encouraging parties to hire separate counsel throughout the mediation process; or (2) to encourage parties to hire attorneys at the conclusion of the process to discuss and evaluate the proposed mediated settlement agreement or to prepare the final documents the parties will submit to a court. “Each of these [approaches] is an acceptable way of ensuring that mediation clients make informed decisions.” This section of the CCDM standards concludes by saying: “Ultimately, the decision whether or not to seek independent legal advice and/or retain counsel is up to each client.”
The UPL guidelines of Virginia, North Carolina, Colorado, and the CCDM advise mediators to make appropriate disclaimers about the limits of their role, to advise parties to consult with independent legal counsel, and to reinforce for parties that their negotiations could affect their legal rights.  

C. Authority to Draft MOUs, Settlement Agreements, and Court Forms

1. Virginia UPL Guidelines

Virginia law generally gives lawyer-mediators and nonlawyer-mediators greater leeway than other states to draft settlement agreements, MOUs, court forms, or other legal instruments relating to the mediated outcome. As noted above, the UPL protection arises largely from the definition of mediation found in the Virginia mediation statutes. The statutes define “dispute resolution services” as including the “screening and intake of disputants, conducting dispute resolution proceedings, drafting agreements and providing information or referral services.”

The Virginia UPL Guidelines provide: “[M]ediators in Virginia are permitted to assist the parties in committing their agreements to writing. A mediator may take an active role in preparing the agreement for the parties if they want the mediator to perform this function.” This statement, an object of Professor Cooley’s criticism, indicates that parties can contract for this service and mediators can provide it subject to the later limitations in the guidelines. It seems the guidelines seek to establish that--unlike the situation in other states--Virginia mediators have greater freedom to draft certain legal instruments under certain conditions. As noted above, the guidelines recognize that allowing mediators to draft documents “facilitates the efficient resolution of disputes and minimizes the costs to the parties, who may not desire or be able to afford their own attorneys.”

The Virginia State Bar’s Legal Ethics Committee has put some constraints on agreement drafting by lawyer-mediators. In Opinion 1368, the committee discussed the creation of a lay corporation that would offer lawyer-mediator services to the public. The prospective lawyer-shareholders asked about the ethics of soliciting business for the lay corporation and of sharing fees between the mediators and the corporation. The shareholders disclosed that, in accordance with Virginia statutes and standards of ethics, they would advise parties that the mediator would not be acting as a lawyer for either party; that the mediator would not give legal advice; that the parties could consult with independent counsel at any time; and that parties should consult with independent counsel for advice about any draft settlement agreement. The lawyer-mediators would also make clear during the mediation that they would not act on behalf of any party in court or represent a party against the other party in any related proceeding.

The bar committee concluded, especially in light of Virginia Code section 8.01-581.21, that the described activities would not “constitute the per se practice of law” although the activities “closely resemble[d] the practice of law.” The committee explained:

The committee believes that providing legal information, albeit not legal advice, and assisting individuals to reach agreement on such issues as division of property, contractual obligations, liability and damages, by definition entails the application of legal knowledge and training to the facts of the situation . . . . Therefore, under the rationale of [two earlier ethics opinions], the committee believes that such activities subject the attorney/mediator to the provisions of the Code of Professional Responsibility while carrying out the tasks involved in mediation.
It concluded that lawyer-mediators could solicit business on behalf of the corporation in the same way that lawyers who engaged in other entrepreneurial endeavors could solicit business for those other enterprises. The committee also concluded that the lawyer-mediators could split fees with the corporation as long as they confined their activities to mediation and avoided the practice of law. Without saying so, the committee assumed that the corporation would be deemed a non-lawyer entity that would otherwise create this ethics issue of fee splitting. In the context of this discussion, the committee defined the limits within which lawyer-mediators could draft mediated settlement agreements. The committee said:

To the extent that the mediator is engaged by the parties as a scrivener of the agreement reached during the mediation process, such tasks do not constitute the practice of law and, therefore, fees paid for that service are not deemed to be legal fees. Should, however, the mediator/lawyer provide any services beyond those of scrivener, the mediator/lawyer must meet the requirements of [the disciplinary rule], which prohibit the sharing of legal fees with a nonlawyer.  

Based on this opinion and others that applied drafting rules to other professionals, like real estate brokers and business brokers, the Virginia UPL Guidelines outlined practices that would likely keep mediators from engaging in UPL. The guidelines note that the ethics opinions seem to “[stop] short of allowing mediators to draft instruments in which they include legally operative terms not requested or contemplated by the parties during the mediation process.” The guidelines advise, however, that “[t]he mediator may simply copy the agreement as dictated by the parties or may choose particular words or phrases to include in the agreement so long as the parties indicate that the language chosen by the mediator accurately reflects their desires.” The mediator may also clarify the parties’ agreement by asking questions, may suggest options for the parties to consider when reaching agreement, may raise issues about the agreement for their consideration, and assist the parties in logically organizing the terms of the agreement.

The guidelines caution mediators to avoid (1) using contractual language the parties cannot understand, including legal terminology, terms of art, or boilerplate legal language; (2) including provisions the parties have not contemplated or requested; or (3) including legally operative clauses, including merger clauses, binding effect clauses, choice of law clauses, remedies clauses, or severability clauses, unless requested by the parties.

The Virginia statutes create other safe-harbors for mediators. They permit a family law mediator to complete child support guidelines worksheets and any written reasons for deviating from the child support guidelines. Mediators may also use commercially available computer programs to make the calculations. A statute found in the Family Law Code requires parties to a custody or visitation order or agreement to give thirty days written notice of an intention to relocate. A mediator who includes the thirty day notice in the written agreement about custody or visitation can do so without practicing law according to the guidelines.

Unlike Connecticut and like Colorado and Georgia, Virginia mediators may also complete court-sponsored or court-approved forms--as opposed to court orders-- when preparing a written agreement for the parties. These forms typically have appropriate language and signature lines to “either order the dismissal of the court case pursuant to the agreement or, in some cases, to convert the agreement itself into a court order.” The Virginia UPL Guidelines suggest the preparation of the forms is not likely to be deemed the practice of law, but even if it is, the service “is authorized and supervised by the courts” to protect the parties.
Finally, the mediator may iterate in the settlement agreement provisions that again highlight the “four legals” or explain mediation confidentiality. Thus, the contract provisions can remind parties that the agreement may affect their legal rights, and that the parties should have independent legal counsel review the agreement before each party signs it. These provisions inform the parties about the process and do not form part of the substantive agreement between the parties. In the end, the guidelines emphasize party self-determination even in the drafting stage of the mediation process. Thus, the limitations on the role of mediators in drafting agreements may keep mediators out of trouble from a UPL perspective, but they also support the core values of mediation as envisioned in Virginia.

The Virginia UPL Guidelines illustrate, however, the incomplete shift to the parallel paradigm. The Supreme Court and Virginia’s DRS have done as much as they likely can do to build the infrastructure to support high quality mediation in the state. The legislature has passed a series of statutes that support mediation, including a definition of mediation that allows mediators to conduct many acts that would be deemed the practice of law in other states. But the legislature has one more step to take. It should pass a law excluding mediation from the definition of the practice of law. At that point, state regulators and Virginia mediators can focus on consumer protection by continuing to ensure high quality mediation based on the core values of the field.

2. Colorado UPL Guidelines

Colorado’s mediation statute implicitly allows mediators to play some role in the drafting of MOUs or mediated settlement agreements. It provides: “If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any.” Unlike Virginia, the statutory language does not expressly allow mediators to do the drafting. The Colorado UPL Guidelines instead make the analytical leap that allows its drafters to conclude that mediators may draft settlement agreements, including those filed with courts. The guidelines later caution mediators not to “select or use pleading forms.” Mediators cannot draft motions, petitions, orders, or other procedural pleadings. They should also avoid preparing or filing motions for dissolution of marriage or related post-dissolution motions. They can, however, advise parties about the existence of certain forms and how to get them and provide them with checklists and brochures from the court’s website. And, they can advise parties that they need to file a motion for dissolution of marriage or related post-dissolution motions.

As a corollary to the drafting role, Colorado mediators may also “assist the parties in the selection, use, and preparation of certain forms to assure coverage of issues and topics in the development of a mediated separation agreement, parenting plan and/or child support plan.” They should stay away, however, from working with forms “not central to the core objective of mediating . . . an agreement for separation or parenting.” The guidelines then provide a list of specific forms central to the process of divorce mediation and “appropriate for use and drafting by the mediator.” These forms can be used “as the drafted agreement or [MOU] . . . whether intended for temporary orders, final orders, or post dissolution matters.” Accordingly, the Colorado UPL Guidelines provide a liberal interpretation of the drafting role of the mediator based on statutory language, which at best, is ambiguous about that role.

The guidelines further caution mediators to avoid using “legalese or boilerplate language” in the documents they draft, stating that they should not insert language that the parties have not considered or accepted. A mediator should also avoid using court captions in MOUs, signing MOUs, or otherwise placing his or her name on the document. The guidelines also recommend that the mediator create the MOU as a “separate document which can be subsequently attached to the appropriate pleading by
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the parties or their counsel for filing with a court.” Surprisingly, the Colorado UPL Guidelines advise mediators that they “may deliver the completed agreement to the court for inclusion in an open case” if the parties so request.

3. Georgia UPL Guidelines

As noted above, the Georgia UPL Guidelines focus on child support calculations. Georgia family mediators can help the parties make these calculations by using “electronic spreadsheets and Web-based calculators designed by Georgia’s child support authorities.” Georgia authorities have designed the tools to guide separating parties to reach state-sanctioned outcomes for child support. Mediators using them do not prepare the actual separation agreement, and even if they did, that “activity is clearly accepted mediator practice in Georgia and does not run afoul of the UPL standards.”

4. North Carolina UPL Guidelines

The North Carolina UPL Guidelines take a cautious approach after they admit that no law clearly draws the line on permissible drafting activities by mediators. Accordingly, they suggest the following best practices: (1) the mediator should advise parties to consult independent legal counsel before creating or signing any legally binding documents; (2) the mediator should not offer any opinion about the legal effect of any MOU or other agreement; (3) the mediator should not sign or initial any MOU or other agreement; and, (4) in the event the mediator has affixed his initials or signature to the MOU or other agreement, he or she should clearly indicate that the signature does not constitute an opinion about the content or legal effect of the document. The guidelines provide sample language for the disclaimers in the agreement to mediate and in the MOU. Like Colorado, however, North Carolina would seemingly permit a mediator to help parties write and sign an agreement at the conclusion of the mediation, if required in a government authorized mediation program.

5. CCDM Mediation Standards

The CCDM Mediation Standards also take a cautious approach in making recommendations about drafting separation or divorce agreements. Non-lawyers may not draft legally binding contracts, but nonlawyer-mediators: can perform a valuable service for their clients by describing their proposed agreements by means of letters, outlines or memoranda, sent to the clients themselves or to their lawyers. For example . . . [a] non-attorney mediator could properly summarize [an agreement for a specific amount of alimony] in a letter to the clients.

*1228 . . .

Our recommended “best practices” include the following: •

Do not ask your clients to sign any letter or memo you send them, other than your retainer agreement. •

As much as possible, use your clients' own language in describing their agreements. •

Avoid using “legal boilerplate” such as “This agreement shall be construed in [accordance with’ ] [•]

Put in bold letters disclaimers such as “This Document Is Not A Legal Or Binding Contract And Is Not Intended For Filing In Court.” •
At the outset of your relationship with your clients, disclose the limits of your competence, the fact that you are not a lawyer, and that consultation with a lawyer is highly recommended before any agreements are finalized. 873

The CCDM standards also caution nonlawyer-mediators against completing court forms:

Whether and to what extent non-lawyer mediators may assist their clients in completing court forms is a complex question, both because the governing legal standards are in doubt and because some court forms require no legal judgment to complete, while others require some, or considerable, legal judgment. This is therefore an area in which non-attorney mediators must proceed with great caution. 874

The CCDM standards continue: “Although there is considerable ambiguity in this area, it appears that non-lawyers may assist clients in completing court forms and other routine legal documents, so long as they are not legally complex.” 875 The standards then suggest that nonlawyer-mediators should be able to help parties complete a Dissolution of Marriage Report (because it calls for no personal judgment). But, nonlawyer-mediators should avoid helping parties complete Complaints and Financial Affidavits. Nonlawyer-mediators should be able to help parties navigate the court system and the forms it requires, so long as the mediator assesses “on a case-by-case basis, . . . their background, knowledge and the nature and complexity” 1229 of the particular form in question. 876

It concludes with this broad caution: “With the case law as restrictive and uncertain as it is, however, non-attorney mediators are well advised to avoid providing any court documents for their clients, except for providing typing and transcription services.” 877 Like Colorado, the CCDM standards surprisingly suggest that mediators can “[a]ccompany[] clients to court, help [a]company them find the right courtroom and help[ them] answer court questions about their agreements.” 878 These activities should not be deemed UPL, so long as the parties and the judge are advised that the mediator is not acting in any legal representational role. 879

The guidelines of Virginia, Colorado, Georgia, and North Carolina tell us a couple of things. First, if the drafters are affiliated with the supervising supreme court (as in Virginia, Georgia, and North Carolina), the UPL regulators may apply a more narrow definition of the practice of law through court rule, order, or guidelines. After all, the supreme court in each state ultimately decides the question of what constitutes the practice of law and it ultimately regulates the persons who practice before its courts, either as lawyers or as mediators. Moreover, if the legislature has declared certain activities by mediators as the “authorized practice of mediation” (as in Virginia and Colorado) by implication they have also declared that mediators are “authorized to practice law” in the mediation context to the extent spelled out in the statute and applicable mediator ethics codes (if any). Even in the absence of a developed regulatory infrastructure for mediators, the state supreme court, by court rule or order, can still authorize mediators working on court-referred cases to engage in practices that a UPL disciplinary body might otherwise deem UPL. The Colorado UPL Guidelines suggest specific language courts can use. 880

*1230 VIII. Precautions Individual Mediators Can Take to Avoid UPL Charges

Nolan-Haley identifies three general ways in which mediators can avoid UPL charges. First, they can practice a style of mediation that “eschews any form of evaluation.” 881 The transformative approach to mediation offers this tactic. 882 The Virginia UPL Guidelines suggest that “[m]ediators who adopt a facilitative approach to mediation will seldom find themselves in the position of questioning whether a particular statement may constitute legal advice.” 883 Sharon Press, the Director of
the Florida Dispute Resolution Center, believes that mediators who strictly comply with the Florida Standards of Conduct will not face the problem of the unauthorized practice of law. The standards support a facilitative style that emphasizes party self-determination and mediator impartiality.  

Second, mediators can use an informed consent or disclaimer approach, in which the mediator ensures that the parties understand that the mediator plays a facilitative role and not the role of an attorney or legal representative of either party. The disclaimer would also advise parties to seek independent legal counsel throughout the process. Third, mediators who engage in borderline activities must do so carefully to preserve distinctions between legal advice and legal information. Finally, Nolan-Haley and Cooley also urge the mediation field to develop a “parallel paradigm” that will successfully label borderline activities as legitimate mediation techniques that facilitate settlement.

*1231 A. More Mediation Training and Education

Until the mediation field successfully develops and asserts the “parallel paradigm,” mediators must take precautions to protect themselves. First, they should continue to get advanced mediation training in skills and conflict theory. As they gain more expertise in the process, mediators may also gain the confidence they need to approach the process in a less evaluative way. In addition, better credentials may make UPL disciplinary bodies less suspicious that consumers have fallen into the hands of poorly trained persons who cannot protect participants’ interests. This recommendation assumes that UPL disciplinary bodies care first about consumer protection and not primarily about market protection.

Second, the training should include mediation ethics. The mediator should be familiar with any mandatory or aspirational ethics codes that apply to his or her mediation practice. The mediator should also become very familiar with the UPL law in the states in which he or she practices. They should review any UPL guidelines prepared by local mediator organizations, court personnel, or national ADR organizations. By understanding the prevailing standards in both paradigms, the mediator can practice mediation with greater caution regarding acts at the boundaries of one or both paradigms.

Third, mediators should obtain training on the substantive issues they face in mediation. Thus, family mediators should get additional training on issues of marital property distribution and child custody calculations. As the field asserts the “parallel paradigm” (one that truly emphasizes mediator competency and consumer protection), mediators with a deeper skill and knowledge base may have an easier time withstanding the scrutiny of UPL disciplinary bodies and the judges who make referrals to those bodies. Under the “parallel paradigm,” mediators need only show that they are competent to give advice or information by virtue of their training or experience.

Mediators should continue to get practical experience in mediation, again because experienced mediators may gain the confidence they need to avoid acts of evaluative practice. Less experienced mediators should also create mentoring relationships with experienced mediators. Nonlawyer-mediators should also consider co-mediating with licensed attorneys who also mediate.

*1232 B. Pre-Mediation Contacts

A mediator should ensure that his or her marketing materials, including websites and brochures, avoid any express or implied promise that the mediator will represent or provide legal services to either party. These materials should begin to explain to parties the different roles that the mediator and independent legal counsel should play in resolution of the dispute. The mediator may also disclose in these materials his or her policy about providing MOUs or other documents.
C. During the Mediation Session

The session should start with the execution of a carefully prepared agreement to mediate. It should explain the role of the mediator, his or her style of mediation, and any limits the mediator expects to place on evaluation activities in the mediation. It should clearly disclose that: 1) the mediator will not represent either party in the mediation; 2) the mediator plays the role of a neutral; 3) parties can seek advice from independent legal counsel at any time in the process; 4) parties should have an attorney review any mediated agreement or MOU; and, 5) the mediated agreement may affect each party's substantive legal rights. The agreement to mediate should *1233 make clear what role the mediator will play in drafting documents, including MOUs, and completing forms. The information provided should reflect the requirements of the UPL statutes, the cases interpreting those statutes, and any UPL guidelines prepared by local mediator organizations or court personnel. The mediator should also consider whether his or her fee structure may attract the attention of UPL disciplinary bodies by the imposition of a separate fee for drafted documents. *1234

The mediator should ascertain at each session whether the parties have retained counsel and the contact information for each counselor. The mediator should also get permission from each party to freely communicate with each party's independent legal counsel. That permission should waive the attorney-client privilege so the lawyer feels free to talk with the mediator, and also waive mediation confidentiality so the mediator feels free to discuss the mediation with the lawyer. The mediator should still take care not to disclose confidential mediation communications (especially caucus communications) to the other party or the other party's counsel unless authorized to do so.

The mediator's opening orientation at the first session should iterate the information provided in the agreement to mediate. The mediator should not assume that parties have read the agreement, even when the mediator provides each party with a copy of the agreement to mediate in advance of the first session. After the parties execute the agreement to mediate and the appropriate waivers of confidentiality, the mediator should learn, either in joint session (if agreed) or in separate caucuses, what counsel has advised each party. At each new session, the mediator may want to reiterate the role of the mediator, the role of independent legal counsel, and the parties' right to contact counsel. The mediator should also learn what additional advice either party has received from his or her counsel. Finally, he or she should share any comments or suggestions the parties' lawyers have provided the mediator.

During each session, mediators should take care to remain as facilitative as possible. They should have some feel for the difference between legal advice, legal information, option generation, option evaluation, and how the UPL regulators in the state may treat specific interventions. They should know ahead of time whether they intend to do any evaluative interventions, and they should respect party self-determination in the process. While the Virginia, North Carolina, and Colorado guidelines have drawn criticisms, they can help mediators get a better feel for interventions that UPL disciplinary bodies may find troubling. If the mediator communicates with either party by e-mail after the mediation sessions, the e-mail should contain a disclaimer that the mediator is not representing either party as a lawyer, that he or she cannot provide legal advice, and that each party should consult with independent counsel if he or she has any legal questions about the e-mail communication. *1235

Cautious mediators will not generate, either before, during, or after the mediation, any written communications, including e-mails, that could be construed as legal advice. As Dr. Fremed's disciplinary proceeding shows, these types of communications can become hard evidence of borderline activities, drawing the attention and disapproval of UPL bodies. *1236 In their absence, UPL disciplinary bodies will have no evidence of these trickier communications or they will be forced to rely on the fuzzy memories of the mediation participants. This latter testimony may not meet the standard of “clear and convincing” proof that most bodies assert they apply.
At the close of the mediation, the mediator should advise parties to consult with independent legal counsel about any MOU or draft settlement agreement the parties created during mediation. The settlement agreement itself should iterate the rights of the parties to seek advice from counsel. In drafting the MOU or the mediated agreement, the mediator should take care in capturing the actual agreement. The mediator should not include terms to which the parties have not specifically agreed, including legal boilerplate language. In addition, the documents should not contain signature blocks and they should clearly indicate on each page that they are draft agreements subject to final review and drafting by legal counsel. In very prominent language, the MOU should state (perhaps on each page) that the parties should not use the MOU in court. Most importantly, mediators should know their state’s UPL law that may limit or prohibit any drafting activities by mediators.

Cautious mediators will transmit these draft agreements or MOUs directly to each party’s counsel. The cover letter should be addressed to counsel with copies to the parties. If the parties have not retained counsel, the copies provided directly to them should still iterate the need to consult independent legal counsel about the terms of the draft agreement or MOU. If the parties request electronic copies of the documents, the mediator should resist the urge to send the copies in that easily revised format. Some mediators will provide electronic copies of draft agreements or MOUs to the parties only in PDF format to discourage editing of the drafts in a way that may confuse later readers about the source or nature of the document. The mediator should not draft pleadings or court forms unless the UPL law in the state clearly allows those activities. Finally, the mediator should not appear in court on behalf of one or both parties for any reason, unless the law in the state clearly provides for the type of appearance contemplated.

In addition, mediators may wish to seek advisory opinions from the state bar committees regulating UPL. They may also wish to seek advisory opinions from state or national bodies providing ethics opinions for mediators.

The sad moral of Dr. Fremed's story is that a mediator can adopt most of these precautions and still face a disciplinary sanction from UPL regulators. At the same time, these precautions, if explained to the disciplinary body with ample context, could affect the result of the proceeding.

IX. The Mediation Field’s Challenge: “Pushing Back” Against the “Law Practice” Paradigm

A. New Laws Exempting Mediators from the Definition of the Practice of Law

The mediation field should begin an organized effort to change the laws and court rules governing UPL and mediation. On one hand, the field should seek new definitions of the practice of law that exclude mediation. The new Connecticut Superior Court Rule provides one approach. Several other states, by court rule, have also exempted mediators from UPL statutes or rules in certain contexts. On the other hand, the field should seek legislation defining the role of the mediator broadly enough to allow mediators to draft agreements, complete court forms as approved by courts, give legal information they are qualified to give by training or experience, and engage actively in option generation and evaluation. The legislation or court rules may need to ensure that parties to mediation get adequate information about using independent legal counsel to protect their rights and ensure that any final agreement serves their interests appropriately.

B. Making Precedent and Defending Our Brothers and Sisters

The mediation field should prepare itself for the next confrontation with UPL disciplinary bodies. First, as noted above, many states are redesigning their disciplinary processes and the statutory or rule definitions of the practice of law. ACR, the ABA’s Dispute Resolution Section, and state mediator associations need to play an active role in that process. Members of
the mediation community can volunteer for service on the committees or boards drafting new language. They can provide comments on any proposed changes. They can write bar journal articles that frame the conversation firmly in the authorized practice of mediation paradigm. They can develop information about the low risk to parties who use mediation services offered by nonlawyer-mediators. They can begin *1238 to build regulatory infrastructures that support mediation in the state and reassure courts and the bar that all mediators possess the training, substantive knowledge, experience, ethics, and skills required to protect the public from incompetent practice. They can request ethics opinions relating to mediation from state bar committees or mediator ethics boards in contexts designed to build additional law reflecting the “parallel paradigm.” These activities may be the collaborative problem-solving approach recommended by Nolan-Haley. 905

Mediators caught up in an UPL disciplinary process should be able to contact ACR and state mediator associations for coordinated and expeditious help. The mediation community should develop several draft briefs, each of which would address the practice of law test used by various jurisdictions. Local counsel could then use those briefs to begin developing the argument on behalf of his or her mediator-client. The brief should not only address the practice of law paradigm, but it should clearly present and argue for the application of the authorized practice of mediation paradigm. The briefs should discuss any mandatory or aspirational ethics codes that apply to the responding mediator. They should include, as exhibits, copies of these codes along with relevant UPL guidelines. The briefs should provide greater context for the discussion of the “parallel paradigm,” including the statements on authorized practice of mediation offered by ACR and the ABA’s Dispute Resolution Section. UPL disciplinary bodies should also know about legislative efforts to exclude from the definition of the practice of law neutrals serving as mediators. The brief should also highlight the number of states that do not limit the participation of nonlawyer-mediators in court-connected cases. The brief should outline the regulatory structure in place for mediators, and where applicable, show how courts handle ethics grievances filed against mediators. The brief should also explain how the core values of mediation (especially party self-determination and mediator impartiality), if properly expressed in ethics codes and enforced through grievance systems, constrain mediator activities within *1239 borders that the legal community should accept.

ACR and the ABA’s Dispute Resolution Section should also develop a cadre of expert witnesses with extensive backgrounds in mediator ethics. These experts could offer to testify at UPL disciplinary proceedings at reduced or no cost to the responding mediator, except to recover travel expenses. 906

In addition, the UPL disciplinary process should ensure due process for mediators. Responding mediators should have clear notice of the allegations against them and the specific communications about which the UPL disciplinary bodies are concerned. The process should not allow late-filed charges against mediators, as occurred in Dr. Fremed's proceeding. 907 Disciplinary bodies should pay for the cost of recording the proceedings and transcribing the testimony. They should make a copy of the transcript available to all parties and decision-makers. The disciplinary bodies should allow parties to file post-hearing briefs on a timeline that permits them to review the transcript of the hearings. The rules of the tribunal should permit a motion for rehearing. Finally, the disciplinary body should take care that at least one of its panel members has training and experience as a mediator. 908 This background will aid in the discussion of the facts, law, and ethics rules that apply in the case. A careful review of the hearing transcript of Dr. Fremed's proceeding shows that the conversation between lawyers and mediators is cross-cultural in nature. 909 As a field, mediators need to ensure that their cultural values are heard and understood by the UPL disciplinary bodies. In most states, these tactics will not solve the overall UPL problem mediators face, but they will help design the kind of conversation we need to have about the perceived problem.

Finally, ACR and state mediator associations should appeal any UPL disciplinary decision that fails to appropriately recognize the “authorized practice of mediation” paradigm. 910 As dispute resolution *1240 professionals, we know when to use litigation to create binding precedent. For over twenty years, the mediation community has largely failed to call the bluff of UPL disciplinary bodies when it comes to constraints on mediation. A litigated approach will require a commitment of pro
bono service from lawyer-mediators in the field. Moreover, if we plan to take up Cooley's call to arms, we should also create dedicated funds for the defense of mediators whose circumstances offer ideal test cases. \(^9\) Dr. Fremed's case may have offered this opportunity, but the mediation community missed it.

C. Designing Regulatory Systems for Mediators? Crafting the “Parallel” Paradigm

The supreme courts in all states bear the responsibility to ensure that any court-connected mediation program provides high quality services to members of the public. Supreme court oversight responsibilities should, however, more closely reflect the ethics and values of mediation, not the practice of law. It is not enough to attempt to regulate mediators through the blunt instrument of UPL enforcement. Instead, courts have the duty to design mediator-specific regulatory systems (or infrastructures) that ensure that litigants get competent mediation services from well-trained mediators. These systems will protect the public in a more direct way than episodic UPL enforcement ever will.

Mindful of this duty, an eighteen-member Advisory Board composed of judges, state and local court administrators, mediators, mediation program administrators, attorneys, corporate representatives, academics, evaluators, and officers of professional mediation organizations with diverse viewpoints have developed the National Standards for Court-Connected Mediation Programs (National Standards). \(^9\) The National Standards, if adopted, would *enhance confidence in and satisfaction with our public justice system.* \(^9\) The Advisory Board expressed concern that “the dearth of generally accepted principles to guide courts in designing, implementing and improving such programs risks . . . confusion and dissatisfaction on the part of individual users as well as the public at large, who could come to view these programs as a form of second-class justice.” \(^9\) It acknowledged that for some disputants, court-connected mediation programs may be their only contact with the public justice system.

The National Standards Advisory Board recommended that courts monitor the quality of mediators working in court-connected programs and provide mediation participants access to a complaint mechanism designed to handle any grievance about a mediator or the process. It suggested courts should evaluate the program on a periodic basis through participant surveys and other forms of feedback to permit the court to correct any deficiencies in the process and to monitor the performance of mediators. Courts should also remove from their rosters mediators who performed below expected skill levels or outside ethical constraints. The Advisory Board further recommended that courts adopt a code of ethics and provide sufficient resources to make mediation available to indigent litigants. \(^9\)

Similarly, the CPR-Georgetown Commission on Ethics and Standards in ADR recognized in its Principles for ADR Provider Organizations that “the growth and increasing importance of ADR Provider Organizations, coupled with the absence of broadly-recognized standards to guide responsible practice, propel [led] this effort . . . to develop the following Principles . . . .” \(^9\) It suggested that a provider “take all reasonable steps to maximize the quality and competence of its services” and take all reasonable steps to monitor *the quality and competence of affiliated neutrals.* \(^9\) These steps could include soliciting mediator evaluations, debriefing mediation participants, making follow-up calls, conducting periodic performance reviews, offering processes for receiving complaints filed against neutrals, and disciplining or removing neutrals who failed to meet ethical or other standards. \(^9\) It also suggested that ADR providers “should require affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics, absent or in addition to a controlling statutory or professional code of ethics.” \(^9\) In addition, it recommended that the ADR provider dedicate staff and resources to meet these suggested obligations to ADR users, the courts, and the public. \(^9\)
In connection with complaint procedures, the National Standards Advisory Board explained in comments to the standards that "widespread agreement" existed about the need for courts to implement "specific, written complaint mechanisms" that are "based upon a clear code of ethical conduct by mediators." 921 While the Advisory Board did not recommend that the courts require unhappy participants to mediate their complaints against mediators, it did recommend that the courts offer this option. Similarly, the CPR-Georgetown Commission urged ADR providers to adopt ethical guidelines to "help ensure that neutrals ... are familiar with and conduct themselves according to prevailing norms of ethical conduct in ADR." 922

Thus, both sets of guidelines set high expectations about the court's role in ensuring the quality of the services provided by mediators. They expect courts to encourage mediators to engage in ethical conduct and best practices. They also expect courts to monitor mediator compliance with ethical practices. Both sets of guidelines respond to the "greater scrutiny in the marketplace, in the courts, and among regulators, commentators and policy makers" of ADR services. 923 They both seek to create fair ADR processes. 924 "[T]hey *1243 reflect the best thinking currently about what constitutes quality in court-connected mediation programming efforts." 925 These thinkers express the concern that courts must assume more responsibility for the ADR programs they offer.

Leila Taaffe, the former Director of the Georgia Office of Dispute Resolution, sees it this way:
In the court context we're very concerned about protecting the public. We say to the courts, "You should send certain cases to us . . ." And there's a quid pro quo . . . . If we're saying to the courts . . . send [us] your poor, your tired, depressed, what[ever] . . . to mediation, and we don't guarantee [the courts] some kind of minimal quality in terms of performance [of the mediator], . . . [the courts are] putting themselves into a very precarious position. Because [we are] taking people who have availed themselves of the courtroom. Who have followed the process that we acknowledge in this country for settling disputes and [the courts are] saying, "Well, try this [mediation], this is going to enhance the civil justice system, or this is going to give you control over resolving this dispute." But unless we can guarantee them some quality and some consistency in that practice, [the courts are] putting themselves on the line. And most of these people are elected officials, and they care what their community thinks. And they should care. 926

Professor Nancy Welsh summarizes this thinking, perhaps, when she states that “[a]s the degree of party autonomy decreased [through mandatory referrals to mediation], the need for court oversight increased." 927 As Welsh notes: “[C]ourts are delegating one of their judicial functions to court-connected mediators. The courts ultimately should remain accountable for their delegates' performance. Therefore, effective monitoring and evaluation, including ethical *1244 requirements and grievance procedures, should always accompany court-connected mediation programs." 928

Supreme courts can approach this task by using the expertise that exists in the national and state mediation communities. Several members of the community have developed expertise in helping courts design mediator regulatory systems. 929 Several states already provide models for regulatory approaches. 930 The design process takes time and commitment and it has its own political dimensions. At the same time, courts should not evade the design responsibility because the task requires more effort than simply triggering the existing UPL enforcement system.

X. Conclusion

Professor Rhode concluded her 1981 article with a statement equally applicable today: “[T]he unauthorized practice movement has been dominated by the wrong people asking the wrong questions.” 931 As Professor Cooley suggested eight years ago,
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a court truly concerned about consumer protection should focus on whether the mediators to whom it refers cases practice within the constraints of the “authorized practice of mediation.” Most mediators agree mediation is not the per se practice of law. To the extent certain actions of mediators come close to the boundaries of law practice, disciplinary bodies should first scrutinize those actions in light of the core values of mediation and generally accepted ethical constraints on mediators. Courts, with the help of mediators, should work towards the development of mediator regulatory systems that displace UPL enforcement in the mediation context.

Until courts take this step, the mediation field should actively participate in UPL enforcement actions so that disciplinary bodies confront and apply the “parallel paradigm” of the “authorized practice of mediation.” We should be ready to establish favorable precedent on appeal. For individual nonlawyer-mediators, the current situation feels confusing and threatening despite all the precautions they may take to avoid a UPL disciplinary proceeding. Legislative efforts to create safe harbors for mediators solve one problem, but they do not ensure high quality mediation. As mediators, we often ask each party to the mediation to identify what contribution he or she has made to the dispute. In the UPL dispute, the mediation field has been quick to blame UPL disciplinary bodies for overzealous enforcement against mediators. The field has been slow to accept responsibility for its failure to create the components of the “parallel paradigm” that would reassure courts, establish clearer roles for lawyers and mediators, and protect the public. “A call to arms” does not overstate the challenge before us.

In Connecticut, the new court rule exempting mediation from the definition of the practice of law allows the state's mediators to put their fear of UPL prosecution behind them. Thus, Dr. Fremed's disciplinary proceeding may be remembered as the last time a mediator faced the power of the “rich, the powerful and the proud.” As a community, let us plan that she will also be the last mediator prosecuted successfully for UPL by any disciplinary body nationally.

*1245 APPENDIX A

Diana M. [Brady] Wright v. James K. Wright
Superior Court of Connecticut
Judicial District of Danbury
March 30, 2005 Hearing

Before Sandra Vilardi-Leheny

Judge: Who came up with [the child support calculation]? Did you have the Child Support Guidelines reviewed by the Family Relations' Office?
Wife: Yes.
Judge: And this is what they gave you?
Wife: No, those are our worksheets that we ran the numbers -
Judge: These are your worksheets?
Wife: Yes.
Judge: So, there is an amount here . . . your Paragraph 11 says, 31 percent?
Wife: Yes, my husband wants [a] percentage deducted.
Judge: Well, I may choose not to order a percentage. Do you understand, this calls for $227- I don't know whether the percentage of 31 percent would be 31 percent of a $100 which is going to be $33 a week. I can't order that . . . . Because I don't know that - So you may want to talk to whoever negotiated this agreement with you . . . . [T]he court has to come up with a figure that . . . complies with . . . the Commission's Guidelines.

. . . .
There is a fax that shows some of this. The parenting arrangement was done by Attorney's Flanagan and Peat, is that correct?

No. We went to mediation.

No, she's a mediator.

Well, I would suggest you call her because on the Educational Support Order . . . you need to have some information and you need to get some legal advice on that . . . I can't order it. I would suggest that . . . you check with her [about] a recent case regarding educational support orders that you may want to know about before I enter this. And, I think before you make an election, you should know the difference. I can't tell you what it is. You don't have an attorney. An attorney did not negotiate this. And you don't know all your legal rights with this.

Well, Your Honor, actually, I did discuss this with Barbara Flanagan. So, what's written here --

Why don't you call her and ask her--if she's written this, you can ask Attorney Flanagan. You can ask her for the legal advice.

But, I--I thought that [if] we just agreed . . . that it would be entered in the contract?

You did, but I don't think you have full understanding of what the ramifications of that are. I have to find this agreement fair and equitable under all the circumstances. And I understand you went to a mediator who wasn't an attorney--or maybe Attorney Flanagan had something to do with this.

When you attached the Schedule A [the parenting plan], which has the Flanagan and Peat fax printout on it, . . . was that before you went to the mediator?

No. Our mediator . . . did the Schedule A. All Barbara [Flanagan] did was take our mediation work and put it into . . . a document.

So, you wish to have . . . this Schedule A incorporated by reference into this agreement?

Yes.

Okay, because all of these provisions are not necessarily spelled out?

I'm not clear what provisions you're referring to?

I'm going to ask you to go down to Family Relations and--I have written certain questions . . . on certain stickies. Schedule A, should that be incorporated by reference?

Your Honor, if we're both in agreement with the way the [educational] paragraph reads, does--does that matter?

[If] you want to enter it, that's fine. I'm just trying to give you an option . . . to look at it [with an attorney]. But there is . . . case law about it which if you knew might change your opinion as to how you are wording this to better protect yourselves and the child.

If we're both in agreement with the way the Separation Agreement reads, regarding the educational paragraph . . . does it matter?

I will order it, if that's what you want and that's fine. . . . But there is . . . case law about it which if you knew might change your opinion as to how you are wording this to better protect yourselves and the child. . . . My questions have to do with the enforcement of this agreement down the line.

That's fine. I just think we've spent so much time working . . . on this agreement together.

You don't have an attorney here in court representing you. There is no attorney I can ask you to talk to . . . [who] could check out the case.

I understand that.

You have not . . . clarified for me--you've used the services of a mediator in Connecticut who is not an attorney but you are representing yourselves pro se. Do you believe that you understand the ramifications of this agreement?

Yes.
Husband: Yes.  

*1249 APPENDIX B

Annotated and Abridged Disciplinary Proceeding Transcript

In Re: Resa Fremed

Complaint No. UPL 05-002

Superior Court

Judicial District of New Haven at New Haven, Connecticut

November 2, 2005

Before the Reviewing Committee of the Statewide Grievance Committee

Tracie Molinaro, Esq.

Margarita Moore, Esq.

William D. Murphy

Maureen A. Horgan: [4] The focus of this hearing will be the finding of the issue of whether or not the Respondent has engaged in the unauthorized practice of law.

Examination of Resa Fremed by Mark Dubois:


A: [Two parties who are separating or divorcing] will work out a plan for themselves. They will make the decisions, not me, for their present and future. I'm really the facilitator. I work with them on helping them make their decisions. We may do some option building. I very much encourage that they seek out other resources to help them make their decisions.

I very strongly encourage, always encourage, the parties to consult with attorneys and bring that information back to our sessions. I encourage that they go to their accountants. I encourage that they go to any financial planners so that they come back with information.

But I'm basically the facilitator so that they can both learn to talk to one another, as well as plan for the future of themselves and if there are children involved, certainly of their children, the present and future.

Q: [11-12] I heard it said that the process of divorce mediation occurs in the shadow of the law. Do you think that's a fair description of your relationship to the legal process when you do this mediation?
A: I don't consider it any part of the law. [T]hat doesn't even enter the picture when we're talking about, let's say, children, for example. 947 It's really what's in the best interest of the children and it's not really about . . . as far as I'm concerned, it's not about law. It's about children. 948

*1252 Q: [I]t's my understanding there are certain issues that must be addressed in a typical family dispute. One of them could be child support. Now, child support is regulated by the courts. There are certain things that can and cannot be done. Are you familiar with the law in that regard?

A: Oh, yeah.

Q: How do you address that issue when you're helping these people to come to their own . . . . [*13] [Y]ou give them the information and let them come to their own agreement . . . .

A: [There are] different types of mediation and [I am] more [of] a facilitator. You do option building, facilitat[e] . . . . That was the John Haynes model.

Q: [*14] [I]s it necessary for you to give them information about child support guidelines and deviations and such?

A: Oh, I don't give them any information about any of that, but I will point them [in] the direction. 949 I will say, check with your attorney or . . . there's a blue guidelines book 950 . . . pick up this book . . . from *1253 the attorney's office, they could pick it up from the courthouse. . . . So that's a resource they could use. And I know this information is available online. . . . I do say that there are Connecticut State guidelines that they need to follow.

Q: [If] the parties . . . come to some agreement, do you help them understand whether or not that would be or would not be within or without the guidelines?

A: I don't do that. Again, . . . I always say, check with your attorney on this. 951 [*15] [S]ee if this is . . . within the range with . . . your attorney. And many a times . . . I'd write a note . . . to please have your attorney check on this . . . . I remind them to do that. I emphasize, check it with your attorney.

Q: I notice from your mediation contract . . . [that] you tell these people you're not a lawyer. 952

A: Right.

*1254 Q: And do you require that they have a lawyer when you try to mediate their dispute?

A: [I]t's [not] in our guidelines to require anything. Again, as a mediator, you don't require . . . . I'm a facilitator. I strongly encourage. . . . [O]ften I will ask . . . who is your attorney? . . . And I encourage each to have [*16] independent counsel. . . . [I]t's really about . . . hav[ing] someone who is concerned about what's in his or her best interest. . . . And I also say you will need an attorney to write up the agreement 953 . . . So that's what I tell them . . . once they walk out of the door, you can't follow them. . . . [I]t's not like an infant.

Q: [*17] [O]ften parties to these family disputes have conflicting interests. . . . And in attempting to facilitate, do you educate them with regard to their interests? I mean, for instance, it may be better for one party to have alimony and it may be . . . better for one party to settle up the property so that there is no ongoing alimony.
A: Yeah. That's not a mediator's role. . . . That's not our role. . . . [A]n example would be, you'd say, okay now, . . . what is your interest, what do you want, to one party--and that's the other thing[,] I try to take turns starting with one [party] [and] going [*18] to the other [party], so I'm not, I show that I'm very impartial.  

. . . I have a flip chart. Okay, that's what you want; tell me what you want. . . . So they see right up there [on the flipchart], this is what one wants, and this is what the other wants. . . . [T]hen they can discuss it. . . . I try . . . to get them to talk to one another, which they [can not] . . . do without the facilitator present. . . . And so the process moves on where . . . they will . . . com[e] up with what they may or may not agree to. Now if they don't agree to it, we just keep . . . we move on [to a new topic]. And there are many times when they may not agree to a particular number and . . . we'll come back to that later. Or, if [they] still can't decide, that might be something that . . . they'll work . . . out with their attorney.  

Q: Choosing one course or another at any one of those turns in the road may have consequences . . . . [*19] Do you explain the *1255 consequences to them? . . . [For instance,] choosing to treat distribution or division of property . . . as a property distribution . . . in lieu of alimony . . . may have tax and other consequences . . . for both parties. What do you, if anything, explain . . . to them about . . . the consequences of their choice?  

A: [I]f I'm hearing that they're making a choice that will have consequences, I will say, why don't you check that out with your accountant  because this may have some consequences . . . . I will point it out, but I also will say, check it out with your accountant or check it out with your lawyer.  

Q: But you, as the mediator, don't attempt to [*20] . . . school them in the consequence of their . . . chosen course of conduct.  

A: I will say . . . why don't you read about it . . . I will not . . . give them a dissertation on it because I'm not . . . an expert in any of those fields. 956 I'm the mediator.  

Q: [A]nother area of potential discussion, often animated discussion I think, is the area of post-majority educational support. You're familiar with that area?  

A: Yes, yes.  

Q: And there's some . . . new law called the Educational Support Act. 957 What is your understanding of that law?  

A: [It] is a law that's fairly recent. . . . [Parents] must provide for some . . . education[ ] . . . or college . . . for their children. They must provide something. And it . . . should be at least equivalent, in terms of any tuition or anything . . . to the State of Connecticut tuition. . . . [*21] They must have a plan for their kids' college education.  

*1256 Q: . . . And do you advise them of the necessity to include that in the whole basket of issues that should be mediated or resolved?  

A: Yes. [Even] prior to that law, I encouraged that anyway because that [] . . . mak[es] sure that the kids' best interests are taken care of . . . we try and encourage it. And in most of my earlier mediations, we had that included anyway.  

Q: . . . [T]here are choices as to how that post-majority educational support would be treated, whether it be treated like . . . a contract, or . . . an order of the court, or the court reserving or continuing jurisdiction. . . . Is that your understanding?
A: . . . I may know about it but I will not--that's not something that I would deal with at all in a mediation case. I would just strictly [*22] deal with . . . what . . . in terms of education and . . . what each party would be willing to contribute and . . . let them plan . . . what they would want for their kid's college [education].

Attorney Molinaro: So what if I said I don't want to . . . have the court make the decision about my children's college expenses? . . . Can I do that? What would you say?

A: . . . [W]hy don't you just check that out with . . . your attorney . . . or read about it . . . from what I know . . . there is a law in Connecticut that you need to abide by and just, why don't you check it out . . .

Attorney Molinaro: . . . So you're not aware, personally, that there's an option by which parents can waive that language[?]

A: . . . I'm aware of it but I won't tell them. You see . . . [*23] that would be being a lawyer. I'm not going to tell them that they could waive anything because . . . that's not my [role]. [M]y role as a mediator is to make them be aware that they're going to . . . need to plan something for their kids' college education.

Attorney Molinaro: . . . [W]ould you explain these are the options? You can waive it if it's . . . under certain circumstances. You can have a court order with specific numbers now, for example, each fifty-fifty, or you can . . . decide now how much you're each going [to] contribute. . . . [*24] Do you help them build those options within the context, for example, of post-secondary educational support?

*1257  A: Well, they build options of what type of support that they feel that they want to provide for their kids. 958

Attorney Molinaro: So if they don't want to provide for their children . . . do you try to encourage them to provide for their children?

A: . . . [Y]es. But I encourage them to provide for their children because that's part of what would be in the best interest of the kids. And if they have already said that they want to do what's in the best interests of their children 959 . . . [post-secondary education support] is fulfilling what they want for the present and the future of their kids. So we would do option building for . . . their education.

Attorney Molinaro: . . . And if they said to you something like, am I entitled to alimony, what would you say to that?

A: It would probably be the same thing. Am I entitled to alimony? I can't [*25] answer any questions. . . . I'm not a lawyer. I can't tell you if you're entitled to anything. . . . and the entitlement part is not something I would answer. 960

Attorney Molinaro: . . . So if I came to you and said, my husband and I have worked out child support guidelines using that . . . blue book[.] . . . [C]an you check them[?] [W]hat would you say?

A: I'm not going to check them. . . . I don't prepare any forms or  *1258  check any forms [*26] of theirs at all. 961 . . . I don't even see some of their forms.

Examination Continues of Resa Fremed by Attorney Dubois:Q: . . . [W]hat happens when the parties reach a point where they are in accord on . . . the issues that have been facilitated . . . that you've helped them with?
A: I prepare a Memorandum of Understanding [MOU] again, that was in my training with John Haynes. We put in whatever they have agreed to in the mediation sessions. And they review that memorandum in my office. I don't let that out. I don't let that out of my hands. And when the two of them have agreed upon everything we're finished. And I make a copy for each party with a cover letter. And the cover letter is to their attorney. And also I get a signed release from each party so that I can talk to the attorney if there are any issues and anything the attorney wants to talk to me about. And that copy is given to the party to bring to the attorney.

Q: I was looking at your brochure. There's a variety of areas, other uses of mediation. One says you draft separation agreement[s], the other says prenuptial agreements. What is the nature of your involvement in those areas?

A: I've never done a prenuptial. I heard the word “agreements.” But what I really meant is that a lot of people plan to separate and want to come to some terms about their own personal separating. It's not an agreement separation agreement that ever goes to court or anything.

Q: At some point last year I believe, Mr. and Mrs. Wright came to see you. And what was the nature of the problem that they brought to you?

A: Well, it isn't a problem. They just wanted to get a divorce.

Q: Did they report that either of them had been represented by a lawyer?

A: When I go through the agreement to mediate with the parties, that's when we talk about a lawyer. What is your attorney's name? It's on the initial contact sheet.

Q: And when the Wrights came in did either of them have an attorney?

A: When they first presented, I don't remember.

Q: And then you went through this fact-finding process?

*1261 A: Yes.

Q: And you identified a checklist of issues?

A: Um-hum.

Q: And over what period of time did you assist them?

A: I think the first time was in the beginning of August, until the end of October of 2004. Our last session was in August of 2004. But there were conversations. I was having with their attorney, with Barbara Flanagan. And I don't remember the dates or anything, but there were several conversations I had with her between August into October. We had four sessions. [T]he 26th of May and then June 16th and August 4th. We never completed the mediation.

Q: Do you have a recollection of what issues were still open when they finished with you?
A: Child support. . . Any of the financial issues . . . Educational. College. Life insurance. . . [T]hey were having . . . a lot of difficulty coming to agreements.

Q: . . . Now, there is in the materials at Tab 3 a draft Memorandum of Understanding. And is that something that you prepared?

A: Yes.

Q: . . . [F]rom my review of it, it does appear that there's a resolution of many of those issues that you've just described. So what happened from August, when they were not able to . . . [*33] finish, . . . and October when you prepared this MOU?

A: . . . [T]hey would constantly change their minds. . . . [T]his is what was happening with [Attorney Flanagan] too when they were seeing [her] . . . . So then when this was sent to Attorney Flanagan, it was definitely . . . just a draft.

Q: When did Attorney Flanagan become involved in this?

A: I don't remember the exact date, but I remember having numbers of conversations with [her] by telephone. . . . [S]he was involved all along in name because [the husband] [*34] was always saying well, I need to talk to my attorney about this. And I'd say, fine . . . . [T]here were several times when he wanted to stop mediation. [*72] I said fine, and let . . . the attorney continue. . . . They called and . . . ask[ed] questions. . . . [P]articularly . . . he would call. And I said, well, check it out with your attorney. Or he'd come up with not really understanding what was going on. I said, well, just check with your attorney. [*35] [H]e called . . . in October and he said . . . he was interested in . . . stopping mediation. He didn't . . . understand the numbers. So I agreed, again, . . . only because [the draft MOU] was . . . [T]he draft MOU] was *1263 going to an attorney that I would . . . normally, the draft would go no place, it would just stay with me [until it was finished], but because it was going to . . . an attorney, I faxed if directly to . . . Barbara Flanagan on [October] the 27th. . . . I would fax the draft . . . only to Barbara.

Q: The proposed disposition of the various issues . . . recorded in this draft Memorandum of Understanding, was that something that the parties had conveyed to you or was that a suggestion you had made as [*36] to how they might resolve these issues?

A: No, it was definitely from them. . . . [T]hey put the numbers in.

Q: . . . [B]ut in August all these issues were open and then with no more sessions in October, suddenly we have an MOU. . . . How did that happen?

A: Because [those were] the things that they had decided on before and then changed their mind about . . . . But this [represents] the latest decisions they had made. . . . [I]t's an ongoing thing. It's on the computer and I make changes often. And again, as a draft, this is . . . what they were telling me to [include].

Q: [*37] . . . And then you sent this to Attorney Flanagan.

A: Right.

Q: . . . Had you been involved with . . . them . . . in coming up with the language that ultimately wound up in their agreement [about child support] that they submitted to the court?

A: No.
Q: ... Had you explained to them how it was going to be necessary to structure . . . or refer to this child support?

A: [*38] They had . . . at the time, [the] blue book, and they had the forms from the blue book that they completed themselves. . . . But at some point they submitted a document which . . . I think it's at Tab 8 *1264 in Attorney Haakonsen's submission . . . which was their . . . self-styled, separation agreement. 974

Q: Had you ever seen that before . . . these proceedings?

A: No, not at all.

Q: . . . And . . . in that document . . . they attempted to describe a methodology at paragraph 11 . . . concerning how child support was going to be computed.


Q: . . . [H]ad you discussed that issue at all with Attorney Flanagan?

A: [*39] No. . . . [B]ecause Mr. Wright was disabled, he wasn't sure if he was going to [be] able to go back to work or not. . . . [H]e wasn't sure what his salary was going to be . . . . They . . . put together two sets of numbers, one [set] based on the . . . disability [income] and one [set] based on if he'd go back to work. And that's something that they would decide later anyway . . . . [T]hat was in the process.

Q: [*40] [T]here's a paragraph [of the MOU] that says the child support amounts were calculated using the child support guidelines.

A: [T]hat's what they . . . did. . . . [T]hey had provide[d] . . . the numbers, . . . they put [them] on the . . . child support form that's in that . . . Blue Book.

Q: . . . [D]id you then take that [number] and incorporate that number and reference into your MOU?

A: Right. . . . [A]nything in italics is definitely nothing that they've decided upon. So this is all in italics, . . . [it] means that [these are] things that they have not even [agreed upon]. . . . [M]y usual procedure . . . when I've completed the MOU [or mediation] . . . the only thing that you might see in italics is some instructions for the *1265 attorney . . . [an] explanation to the attorney why we did so and so and so. But you see . . . a lot of this [MOU] is in italics [and] means that [*41] they haven't really come to any conclusion [yet on those items].

Q: [A]nd . . . looking at the page . . . of the MOU concerning post-secondary education . . . that's not in italics. . . . So is that something that the parties had then come to an agreement on . . . at some point . . . through the summer?

A: Right.

Q: . . . [H]ad you shared with either of them how that agreement should be treated by the court, either as an order or as a contract or --

A: No. I did not.
Q: [*42] Where were they relative to life insurance when they finally left you? . . . I guess that would be in the MOU? . . . It's not in italics. . . . That would mean --

A: That they had agreed on it.

Q: Now it appears from the transcript there was an issue concerning whether or not Mr. Wright actually had the insurance or . . . was going to obtain the insurance. Had you been involved with explaining to them the [*43] necessity of having the insurance in place before the order entered?

Attorney Haakonsen: . . . Judge Leheny was completely wrong on the law. So if where you're going is, did she explain to them that [the] law was as Judge Leheny perceived it, . . . I'm sure [Resa] didn't and I hope she didn't . . . .

Q: [*44] I'm just asking her what, if anything, she explained about the law.

A: I didn't explain anything about the law because I'm not a lawyer and I don't explain about the law.

Q: Now, after October when you sent the MOU to Attorney Flannigan, . . . did you have anything else to do with the Wrights?*

*A1266* A: No.

Q: Did they tell you they were going to court?

A: Nope.

Q: . . . [D]id they at any point tell you that they had been to court?

A: Nope.

Q: [*45] . . . You charge a separate fee for preparing the MOU? 975

A: Yes. 976

Q: . . . And is that something that is typically done by folks in the mediation field? Charging separately to prepare the agreement? 977

*A1267* A: I don't know, but I don't charge an hourly fee. 978

Examination of Resa Fremed by Attorney Haakonsen: 979

Q: [*49] I think there might have been some misunderstanding in . . . the discussion earlier about . . . the college education provisions in your agreement. If I recall correctly, you testified that you always encouraged people to make post-majority support agreements. But I think a question was asked whether or not you were aware that parties had the ability to . . . waive . . . having a court order enter[ed]. And are you, in [*50] fact, aware of that?
A: Yes, I'm aware of it.

Q: . . . [W]ere you intending to convey that you were telling people that they had to make an agreement?

A: No, no. I don't tell them they have to do anything. 980

Q: . . . When you last saw the Wrights in August of 2004 was it your understanding that they were abandoning mediation at that point?

A: Ah, not totally, no.

Q: [*51] . . . [W]hen . . . [did you] understand that they were not coming back?

A: . . . [W]hen Mr. Wright . . . called to say . . . he didn't want to do this anymore. . . . [L]et's get it to his attorney.

*1268 Q: . . . And again, the things that you put in your Memorandum of Understanding when you faxed it to Attorney Flanagan were all things that . . . represented the last thing that they had agreed to. Is that correct?

A: . . . [T]here were things in italics that they were sort of still considering. It wasn't really an agreement. So those . . . items . . . in italics . . . were things that they still needed to work on.

Q: . . . [Y]ou . . . keep this as a . . . running document. [Y]ou start very early [drafting it] and . . . make changes on it as the mediation [*52] goes along?

A: Constantly, thanks to the computer.

Attorney Molinaro: . . . You indicated that your normal protocol is that the Memorandum of Understanding would be given to the parties at the end [of the mediation] and they would then turn it over to their lawyers to convert or do whatever they need to do to present it to the court. . . . What if they have no lawyers? How do you leave it with them?

A: . . . I still put the same cover letter with [it], this is for your attorney. . . . [P]lease give this . . . to your attorney. Any questions, please call me. And I give that to each individual.

Q: [*53] Did you ever turn over a copy of [the MOU] to the parties directly?

A: No, never. 981

Q: So . . . neither one of them prepared that.

A: Right.

*1269 Examination of Barbara Flanagan by Attorney Haakonsen. 982

Q: [*57] . . . [W]hat was the nature of your involvement [with James (aka Keith) and Diane [Brady] Wright]?
A: Mr. Wright retained me to represent him. . . . I filed an appearance on his behalf on October 4, 2004, to represent him in a pending divorce action which had been filed pro se by his wife in June.

Q: ["58] So when Mr. Wright hired you, did you subsequently have some contact with Resa Fremed?

A: [S]he faxed me the Memorandum of Understanding that the parties had reached. . . . [We had] a few phone conversations. My last conversation with her was in December of 2004.

Q: . . . [W]ere you consulting . . . with Mr. Wright prior to October of 2004?

A: I believe so. I had a conference with him before he retained me in September of 2004. . . . [H]e did ["59] consult with me in July of 2004 . . . and he asked for some advice, but he did not retain me.

Q: . . . After you got [the fax from Resa Fremed], what did you do?

A: Discussed it with my client. Mrs. [Brady] Wright was pro se and it's my position, my practice that I do not speak with pro se's. *983 I communicate with them in writing. *984 I, at some point, prepared a *1271 separation agreement . . . in December of 2004, and there were several faxes. I faxed it to Mrs. [Brady] Wright and she faxed me - there were many exchanges between the two of us. And many things she wanted changed, and things that she wanted in, that I didn't feel were appropriate to be in. And Mr. Wright used his retainer and . . . in January [2005] . . . we parted on amicable terms - that it was getting too expensive, and that his wife and he could not agree, and that since she was pro se, he was going to be pro se. And [on] January 25, 2005, he filed an appearance in lieu of mine and that's the last that I heard from Mr. Wright.

Q: . . . Is this a copy of one of the agreements that you drafted?

A: ["60] This is the only agreement, yes. I drafted an agreement . . . on or about December 6, 2004. . . . [M]y client got a copy of it, and that agreement was faxed to Mrs. [Brady] Wright. And then she had issues with it and was faxing me back and forth and I was trying to resolve it on an uncontested basis. And, as I said, Mr. Wright's retainer had run out and he chose to . . . he was frustrated . . . and he chose to go on his own at that point.

Attorney Molinaro: . . . Was there a cover letter that went with this [agreement] to [Mrs. Brady Wright]?

A: ["61] . . . I believe there's a cover letter that just says, enclosed please find draft separation agreement. . . . [I]t went through [by fax] on . . . December 6, 2004.

Attorney Haakonsen: . . . Now, . . . drawing your attention to page 8 of the [*62] agreement that you drafted, I noticed that you did specify a sum for weekly child support.

*1272 A: Yes. . . . I believe that . . . the amount [was] based on his disability and then the second amount was based on his regular employment which he intended to go back to.

Q: . . . And you also attached to this agreement a Schedule A . . . [W]here did this Schedule A come from?

A: I believe it came from the . . . it was a parenting arrangement that came from the Memorandum of Understanding.

Q: . . . And is it unusual for you to do this kind of an attachment for a parenting arrangement?
A: No, not at all, not at all. It depends on the file. If it's long and detailed like this and was negotiated between the parties and they have it written out, or it was negotiated by a child psychologist or someone else, then I will just attach it as a schedule, just for ease sake.

Q: As you look through [a copy of the agreement the Wrights eventually filed in court, Exhibit 8 to the brief], does it appear to you to resemble the agreement that you prepared?

A: Yes . . . it's obviously a different type . . . and it's not exactly my agreement . . . it looks like a cut and paste from a scanner or something like that and changes were made by hand. . . . The boilerplate is the same . . . . The provisions regarding education and many of the other provisions, they just took from the separation agreement that Mr. Wright paid me to prepare.

Examination of Barbara Flanagan by Attorney Dubois:

Q: . . . When you first met with Mr. Wright in July, what did he describe to you as the status of the proceedings between himself and his wife?

A: I believe he told me that the parties were mediating and he was hoping that he could resolve it without the benefit of an attorney. . . . No one wants to pay attorneys. I quoted him a retainer and . . . so we just had a consultation like I have with many people.

*1273 Q: [*65] . . . During the summer and into the fall of ‘04, did . . . you represent Mr. Wright?

A: No . . . his retainer check was dated September 13, 2004.

Q: [*66] . . . What was the status of the case at that point?

A: . . . On the day he wrote me the check, [I had] an hour and a half . . . telephone conversation [with him]. And I had a telephone conversation with Resa on the 15th . . . two days after he wrote me that check . . . So, obviously, he must have told me that it was in mediation. . . . And I [had] other conversations with Resa in October.

Q: . . . What did he want you to do?

A: . . . He wanted me to assist him in finalizing an agreement. And I guess he felt that he was . . . at a dead end and . . . [that] his wife was taking advantage of him . . . and that he was going to have to retain a lawyer.

Q: [*67] And did you then attempt to negotiate the resolution of some of the issues in dispute with Mrs. [Brady] Wright?

A: Ah, I wouldn't call it negotiate. . . . I do not have contact with pro se's except in writing, and reluctantly at that. . . . I've never spoken to Mrs. [Brady] Wright . . . over the telephone. We faxed things back and forth . . . And we also had a court appearance because there was a [house] refinance[ing]. He was particularly concerned with . . . she was anxious to buy him out of the house and wanted to do that before an agreement was finalized because of interest rates or something along those lines, which is possible to do. And we went into court, I believe, to get permission for relief from the automatic orders. And I did not handle the closing, but Mrs. [Brady] Wright refinanced and had an attorney and I spoke with that attorney. And it was agreed on an amount that Mr. Wright would get paid. . . . And it was a favorable number to Mr. Wright, so there was no prejudice. [*68] . . . And that was one of his main concerns when he came in to see me, is getting the correct numbers . . . a buyout.
Q: What kinds of things were you faxing back and forth? . . . This agreement . . . dated . . . December ‘04?

*1274 A: Yes. . . . And I faxed [Mrs. Brady Wright] on October 28th . . . a letter that said that I [had] received a draft of the Memorandum of Understanding from Dr. Fremed, that I needed her financial affidavit, that I couldn't do the child support guidelines without it, that she had represented to her husband that it was coming soon, that as soon as I received it I would prepare the separation agreement.

Q: [*69] Had you prepared a separation agreement or a divorce agreement for the parties before you received the MOU?

A: . . . [T]he only agreement I prepared was in December [after receiving the MOU from Dr. Fremed in October].

Q: I notice that on page 8, paragraph 11 of your agreement, there's some numbers for child support and they appear to be exactly the same as those contained in Dr. Fremed's agreement. At the bottom of the page $155 and on the next page, I think $217 . . . [W]hat was the relationship between Dr. Fremed's agreement and the one you prepared?

A: Ah, I would have run my own child support guideline analysis to make sure . . . I believe that that's what [*70] she did. . . . But I would have not just picked those numbers out of the air, I would have verified. And that's why I believe I asked independently for a financial affidavit from Mrs. [Brady] Wright . . . after I got the [MOU]. Because I knew, obviously, that the judge was going to ask me for that. And I didn't go to court . . . so I don't know what they handed in to the court that day. I have no idea. I was out of the case at that point.

Attorney Molinaro: Did you get a financial affidavit from Mrs. [Brady] Wright? [A]nd did you do guidelines?

A: . . . I got from Mrs. [Brady] Wright in December . . . a fax . . . that was her own form of a financial affidavit and filling out the guidelines on her side that she faxed me before I [*71] did the agreement. So it wasn't the financial affidavit form but she did prepare something and send it to me. . . . I assume I would have [completed the guidelines]. I would have never just taken the numbers from somebody else. I don't know for sure. I know that Mrs. [Brady] Wright, in her fax, said that *1275 the guideline form had been given to her by Resa to fill out and then she sent me this worksheet from her accountant. . . . That was not a final agreement, it was simply a draft. And it was stamped that.

Attorney Dubois: [*72] Did [your separation agreement] address the issue of post-majority educational support somewhere?

A: I believe the draft did. And that had been something that they had agreed on in mediation . . . because I know that if I had finished it, I would have put the statute number in it. . . . But this was my - this was the standard language from the statute that I used . . . [on page] [t]en. And it was subject to modification. [T]hey had agreed to do this $10 deposit. I don't know if that's in the final agreement or not. [*73] I did not negotiate that. That was part of what they had agreed on [in mediation].

Q: What was your understanding of the status of . . . the MOU?

A: [T]here were items in dispute, I believe, and that's why Mr. Wright retained me.

Q: And while he remained your client, were you able to reach agreement on those items?

A: Um, no. . . . What we were able to reach agreement on was the buyout of the house.

Q: When [did he pay his final bill]?
A: He wrote me that check on January 25, 2005. [*74] My last work on the file was a letter to him, December 23, 2004, where I asked him for an additional retainer.

Q: And other than perhaps speaking to him recently, were you involved at all in March when they went before Judge Leheny?

A: No, I was not. I have no idea what happened after he replaced me.

Examination of Diane Brady, formerly known as Diane Wright, by Attorney Haakonsen. 987

Q: [*78] Did you file a pro se divorce complaint?

A: Yes, we did.

Q: . . . And did you prepare the divorce complaint?

A: If I remember correctly, yes. I filled out the paperwork. But I actually believe we started mediating before we actually had the [divorce] papers served [on Mr. Wright].

Q: [*79] How did you happen to choose Dr. Fremed for a mediator?

A: She was the only one I found online.

Q: . . . Over what period of time did you meet with her?

A: . . . It was October.

Q: . . . Who told you, if anybody, how to file the papers with the court, what you needed to file and where?

A: I went to the court and I actually got the pro se divorce kit and I read through that. And I did a lot of research online, actually. Under the pro se, the Superior Court has a website for pro se divorces. And I also spoke with Robert Jackson several times, who's at the Danbury Superior Court, just asking questions.

Q: . . . And, then during the summer and into the fall of 2004, as you worked with Dr. Fremed, did there come points where you had to agree on such things as child support, or post-majority educational support, life insurance and other things such as that?

A: Yes.

Q: . . . At any of those points how did you acquaint yourself with the law or the requirements of a child support agreement or order?

A: Well, there were the Connecticut State guidelines, which were provided to us by Resa, and they're also available online too. But we actually never came up with a child support number until we went before the judge that day that we were divorced, which was March 30th, because my ex-husband had been on disability, so the figures were not accurate.

Q: What about issues such as post-majority educational support when your children are beyond 18?
A: That was me. [82] I just think that a parent, whether it's the male or female, has a right to support their children. And if a child is living at home with one parent while attending university, then child support should still be in place. I don't think it should be the burden of that parent just because they turn 18.

Q: . . . And did you ask Dr. Fremed about that issue or topic?

A: I did. . . . I have an email on that too because she had mentioned that in her professional experience she had not come across that, but as long as we agreed on things in the - oh, I had asked her, in your *1278 experience have you found some couples to extend the child support to the age of 21? And her response was, it usually ends when the youngest child is 19 or graduated from high school, but it is up to the parent's discretion if some support is continued . . . for the children while in college. . . . So she just said from her experience, it's rare, but, again, as long as we both agreed on everything that goes into the judgment, you know . . . .

[*83-87] [Parties discuss evidentiary issues relating to the e-mail copies witness had brought to the hearing, which no one had seen before. Reviewing Committee members and the lawyers decided they could be used in the hearing but recognized that the incomplete nature of the e-mails would go to their evidentiary weight and not to their admissibility. Attorney Dubois agreed to recess the hearing and make copies of the e-mails for distribution to everyone. Attorney Haakonsen “had almost no time to review the e-mails” before the testimony resumed. 991 The witness indicated she had to leave at 3:30 p.m. Attorney Haakonsen asked for some time to ask the witness questions about the e-mails, too, in the time remaining.]

Attorney Dubois: [*87] Ms. Brady [Wright], these e-mails that you shared . . . include three, either 11- or 12-page sets, dated October 18th, October 25th and October 26th, all of which seem to include this Memorandum of Understanding. What was going on between yourself and Dr. Fremed at the time that these were going back and forth?

A: [W]e were just trying to clean it up because at the end of the mediation we knew we had to take it to an attorney for them to drop into, I guess what they call legalese, or the official court document. So we wanted everything to be as accurate as possible before we took it to the attorney because I knew that the more time I had the attorney work on it, the more money I was going to have to pay, which I *1279 couldn't.

Q: And did you and your husband agree what attorney [*88] was going to take this document and turn it into the court document?

A: . . . [N]o. That process stopped when he retained Barbara Flanagan.

Q: . . . And why did it stop as opposed to hav[ing] Barbara Flanagan be the attorney who integrated this [MOU] into a court document?

A: Well, she did. . . . Which she gave to me . . . the day before court and pretty much just expected me to sign it and send it back. And I didn't. So that ['s] when we appeared in court on the Wednesday, which was out first court date . . . [S]he sent it to me on a Monday afternoon. That night I made revisions to it. I sent it back to her office that evening. She was in court all day Tuesday so she didn't touch it, so when we got to court on Wednesday, we didn't have a signed divorce decree because she had not had the time to make the changes. . . . [M]aybe a week, two weeks after that, my ex-husband told me that he was advised to drop her since I was a pro se divorcee, and she couldn't speak to me legally because I didn't have my own attorney. [*89] After that I took what Barbara had given me with what we had, based on the summary notes from Resa and I . . . put them in a word document. 992
A CONNECTICUT MEDIATOR IN A KANGAROO COURT?:..., 49 S. Tex. L. Rev. 1047

Q: Is [the document at Tab 8] the document you prepared?

A: I brought a copy of our judgment that was put into court. Yup, so it's . . . it's the same.

*1280 Q: . . . And you prepared this final document?

A: I did, yes.

Q: . . . Working from what?

A: Working from the notes from . . . our mediation sessions and from the document that Barbara Flanagan had provided. Since she was the one originally putting it into legalese, that's what I started working off of . . . [T]here were a lot of inaccuracies in Attorney Flanagan's paperwork so I took it and I corrected it and put in what we, my ex-husband and I, had originally agreed on. . . . And I left most of the legal verbiage in there. 993

Examination of Diane Brady [Wright] by Attorney Haakonsen:

Q: [*90] . . . [W]hen you went to Dr. Fremed you knew she wasn't a lawyer, right?

A: Yes.

Q: And did she tell you that also?

A: Yes. 994

Q: And what, if anything, did she tell you about legal advice?

A: . . . I remember her saying that a true mediator would not be an attorney because there were very different ways of thinking and approaching a divorce and how you get two parties to agree on things. She did mention that there are attorneys that are mediators that . . . play both roles. 995 But I chose a [non-lawyer] mediator because I did . . . [T]hese were a lot of inaccuracies in Attorney Flanagan's paperwork so I took it and I corrected it and put in what we, my ex-husband and I, had originally agreed on. . . . And I left most of the legal verbiage in there. 993

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Q: Did Resa tell you that she [*91] wasn't going to give you advice about what was in your best interest . . . in terms of the law?

A: In terms of the law, yes. 997 As her role, she stated in the very beginning that she was not privy, like partial, to either side of us. 998 . . . She said . . . I'm just here to help you guys along to figure out what it is that you need to decide on. And there were a lot of things that I hadn't thought about that Resa actually helped us to think about. And, in a way, I feel sorry for the other people that don't get a chance to sit with a mediator because there's a lot of things that go uncovered in the children's best interests. 999

*1282 Q: [*92] And at various points during your mediation, did she recommend to you that you consult with a lawyer about issues?
A: Yes, if there were things outside of the mediation agreement, like, that she had nothing to do with. Yes. And she . . . many times said, well, when this is all done you have to take it to an attorney and they will drop it into the legal form and then you can take it to the court . . . .

Q: . . . So when you were asking her questions in these emails, you weren't relying on her to give you legal advice, were you?

A: No.

Q: Did you consult with a lawyer?

A: Ah, there were several times that I spoke with . . . there was an attorney in Bethel that I dealt with. I was trying to get my ex-husband to sign a quit claim deed so there were a few times that I spoke with him regarding . . . my buying my ex-husband out of the home. And then there were a couple of times when I consulted my *1283 brother-in-law, who's an attorney, just on . . . other items.

Q: [*93] . . . At various times during the process, you did get legal advice from people . . . who were lawyers.

A: I did, but I never retained counsel.

Q: . . . But originally you did expect to retain counsel to draft an agreement.

A: Yes, but . . . only at the very end.

Q: . . . And you understood that that's what Resa expected you to do.

A: Yes.

Q: And all the documents that you filed in the court were prepared by you. Is that correct?

A: Yes. [Although] Barbara Flanagan did file some paperwork.

Q: . . . Earlier you mentioned that you hadn't actually finalized the amount of the child support that the child support guidelines required until the day that you went into court. Is that correct?

A: Yes.

Q: But it's true, isn't it, that you filled out the child support guideline worksheet a number of times before you went to court?

A: Many times.

Q: [*95] So during this time in October that you were . . . emailing . . . the Memorandum of Understanding back and forth with *1284 Resa, I noticed at one point she said that she couldn't really put in changes . . . when she didn't know whether or not your husband had agreed to them.

A: Right.
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Q: So was it your understanding that you were both . . . still involved in this process with her to try to clean up this memorandum?

A: . . . [A]t that point it was mostly on my shoulders to do it, to put it into a document because we were . . . if I'm not mistaken, that was just prior to when he retained his attorney. But then many things changed and he did retain the attorney and so then everything kind of went to her to do. [*96] . . . The changes that Resa said she couldn't put in without his approval, I don't think we ended up putting in. But there were things that when we took the agreement to court, were changed that day . . . when we sat down with the . . . special counsel . . . of the . . . Danbury Superior Court.

Q: [*98] [I]t would be fair to say that the things that she told you that she couldn't change without Keith [Wright]'s agreement, were more substantive things that would have actually changed the meaning of what you were agreeing on.

A: Yeah.

Attorney Molinaro: . . . There's two emails. One is October 26, 2004, at 20:18:22 p.m. . . . [A]bout a quarter of the way down it says: Hi Diana. . . . I was able to incorporate most of your changes. Paying Keith for his share of the house can't be done at time of refinance. It's too ambiguous. You may want to do this by the time of divorce. What happens if you refinance next week and give him his share? So long as there isn't an official divorce, he can change his mind and request a different amount. What did you think that meant?

A: . . . I had assumed that if he signed the quit [*99] claim deed that we presented to him with the attorney that I had talked to in Bethel, that I would buy the house out from him and that would be it. I didn't know . . . that there was a possibility that after the divorce he could go back after more proceeds. Like if I sold the house . . . for a lot of money, he could come back and say, well, I want half of that or a quarter of that or whatever[.]

*1285 Q: [W]ho did you learn that from[, that] that might be possible?

A: . . . [T]he attorney in Bethel . . . 1006 [W]e had actually . . . gone there with the . . . quit claim deed and the numbers that we agreed upon and my . . . ex-husband refused to do it that day . . . [P]rior to that, [I discussed it] back and forth with him . . . if he signs this, is it a done deal? And he actually said, no, it's not because I still needed to remove him from [*100] the title.

Q: . . . [W]as that your understanding after you received this email from Resa?

A: Ah, no. 1007 That was further clarified by the attorney in Bethel . . . [W]hen she mentioned this, it was kind of the first I had heard about it. 1008

Q: . . . So that wasn't something you raised, that was something that she raised.

A: Um, well I think it was based on the fact that I had wanted to put in certain wording regarding the refinance and that was something that she was saying she couldn't do because Keith hadn't been . . . involved in it and we hadn't refinanced yet either. 1009

Q: . . . The second one is [from the] same day . . . a bit later in the night. October 26, 2004, 20:32:01 p.m. The top says: Resa, I agree with you 100 percent. . . . [*101] Resa writes: Diana, I'm not a lawyer, 1010 but I think if you quit claim the deed and
give Keith his money you will [be the] exclusive owner of the home et cetera. So what was your understanding after receiving that email?

A: . . . I stated in here too that I had to check with the attorney that I know in Bethel, but I'm pretty sure [Keith] wouldn't be able to get any more money from the sale of the house if it gets sold in the future. . . . When it was explained to me from the attorney in Bethel, if I just sign the quit claim deed, then it didn't necessarily remove him from the rights to the home. . . . It's always helpful to have another opinion. A single mom working and having the two kids and never having to have gone through this before. . . . Resa was my point person. . . . She was the one that was helping us with the mediation and I had not retained counsel. But . . . when I needed to, I did ask for other people's opinions and I did check with other people before doing anything . . . even trying to sign the quit claim deed with an attorney in Bethel. . . . If I asked her things that I shouldn't have, that was my fault because I really didn't know who else to go to.

Attorney Haakonsen's Examination of Diane Brady [Wright] Continues:

Q: Looking back at that same email . . . where Resa says: I'm not a lawyer but . . . . Would it be fair to say that you took that as she's raising an issue? Hey, here's something you better check out?

A: Oh, absolutely. I think that's what she did throughout the whole process.

Q: So you didn't rely on her to tell you what exactly the law was going to do if you did a certain thing? In this case, how the law would apply to you if you got this quit claim?

A: No, you're correct. . . . I was agreeing with her that I do need to be sure and I have to follow up and do more homework and check on it.

Examination of Diane Brady [Wright] by Attorney Dubois:

Q: . . . It says page 1 of 1 [December 21st]: Hi Diana. Are you divorced yet? . . . And Dr. Fremed is talking about . . . post-majority educational support or something. . . . How did you understand what she was telling you here? as a friend? as a mediator? as a counselor?

A: I think that was just her professional opinion. . . . [Y]ou can see in the judgment . . . I didn't take that advice. . . . I was curious to see if anyone else had . . . done it before or . . . if it was the norm. Because sometimes you get pigeonholed into doing things just because the State says that this is our . . . template. . . . I thought . . . there [was] something that we could mutually agree upon that would benefit the children, that it would be in our best interest to do, whether it was a minimum for the State or not.

Q: Did you ask her for her advice on that issue?

A: I asked her . . . if it was common . . . [o]r if she had heard of it before.

Q: And then she shared her knowledge with you.

A: Yes.
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Attorney Molinaro: In the email preceding that, December 21st, 20:12:32 p.m., at the very end you say: Any ideas on how to go about this?

A: That was any ideas on how . . . to get him to put it in writing, because through the mediation process there were many things that he verbally agreed to but refused to put in writing. And I kept stumbling up against a wall because if it came from me, he wouldn't want to put it in writing. . . . [106] And I felt that maybe if it came from Resa, or if she had a suggestion of how to get him to put it in writing that . . . we could finalize it. So that was what I needed the ideas about because dealing with him was not always the easiest thing . . .

Attorney Haakonsen: [107] I just wanted to offer . . . for the benefit of the Committee, copies of the Alimony and Child Support Statutes. . . . [O]ne of the things that Judge Leheny got sort of exercised about was the parties' agreement about life insurance. [Resa] testified that she didn't give them any particular advice one way or the other, but I just want to note for the record that Judge Leheny was a little behind on the law. . . . [T]he statutes which were in effect at that time, say something different from what she told the parties she had the power to do. So to the extent that one might think that they had been misled [by] their mediator or their lawyer[s], for the record . . . my position is they hadn't [been]. [108] [T]here was some case law . . . where the Appellate Court . . . said, it's an error to order a party to . . . provide life insurance as security for support or alimony . . . unless you have evidence that . . . the insurance is available and the person can afford it. That case law was overturned by statute subsequent to that time . . . it was 2002, thereabouts. . . . [T]he statutes read that the court can order . . . life insurance, as security unless the party ordered to get the insurance proves that it's not available or it isn't affordable. . . . So, unfortunately, the Judge had that one wrong. So, just for the record, in case anybody should be wondering . . . [whether] this was a mistake somebody [made] in drafting this agreement, it wasn't.

Attorney Molinaro: [110] Dr. Fremed . . . you testified that you did not provide . . . the parties with a copy of the Memorandum of Understanding. . . . Yet we have emails here with various copies and versions of that document. Can you explain?

A: . . . I normally don't. . . . [M]aybe Diane was very persistent. And I knew it was going to . . . an attorney and she was correcting the “T” s and . . . maybe I did do that so that at least . . . the attorney would get some of what [Diane] wanted in there.

Q: [112] . . . [Y]ou indicated that questions like that [property and refinancing] might be deferred to . . . their attorney . . . and that . . . it would not be your practice to . . . make a specific recommendation. But it seems to me that in some of these emails you are making a specific recommendation about whether it's what to do or what not to . . .

A: It is not my practice. And . . . I guess I have to admit [that] she was pressing and . . . I succumbed to some of that. But I was saying in my [113] experience, I didn't view it as legal advice at all. . . . I viewed it as . . . some things . . . she should look at. . . . And I can say this under oath again and again, I assumed that she was consulting with an attorney because she [said] she discussed this with an attorney at different times. . . . I assumed she had. And I was just . . . alerting her to some options that she might have to look at with an attorney. . . . [T]here were so many times, I said check with an attorney, check with an attorney.

Closing Statement by Attorney Dubois:

[114] . . . [T]his is an area of law that I'm very unfamiliar with . . . had some questions with regard to how a mediator could engage in the process of mediation in an enterprise, which is not only in the shadow of the law, but very much driven by the law, and what would you do when you reach those turning points where you necessarily had to make the parties aware of legal choices that had consequences? (emphasis added) . . . I think this morning she did a very good job . . . of articulating the aspirational
ideals and the lines that mediators should draw between giving legal information as opposed to giving legal advice and helping the parties to identify the issues without helping them to understand which side is going to be advantaged here or there.

*1291 The emails, which came as a complete surprise, indicate that even the best and most highly qualified and credentialed mediator might sometimes cross the line inadvertently. And [that is what] appears to be going on here . . . . Well, I'm not a lawyer, but think about this. Now whether that amounts to the unauthorized practice of law, whether she's crossed that line and gone beyond what she should have done, that's going to be up for the Committee to decide.

. . . [A]t the end of the day, the question that I ha[ve] is, how do you operate in this field? And the answer, I guess, is carefully. Maybe you think it's within the . . . scope of reasonable conduct. It's up to the Committee. I'm not really taking a position . . . .

Closing Statement of Attorney Haakonsen:

[*116] Those [emails] are not the practice of law. That is exactly the kind of information that is regarded as incidental, part of the incidental exception [to the practice of law]. [Y]ou can't do family mediation or divorce mediation without presenting information about the statutes, without talking about the child support guidelines, without saying things like, you know, people come in and they say, oh, well . . . we're thinking about owning our house jointly for the next 20 years after we're divorced . . . would it be okay for a mediator to say, well you know, you could have a problem with that down the road because of . . . tax laws and those kind[s] of stuff. Is that legal advice? Does that make you practicing law?

I think the case law says that it doesn't because it says that, for example, an architect or an engineer is not practicing law if he gives his clients advice that, you have to have a fire escape here because the law requires it . . . . Well, that is applying facts to law--or law to facts. . . . But when that's an incidental part of the service that you offer, in this case mediating, helping people reach a mutual understanding on their disputes, that's a recognizable legal exception to the practice of law.

And you have to look at the entire [service] being offered. [From] Ms. [Brady Wright's] [*118] testimony, it's very clear she did not go seeking legal advice or representation from her mediator. She was seeking mediation. And she knew that if she needed legal advice, she needed to go see a lawyer. And when she came to a point where she needed legal advice, she went to a lawyer.

And, so, when she was testing out some of those issues with her mediator, she wasn't thinking that she was getting legal advice. [That's] another one of the tests [for the practice of law]. And the mediator told her from the very beginning on numerous occasions, I'm not a lawyer. I'm not giving you legal advice. You need to consult with a lawyer. I'm not drawing up legal documents for you.

I think the [record is] perfectly clear she didn't draw up legal documents. Ms. Brady [Wright] drew up all the documents they filed in court, herself. . . . [S]he took the agreement drafted by the lawyer and did whatever she did with it.

[*119] And during the process [the parties might tell the judge] we consulted with a mediator. And unfortunately, right away the judge . . . assum[es] that anything that's wrong with the agreement must be the fault of the mediator.

In this case the things that the judge was raising [as issues] appeared to have been things that either came from language inserted by the lawyer or were things that the parties changed themselves before going into court or had other origins other than the mediation.
And even if in the mediation some agreement is reached by the parties . . . which is legally problematic, that's exactly why the mediator advises the parties to get legal advice as this mediator did, orally and in writing, and more than once.

So [don't] pick out little parts of what happens in a mediation, a perfectly appropriate mediation and say, boy, that sounds like legal advice. That sounds like something that a lawyer does. . . . [T]hese things [ ] fall within that incidental-to-the-overall-other-job-that-your-doing exception. [*120] I mean, think about what accountants do. Accountants give advice all the time that has to do with law. They apply the law. . . . The entire Internal Revenue Code is law. They're not lawyers, but the law is incidental to what they do. And it's just as incidental to what mediators do.

And the three other cases involving non-lawyer mediators that this Committee has heard in the past, 1029 . . . in every one of those cases, there [were] things that . . . [you could say] look[ ] like something that's part of the definition of the practice of law. And in all of those cases the Statewide Grievance Committee has found that what they were doing was incidental to the job of mediating. . . . [W]hat Dr. Fremed did in this case is [no] different from [those cases]. 1030

Footnotes

a1 Associate Professor at the Appalachian School of Law. She teaches negotiation, mediation, and arbitration. For twenty years, she served as a commercial dispute litigator, mediator, and arbitrator. She earned her degrees from Washington University (B.A., J.D.) and from the University of Missouri-Columbia (LL.M.). She holds one of twelve positions on the Standing Committee on Mediator Ethical Guidance of the American Bar Association's Section of Dispute Resolution. She also serves as co-chair of the Ethics Advisory Opinions Database Subcommittee of the Standing Committee. At the state level, she sits as one of the five-members of the Virginia Mediator Review Committee. She also serves on Virginia's Dispute Resolution Services' Ethics Committee charged with revising the Virginia regulations governing the certification of mediators, the mediator code of ethics, and the mediator grievance procedures. She thanks Dean Wesley Shinn for the summer research grant that supported this research. She thanks Dr. Resa Fremed and Kate Haakonsen for their time, their stories, and the use of their names in this article. She thanks David Johnson, Jason Sorel, Brandy J.L. Roatsey, Matthew C. Freedman, Sean D. Kennally, and Ursula L. Walder for their comments and research assistance. Professor Young also thanks John W. Cooley, Geetha Ravindra, Gregory Firestone, John McCanmon, and Samuel Jackson for their comments to earlier drafts of the article. Professor Young is currently on inactive status as a lawyer in Missouri and the District of Columbia. She is not licensed to practice law in any other state. Accordingly, she provides general information in this article and she suggests that readers with particular Unauthorized Practice of Law (UPL) problems seek legal advice from independent legal counsel licensed to practice law in the reader's state.

1 Mark Twain, A Connecticut Yankee in King Arthur's Court (Barnes & Noble Classics 2005) (1889).

2 See generally id.


4 The author apologizes in advance for using the term nonlawyer-mediator in this article, which some mediators have labeled “pejorative.” Lemoine D. Pierce, Letter to the Editor, It's Time to Get Rid of the Term “Non-Lawyer,” Disp. Resol. Mag., Fall 1998, at 2; see also Ericka B. Gray, What's in a Name? A Lot When “Non-” Is Involved, 15 Negotiation J. 103, 103 (1999); David A. Hoffman, Is There a Niche for Lawyers in the Field of Mediation?, 15 Negotiation J. 107, 107-08 (1999) (“When the term ‘non-attorney’ is used scornfully or dismissively to describe these [mediation] colleagues, it is painful, and I stand shoulder-to-shoulder with Ericka [Gray] and other mediators who seek to end this invidious distinction.”).
Dr. Fremed granted the author the right to disclose her name and to discuss the facts of her disciplinary proceeding. Dr. Fremed waived her right to confidentiality and she made all the records of the proceeding available to the author. The author deeply appreciates Dr. Fremed's candor and courage.

A “kangaroo court” is “a mock court in which the principles of law and justice are disregarded or perverted [and] characterized by irresponsible, unauthorized, or irregular status or procedures.” Webster's Ninth New Collegiate Dictionary 657 (1985).

The Chief Office of Disciplinary Counsel called the consent judgment a “Stipulation.” See infra note 317 and accompanying text.


Id. (quotation marks omitted).

Id. at 78; see also Jacqueline M. Nolan-Haley, Lawyers, Non-lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective, 7 Harv. Negot. L. Rev. 235, 282-86 (2002) (advocating a “power-sharing and problem-solving” approach); David A. Hoffman & Natasha A. Affolder, Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution?, Disp. Resol. Mag., Winter 2000, at 20, 22-23 (asserting the need for greater clarity and uniformity in defining terms).

Cooley, supra note 8, at 74. Cooley makes the argument that the mediation field’s attempt to advise nonlawyer-mediators how to avoid engaging in the practice of law will lead to these negative affects on the field. Id. Obviously, application of the “law practice” paradigm in a specific situation involving a nonlawyer-mediator can have the same affect, only more directly.

Id. at 79.

For a discussion of a comprehensive regulatory system, see Paula M. Young, Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field, 21 Ohio St. J. on Disp. Resol. 721, 731-41 (2006) [hereinafter Young, Take It or Leave It].

A comprehensive regulatory system typically consists of several components. First, the regulatory system creates barriers of entry to the field consisting of several possible components: (a) training requirements that vary depending on the type of mediations the mediator intends to conduct, (b) ethics training, (c) moral character reviews, (d) minimum degree or professional license requirements, (e) written tests, and (f) performance-based testing or evaluation. The system may also grant official recognition that the mediator has passed these barriers to entry by certifying, registering, or rostering the mediator. The regulatory system may regulate or approve mediation training programs. The system may also require mediators who have successfully passed the barriers of entry to prove at a later date--through a recertification or re-registration process--that they are committed to the mediation field and to their skill development. The system may require continuing mediation education, including additional ethics training, or proof that the mediator has completed a specified number of mediations in a specified time period. The regulatory system may also support mediators by providing ethics information, encouraging compliance with aspirational ethics guidelines, creating a mandatory ethics code, and issuing ethics advisory opinions. The regulatory system may further provide rules or guidelines for interacting in the legal world on issues of mediation confidentiality, the unauthorized practice of law (UPL), and mediator immunity. It should offer public oversight through well-designed grievance systems. Finally, a comprehensively designed regulatory system will grant the state supreme court or its ADR administrator the power to sanction mediators for ethical violations or other misconduct. Those sanctions would at least include the ability to remove mediators from court-approved mediator rosters.

Id. (footnotes omitted).

E-mail from Kate W. Haakonsen, Partner, Brown, Paindiris & Scott, LLP, to author (Feb. 22, 2008, 10:40:00 EST) (on file with author).

Cooley, supra note 8, at 78.

His style supports party self-determination and concedes to the parties all substantive decisions about the outcome. Many people have called him the “father of modern mediation.” See, e.g., Australian Dispute Resolution, Mediation Training Tapes: Dr. John Haynes in Australia, http://www.ausdispute.unisa.edu.au/resources/trainingtapes.htm (last visited Apr. 13, 2008). He authored twelve books, primarily on family mediation. He was the “Founding President of the [United States] Academy of Family Mediators... and the first recipient of its Distinguished Contribution Award in 1989.” Id. He “trained over 20,000 professionals in more than twenty countries” and mediated over 5,000 cases in private practice. Id.

Connecticut does not have a court imposed minimum training requirement for mediators. E-mail from Kate W. Haakonsen to author, supra note 14; see also N. Va. Mediation Serv., United States Mediator Certification Standards: A Digest of State-Wide Requirements for Court Mediators 19 (Cindra Rehman & Richard Hayden eds., 2003) (available from the Northern Virginia Mediation Service, 4260 Chain Bridge Road, Suite A-2, Fairfax, VA 22030) (on file with author) (stating that “[o]nly senior judges and judge trial referees serve as mediators” and require only seven hours of training). Advertised mediation training programs typically offer forty hours of basic mediation training. See, e.g., Connecticut Mediation, Training Programs, http://www.connecticutmediation.com/training.htm (last visited Feb. 25, 2007); ABA Section of Dispute Resolution, ADR Training Providers by State, http://www.abanet.org/dispute/usa_training.pdf (last visited Apr. 6, 2008). Charles Pou, Jr. has created a “Mediator Quality Assurance Grid” which helps conceptualize the “prototypical” approaches to mediator training and other barriers to entering and staying in the field. Charles Pou, Jr., Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality, 2004 J. Disp. Resol. 303, 325 (2004). The five approaches are: (1) No hurdle/No maintenance; (2) High hurdle/Low maintenance; (3) High hurdle/High Maintenance; (4) Low hurdle/Low maintenance; and (5) Low hurdle/High maintenance. Id. He explains that a “high hurdle” or an initial barrier of entry to the field could include “many hours of training, experience, and/or observation” requirements. Id. It could also include minimum degree credentials, performance based reviews or tests, moral character reviews, and high application fees. “Low hurdles” are designed “to allow people with [little] training and experience to [enter the field].” Id. at 325-26. Maintenance requirements include continuing education, a minimum number of mediations completed since the initial entry into the field, periodic renewal of the mediator's certification, registration or roster status, and renewal fees. See id. at 326. The author would characterize Connecticut's approach to mediator regulation as Low hurdle/No maintenance.

Advanced Practitioner membership for the ACR Family Section requires at least two years of family mediation experience or a minimum of 250 hours of face-to-face mediation experience, sixty hours of family or divorce mediation training, two hours of domestic violence training, at least four hours of consultation with an ACR Advanced Practitioner member, a promise to complete “20 hours of continuing [mediation] training every two years,” and the payment of $55 for the designation fee and section dues. See Association for Conflict Resolution, ACR Family Section Advanced Practitioners, http://www.mediate.com/ACRFamily/docs/Family%20section%20AP%20Members.pdf (last visited Apr. 12, 2008).

In that capacity, she “signed off” on a form required by the courts prior to the divorce hearing. E-mail from Dr. Resa Fremed, Resa Fremed LLC, to author (Apr. 13, 2008, 19:08:00 EDT) (on file with author). Accordingly, she could provide information about parenting plans under most mediator ethics codes. She was competent to do so by virtue of her experience and training. See infra note 341.
The author would guess that the marketing brochures of most mediators are not so careful in highlighting the ongoing role of attorneys in the mediation process. The 2005 Model Standards require a mediator “where appropriate... [to] make the parties aware of the importance of consulting other professionals to help them make informed choices.” Model Standards of Conduct for Mediators Standard I.A.2 (2005), available at http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal. The aspirational ethics standards for family mediators provides that “[a] family mediator should inform the participants that they may seek information and advice from a variety of sources during the mediation process.” Model Standards of Practice for Family and Divorce Mediation Standard I.C (2000), available at http://www.afccnet.org/pdfs/modelstandards.pdf. Another standard requires the mediator to inform the parties before the mediation begins “that they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process.” Id. Standard III.A.4. It also requires the mediator to inform the parties that the presence or absence of other persons at a mediation, including attorneys, counselors or advocates, depends on the agreement of the participants and the mediator, unless a statute or regulation otherwise requires or the mediator believes that the presence of another person is required or may be beneficial because of a history of threat of violence or other serious coercive activity by a participant. Id. Standard III.A.7. Yet another standard provides: “The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.” Id. Standard VI.C.

The Florida rules require a mediator to refer parties to seek independent legal counsel “[w]hen a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations.” Fla. Rules for Certified and Court-Appointed Mediators R. 10.370(b) (2000), available at http://www.flcourts.org/gen_public/adr/bin/RulesforMediators.pdf. Another rule requires the mediator to “respect the role of other professional disciplines” and promote cooperation between professionals working with the parties. Id. R. 10.670.

Virginia contemplates referrals to both lawyer and non-lawyer experts, such as accountants, financial planners, or child psychologists. The Virginia Standards of Ethics (SOEs) provide: “The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant.” Standards of Ethics and Prof'l Responsibility for Certified Mediators § F(1) (Judicial Council of Va. 2005), available at http://www.courts.state.va.us/soe/soe.htm. The “four legals” highlight for parties the right to consult with legal counsel at any time in the process. See infra note 32. The discussion of the “parallel” paradigm of the “authorized practice of mediation” focuses on the two aspirational codes and the two mandatory codes indicated in this footnote, unless otherwise indicated.

Respondent's Hearing Brief, supra note 23, exhibit 2; see also agreement to mediate infra note 894.

Respondent's Hearing Brief, supra note 23, exhibit 2.

Id.

Id.

Telephone Interview with Dr. Resa Fremed, supra note 22. Virginia is unique in explicitly requiring a specific set of disclosures by the mediator in the opening statement and in the agreement to mediate. A portion of these disclosures is now known in Virginia as the “four legals.” Failure to make these disclosures serves as grounds for voiding the settlement agreement reached in mediation. See discussion of Va. Code Ann. § 8.01-576.12 (2007) infra note 898. Virginia's SOEs provide:

a) Prior to commencement of a court-referred mediation, the mediator shall inform the parties in writing of the following:
1. The mediator does not provide legal advice.
2. Any mediated agreement may affect the legal rights of the parties.
3. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.
4. Each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

b) In all other cases, the mediator shall inform the parties, orally or in writing, of the substance of the [disclosures required in (a) above]. Standards of Ethics and Prof'l Responsibility for Certified Mediators § D.2(a)-(b) (Judicial Council of Va. 2005) (emphasis added).

In contrast, the Divorce Model Standards suggest that mediators make certain disclosures before the mediation begins including the role of attorneys in the process. See Model Standards of Practice for Family and Divorce Mediation Standards III.A.4, 7 (2000).
Lawyer-mediators should also make clear that they do not represent any unrepresented parties in mediation as their legal counsel. Model Rules Of Prof'l Conduct R. 2.4(b) (2007) (discussing the role of lawyers serving as third-party neutrals).

Respondent's Hearing Brief, supra note 23, exhibit 3.


See id. at *92-93, *98-101.

Id. at *66, *87-88, *94.

Respondent's Hearing Brief, supra note 23, exhibit 3. Of the ten pages of the MOU, two pages related to the parenting plan. Another two pages related to other matters involving the children. The MOU does not address marital assets, liabilities, personal property, inheritance, taxes, wills, and the name change until pages eight and nine. See id.

See Disciplinary Proceeding Transcript, supra note 34, at *41-42.

Id. at *81, *94; see also Transcript of Divorce Hearing at 11, 15, Wright v. Wright, No. FA-04-04000315S (Conn. Super. Ct. Mar. 30, 2005) [hereinafter Divorce Transcript] (on file with author). Excerpts from this transcript appear at Appendix A to this article. The parties had prepared the child support calculation that appeared in the Separation Agreement presented to the court using guidelines and their own perception of their interests and needs. Id. at 7-11 (calculating their own child support numbers, speaking with the court's Family Relations office about them, and using the court's library to read about child support); see also Disciplinary Proceeding Transcript, supra note 34, at *25-26, *37-40.

Italics in the MOU indicated the parties' last attempt at agreement; items in regular text indicated items on which they had agreed. Disciplinary Proceeding Transcript, supra note 34, at *40-41, *51. The items still in italics on October 27, 2004, when Dr. Fremed faxed a copy of the MOU to Attorney Flanagan, included the amount of child support payable if the father returned to work; modification of child support in the future based on changed financial circumstances of the parents; the age at which either parent could make a claim against the estate of the other parent if life insurance had lapsed; the amount in the father's Vanguard fund; and the mortgage liability and sale of the marital home. Respondent's Hearing Brief, supra note 23, exhibit 3; Disciplinary Proceeding Transcript, supra note 34, at *32-33, *36, *51, *73.


Respondent's Hearing Brief, supra note 23, exhibits 3-5 (showing Dr. Fremed faxed the draft MOU to Attorney Flanagan on October 27, 2004); see also Disciplinary Proceeding Transcript, supra note 34, at *35, *51, *58, *68.

Respondent's Hearing Brief, supra note 23, exhibit 3; see also Robert D. Benjamin, A Critique of Mediation--Challenging Misconceptions, Assessing Risks and Weighing the Advantages, 146 Pittsburgh Legal J. 37, 38 (1998) (“For a mediator who is not an attorney, allowing [a] signature [on an MOU] is tantamount to the unauthorized practice of law....”).

Disciplinary Proceeding Transcript, supra note 34, at *60-64, *69-70, *88. She attached the parenting plan prepared by Dr. Fremed as Schedule A to the Separation Agreement after reviewing it. Id. at *62; see also Respondent's exhibit B, In re Fremed, No. UPL 05-002 (Conn. Statewide Grievance Committee Nov. 2, 2005) [hereinafter Flanagan Agreement] (on file with author) (agreement drafted by Attorney Flanagan). A comparison of the MOU, the Flanagan Agreement, and the Separation Agreement submitted by the Wrights in the divorce proceeding show that they are altogether different documents.

Compare Respondent's Hearing Brief, supra note 23, exhibit 3 (containing Dr. Fremed's original draft of the parenting plan), with Respondent's Hearing Brief, supra note 23, exhibit 8, schedule A (containing the portions of the MOU relating to the parenting agreement which appear as Schedule A to the Separation Agreement, as modified in handwriting by the Wrights).
Disciplinary Proceeding Transcript, supra note 34, at *59.


Paragraph 11 of the Separation Agreement provided in pertinent part: “The husband shall pay to the wife $176 per week for child support in accordance with the Connecticut Child Support Guidelines.... If said children should attend university away from home or move away from home once they turn nineteen (19) years of age then child support payments will cease.” Respondent's Hearing Brief, supra note 23, exhibit 8. The following handwriting appeared in this paragraph: “$176” and “31% of pay” with an arrow drawn to the amount of $176 along with the initials of both parties: “dbw” and “jkw.” Id.; see also Divorce Transcript, supra note 39, at 8, 11, 15, 22, 30-31.

The Chief Disciplinary Counsel further identified the child support issues as including “how child support was to be calculated, how unreimbursed medical and other child-related expenses would be allocated, [and] what reasons the parties wished the Court to find to justify deviations from the support guidelines on some issues.” Prehearing Memorandum of Disciplinary Counsel at 1, In re Fremed, No. UPL 05-002 (Conn. Statewide Grievance Committee Oct. 18, 2005) [hereinafter Disciplinary Counsel's Prehearing Memorandum] (on file with author); see also Divorce Transcript, supra note 39, at 24-25; id. at 31 (unreimbursed medical expenses); id. at 11-13 (child care costs). The court found that the allocation of unreimbursed medical expenses between the parents complied with Connecticut law. Id. at 31.

See Divorce Transcript, supra note 39, at 36-39.

Paragraph 14 of the Separation Agreement provided:

The husband and wife each agree that it is their intention to provide for each of the children for up to four (4) full academic years at an institution of higher education or a private occupational school for the purpose of obtaining a bachelors or other undergraduate degrees or other appropriate vocational instruction. The obligation of the husband and wife shall include room and board, dues, tuition, fees, books, registration and application costs and other related expenses incurred while attending college. Such expenses shall be estimated on the costs for attending the University of Connecticut for a full time in-state student. The obligation of the husband and wife is contingent upon the child maintaining good academic standing in accordance with the rules of the institution or school. The child shall make academic records available to both parents. At the appropriate time the husband and wife shall participate in and agree upon the decision as to which institution of higher education or private occupational school the child will attend. The court may make an order resolving the matter if the parents fail to reach agreement. The obligation of the parties under this provision shall terminate no later than the date on which the child attains the age of twenty-three (23) or upon graduation from the university of higher education or private vocational instruction. This provision is subject to modification or enforcement in the same manner as provided by law for any other child support order. The obligation of each parties [sic] shall be limited to a maximum of 50% of the aforementioned educational expenses for each child and said obligation shall be contingent upon the financial ability of each party to make such contributions at the time of each child's enrollment. The husband and wife shall each deposit ten ($10.00) dollars per week per child into an existing savings account established through US Alliance Federal Credit Union. The wife shall be the trustee of these accounts and the husband shall be the second trustee. At the appropriate time the children shall also apply for loans and/or
scholarships available. If either child does not go to college or a private vocational institution then all monies incurred shall remain in an established account for that child until they [sic] attain the age of thirty (30) years.

Respondent's Hearing Brief, supra note 23, exhibit 8.

53 See Divorce Transcript, supra note 39, at 37-38, 45-46. Paragraph 17 of the Separation Agreement provided:

The husband and wife shall each maintain unencumbered life insurance covering his/her life, naming each other as trustee for the minor children, the irrevocable beneficiaries thereof. In the event the policy holder has in excess of $250,000 then he/she may designate a portion of that policy equal to $250,000 to satisfy the obligation as outlined in this paragraph. This provision shall be effective until each minor reaches the age of twenty-one (21) at which point the wife/husband will terminate being the trustee and the policy will remain in the children's names, split equally between the children. Once the said children reach the ages of twenty-one (21) either parent has the option of removing the children's names from the said policies or terminating the policy completely. The husband and wife shall furnish each other with satisfactory evidence that these policies are in effect, on a yearly basis. In the event that said insurance shall not be maintained in effect at the time of the husband/wife's death, then the amount of the insurance specified above shall constitute a charge upon the estate, and indebtedness of the estate of the husband/wife in favor of the husband/wife, as trustee for the minor children. At present the wife has [$250,000/husband $150,000].

Respondent's Hearing Brief, supra note 23, exhibit 8.

54 Divorce Transcript, supra note 39, at 22, 42-43. The judge refered the parties to the court's Family Relations office “because all of these provisions are not necessarily spelled out.” Id. at 43. But the court entered the Separation Agreement as a court order later in the hearing without apparently giving the parties time to use Family Relations. Id. at 54-57.

55 See id. at 37-38, 42-43; see also Disciplinary Proceeding Transcript, supra note 34, at *35, *62.

56 The Bill of Rights for Children of Divorce provides:

(1) The right to express love for both parents; (2) The right not to be placed in the position of a message carrier; (3) The right not to be asked to be the family spy; (4) The right not to be told negative information about their parent or parent's family; (5) The right to remain connected to both parent's families; (6) The right not to be interrogated after a visit with the other parent; (7) The right not to be used as a weapon against the other parent; (8) The right to remain active in both parents' lives; (9) The right to express or not to express his or her own feelings; (10) The right not to be exposed to conflict with the other parent; (11) The right to a stable, safe environment; (12) The right to remain a child and not a parental confidant; (13) The right to be told about family changes, such as moving or visitation; (14) The right not to feel responsible for their parent's divorce; [and] (15) The right to be loved unconditionally.

Respondent's Hearing Brief, supra note 23, exhibit 8.

57 The Bill of Rights for Parent's [sic] Divorcing provides:

(1) A parent has the right to love and nurture one's child without harassment from the other parent; (2) A parent has the right to receive respect and courtesy and the obligation to show respect and courtesy; (3) A parent has the right to attend and participate in a child's special activities; (4) A parent has the right to information regarding a child's physical, mental and emotional health; (5) A parent has the right during parenting time to follow one's own standards, beliefs and style of child-rearing without interfer[ence] from the other parent; [and] (6) A parent has the right to a separate and private life.

Respondent's Hearing Brief, supra note 23, exhibit 8.

58 During the divorce hearing, Mrs. Wright attempted to invoke the “best interests of the child” to justify certain decisions the parties had made. The court advised her that: “That is not enough.” Divorce Transcript, supra note 39, at 12.

59 The lawyer for Dr. Fremed explained that parties appearing pro se often try to bolster the credibility of any agreement they present to the court for approval by claiming that a mediator has written all of it, whether the parties completed mediation or not. Dr. Fremed's lawyer--also a mediator--has taken a precautionary approach to this development by sending to parties only PDF copies of any draft agreements or summaries she prepares during the course of mediation. Telephone Interview with Kate W. Haakonsen, Partner, Brown, Paindiris & Scott, LLP, in Glastonbury, Conn. (Feb. 21, 2007). The PDF file preserves the fonts, images, graphics, and layout of the source document. Parties will then have more difficulty incorporating the mediator's draft language into a final agreement of their own making.
See Divorce Transcript, supra note 39, at 21-22, 37-38, 42-43.

Id. at 54 (“You have not... clarified for me--you've used the services of a mediator in Connecticut who is not an attorney but you are representing yourselves pro se. Do you believe that you understand the ramifications of this agreement?”).

See id. at 8, 11, 15, 22, 30-31 (child support), 36-39 (educational support order), 45-46 (life insurance).


A review of the Divorce Transcript quickly reveals the poor level of communication that existed between the judge and the parties. The judge did not engage in paraphrasing or summarizing, which may have quickly revealed the misunderstanding that led to the disciplinary referral. In fact, the judge interrupted the parties often and did not appear to be listening actively to their testimony. At one point, the judge accused Mrs. Wright of being rude. Divorce Transcript, supra note 39, at 12. A reading of the transcript quickly suggests that the judge felt frustrated and stymied by having to work with parties who appeared pro se. For example, the judge asked, “What are the reasons for the deviation?” Mr. Wright replied, “Oh. I'll pick 'B.' The parents' earning capacity.” Frustrated, the judge explained, “It's not—it's not a Chinese menu kind of thing.” Id. at 25. Because of her own ethical duty to remain impartial, she likely could not give either party legal advice. See, e.g., La Chase v. Sanders, 111 A.2d 690, 692 (Conn. 1955) (finding that judges should not, during a jury trial, reveal their opinion on the merits, express doubt regarding witnesses' credibility, or demonstrate bias to either side). This limitation seemed to serve as a source of frustration for Judge Vilardi-Leheny. She repeatedly told the parties she could not give them legal advice or tell them what to do. See Divorce Transcript, supra note 39, at 5, 8, 9, 10, 11, 36, 40.

Perhaps the busy judge could have called the mediator to learn what had transpired in the matter. However, without a thorough analysis of Connecticut's statute governing confidentiality in mediation, the author will not speculate about the mediator's ability to discuss with the judge mediation communications other than a signed final agreement, including an agreement that incorporated the mediator's draft work-product. For the text of the confidentiality statute, see infra note 161. Some states permit a mediator to breach confidentiality in certain circumstances relevant to this situation: (1) in a subsequent action between the mediator and a party for damages arising out of the mediation; or (2) when a party files an ethics complaint against the mediator. In those circumstances, communications will not be confidential to the “extent necessary for the complainant to prove misconduct” and for the mediator to defend against the complaint. See, e.g., Va. Code Ann. § 8.01-576.10(ii), (vi) (2007). These exceptions contemplate a subsequent malpractice or ethics proceeding. Accordingly, they would not have operated at the point when the trial judge needed more information about who had drafted the final version of the Separation Agreement and whether to request the Chief Disciplinary Counsel to begin an investigation into whether the mediator had engaged in UPL. Some states expressly limit the communications a mediator may have with a judge. For instance, Virginia allows the mediator to inform the court: (1) if the mediation occurred; (2) if the parties reached a settlement; (3) the terms of any settlement or partial settlement reached, so long as the terms are set forth in an order for signature by the court; (4) who attended the mediation; and (5) in the event the mediator withdraws because he or she can no longer remain impartial, the mediator may report his or her withdrawal. See id. § 8.01-576.9; Va. Rules of Prof'l Conduct R. 2.10(f) (2007). The Divorce Model Standards only mention discussions with the court in one context. A standard suggests that the mediator should inform the parties that “any agreements reached will be reviewed by the court when court approval is required.” Model Standards of Practice for Family and Divorce Mediation Standard III.A.3 (2000).

Telephone Interview with Dr. Resa Fremed, supra note 22.

Twain, supra note 1, at 36.


Id.


Id.

See Disciplinary Counsel's Prehearing Memorandum, supra note 50, at 2.

The author has not had the time to research whether the court rule takes precedent over the inconsistent statute. If not, the new rule may only protect mediators working on cases referred by the Superior Court. It may not protect mediators taking private referrals. In theory, they would need to comply with the statute and the cases interpreting it.


(a) General Definition: The practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person. This includes, but is not limited to:

(1) Holding oneself out in any manner as an attorney, lawyer, counselor, advisor or in any other capacity which directly or indirectly represents that such person is either (a) qualified or capable of performing or (b) is engaged in the business or activity of performing any act constituting the practice of law as herein defined.

(2) Giving advice or counsel to persons concerning or with respect to their legal rights or responsibilities or with regard to any matter involving the application of legal principles to rights, duties, obligations or liabilities.

(3) Drafting any legal document or agreement involving or affecting the legal rights of a person.

(4) Representing any person in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in any administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(5) Giving advice or counsel to any person, or representing or purporting to represent the interest of any person, in a transaction in which an interest in property is transferred where the advice or counsel, or the representation or purported representation, involves (a) the preparation, evaluation, or interpretation of documents related to such transaction or to implement such transaction or (b) the evaluation or interpretation of procedures to implement such transaction, where such transaction, documents, or procedures affect the legal rights, obligations, liabilities or interests of such person, and

(6) Engaging in any other act which may indicate an occurrence of the authorized practice of law in the State of Connecticut as established by case law, statute, ruling or other authority.

“Documents” includes, but is not limited to, contracts, deeds, easements, mortgages, notes, releases, satisfactions, leases, options, articles of incorporation and other corporate documents, articles of organization and other limited liability company documents, partnership agreements, affidavits, prenuptial agreements, wills, trusts, family settlement agreements, powers of attorney, notes and like or similar instruments; and pleadings and any other papers incident to legal actions and special proceedings.

The term “person” includes a natural person, corporation, company, partnership, firm, association, organization, society, labor union, business trust, trust, financial institution, governmental unit and any other group, organization or entity of any nature, unless the context otherwise dictates.

The term “Connecticut lawyer” means a natural person who has been duly admitted to practice law in this State and whose privilege to do so is then current and in good standing as an active member of the bar of this State.

(b) Exceptions. Whether or not it constitutes the practice of law, the following activities by any person are permitted:

(1) Selling legal document forms previously approved by a Connecticut lawyer in any format.

(2) Acting as a lay representative authorized by administrative agencies or in administrative hearings solely before such agency or hearing where:

(A) Such services are confined to representation before such forum or other conduct reasonably ancillary to such representation; and

(B) Such conduct is authorized by statute, or the special court, department or agency has adopted a rule expressly permitting and regulating such practice.

(3) Serving in a neutral capacity as a mediator, arbitrator, conciliator or facilitator.

(4) Participating in labor negotiations, arbitrations, or conciliations arising under collective bargaining rights or agreements.

(5) Providing clerical assistance to another to complete a form provided by a court for the protection from abuse, harassment and violence when no fee is charged to do so.

(6) Acting as a legislative lobbyist.

(7) Serving in a neutral capacity as a clerk or a court employee providing information to the public.

(8) Performing activities which are preempted by Federal law.
(9) Performing statutorily authorized services as real estate agent or broker licensed by the State of Connecticut.
(10) Preparing tax returns and performing any other statutorily authorized services as a certified public accountant, enrolled IRS agent, public accountant, public bookkeeper, or tax preparer.
(11) Performing such other activities as the courts of Connecticut have determined do not constitute the unlicensed or unauthorized practice of law.
(12) Undertaking pro se representation, or practicing law authorized by a limited license to practice.
(c) Nonlawyer Assistance: Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct.
(d) General Information: Nothing in this rule shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.
(e) Governmental Agencies: Nothing in this rule shall affect the ability of a governmental agency to carry out its responsibilities as provided by law.
(f) Professional Standards: Nothing in this rule shall be taken to define or affect standards for civil liability or professional responsibility.
(g) Unauthorized Practice: If a person who is not authorized to practice law is engaged in the practice of law, that person shall be subject to the civil and criminal penalties of this jurisdiction.

Id. § 2-44A (emphasis added). The Commentary to the new rule states: “This rule establishes a clear definition of the practice of law and thereby makes clear what is the unauthorized practice of law.” Id. § 2-44A cmt. However, with the inclusion of the language at subsection (a)(6), no one has notice of all the acts that could lead to a UPL disciplinary proceeding.

In fact, if he had known that the legislature contemplated this statutory change, it seems an abuse of prosecutorial discretion to have hauled Dr. Fremed through the disciplinary process, especially when he did not have the courage to take a position on whether she had violated the existing statute. He decided to refer the case to the Statewide Grievance Committee in August 2005. Letter from Mark A. Dubois, Chief Disciplinary Counsel, State of Conn. Judicial Branch, to Michael Bowler, Statewide Bar Counsel, Statewide Grievance Comm., State of Conn. Judicial Branch (Aug. 29, 2005) (on file with author).


Id. at 866.

Id. at 866-67.

Id. at 867.

Id.

Id.

Id. at 867-68.

Id. at 871.

Id. at 870 (emphasis added) (quotation marks omitted) (quoting Grievance Comm. of Bar of New Haven County v. Payne, 22 A.2d 623, 626 (Conn. 1941)) (interpreting Conn. Gen. Stat. §§ 1627c, 1628c (1949)). For a more in depth discussion of the history of the practice of law statutes, see Grievance Committee of the Bar of Fairfield County v. Dacey, 222 A.2d 339, 344-45 (Conn. 1966).
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89 Conn. Bank & Trust Co., 140 A.2d at 870.

90 Id. The addition of the word “manifold” in this description does not clarify the scope of the practice of law. One dictionary defines the word as “marked by diversity or variety.” Webster's Ninth New Collegiate Dictionary, supra note 6, at 724.

91 See infra note 450 and accompanying text.

92 Payne, 22 A.2d at 624.

93 Id. at 624-25.

94 Id. at 625 (citing Detroit Bar Ass'n v. Union Guardian Trust Co., 276 N.W. 365, 366-67 (Mich. 1937)).

95 Id. at 626.

96 Id. at 626-27.

97 Id. at 627.

98 See discussion of consumer protection rational for UPL restrictions infra notes 485-92 and accompanying text. This case illustrates courts' tendencies to claim in conclusory ways that the restrictions protect the public and that the UPL activities under consideration have harmed the recipients of the services. Courts rarely require actual proof of harm or proof that the layperson incompetently provided the services. Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, 33-35 (1981) (described as the “seminal work” on the UPL enforcement issue); Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 Yale L.J. 104, 113-14 (1976) [hereinafter Yale Divorce Research] (“[N]one of [the organized bar's] suits...has developed a record of more than minimal mishaps attributable to [divorce] lay assistants.”).

99 See infra notes 308-17 and accompanying text.


101 Id. at 1360 (advertised costs of each document omitted).

102 Id. at 1360-61.

103 Id. at 1361 (quotation marks omitted) (quoting Baron v. City of Los Angeles, 469 P.2d 353, 358 (Cal. 1970) and State Bar Ass'n of Conn. v. Conn. Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958)).

104 Id.


107 See Monroe, 820 F. Supp. at 684. “Despite the uncertainties of what constitutes the practice of law, vagueness challenges to UPL statutes have been routinely rejected.” Nolan-Haley, supra note 10, at 262.


109 Id. (quoting State v. Buyers Serv. Co., 357 S.E.2d 15, 17 (S.C. 1987)).

110 Id. (quoting Pulse v. N. Am. Land Title Co. of Mont., 707 P.2d 1105, 1109 (Mont. 1985)).
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111  Id. (citing Kennedy v. Bar Ass'n of Montgomery County, Inc., 561 A.2d 200, 208 (Md. 1989)). For a discussion of how other courts have handled the form and document drafting issue see infra note 577 and accompanying text.


113  Id. at 342-43.

114  Id. at 346.

115  Id. at 346-47.

116  Id. at 347 (emphasis added). This definition does not make clear whether all three conditions separated by the “and” emphasized in the sentence must exist to constitute legal advice. This test parallels the “relating law to specific facts” test. See infra note 451 and accompanying text.

117  Id. at 348-49.

118  Id. at 347.

119  Id.

120  Id. at 350.


122  Id. at 871; Dacey, 222 A.2d at 346; Statewide Grievance Comm. v. Patton, 683 A.2d 1359, 1361 (Conn. 1996); Monroe v. Horwitch, 820 F. Supp. 682, 686 (D. Conn. 1993), aff'd, 19 F.3d 9 (2d Cir. 1994).


124  Conn. Bank & Trust Co., 140 A.2d at 871.

125  Dacey, 222 A.2d at 347.

126  Id.

127  See infra note 451 and accompanying text.

128  Dacey, 222 A.2d at 347. For additional interpretation of this case law, see discussion in the CCDM Mediation Standards II (Conn. Council for Divorce Mediation & Collaborative Practice 2001), available at http://www.ctmediators.org/standards.htm. For a discussion of the “incidental services” exception, see infra notes 457-78 and accompanying text.

129  See In re Carney, No. UPL 98-021, at 1 (Conn. Statewide Grievance Committee 1999) (proposed decision) (on file with author). The Statewide Grievance Commission did not issue its final decision until January 11, 2001. See Letter from Daniel B. Horwitch, Statewide Bar Counsel, Statewide Grievance Comm., to Mary Ann Carney (Jan. 11, 2001) [hereinafter Carney SGC Decision] (on file with author). Accordingly, this respondent waited at least a year to learn that she would not be subject to the penalties imposed by the “practice of law” statute.

130  In re Carney, No. UPL 98-021, at 1.
131 Id. at 1-2.
132 Id. at 2.
133 Id. at 1-3.
134 Id. at 2.
135 Id. at 2-3.
136 Id. at 3. For a discussion of the Virginia UPL Guidelines, see infra notes 737-46, 778-99, 824-51 and accompanying text.
137 In re Carney, No. UPL 98-021, at 3.
138 Carney SGC Decision, supra note 129. In finding that divorce mediation was not the per se practice of law, the SGC may have concluded that divorce mediation did not fall within the “customary function” of lawyers. As noted infra notes 656, 664-65 and accompanying text, early leaders in the divorce mediation field did not hold law degrees. Instead, they tended to hold mental health degrees. Thus, as a matter of fact, divorce mediation had not been a “customary function” of lawyers, especially when practiced in a way that focused on normative values other than law.
139 Carney SGC Decision, supra note 129 (emphasis added).
140 This statement suggests that the Committee applied the “commonly understood” test for the practice of law. See infra note 450 and accompanying text.
141 This statement suggests that the Committee applied the “affecting legal rights” test for the practice of law. See infra note 449 and accompanying text.
142 The reference to the “core work of mediation” may have found its source in the CCDM Mediation Standards, discussed infra notes 770-74, 817-22, 873-79 and accompanying text. Standard 1 identifies the “core activities of mediation” as “helping people communicate, problem-solve and negotiate effectively.” CCDM Mediation Standards I (Conn. Council for Divorce Mediation & Collaborative Practice 2001) (emphasis added). It is impossible to know exactly how the SGC or Reviewing Committee contemplated that a mediator would perform these activities without identifying issues. In addition, the author of this article cannot understand how a nonlawyer-mediator could possibly know what this limitation meant and how to modify her behavior to comply with it.
143 Again, how would a nonlawyer-mediator know what this instruction meant and how to comply with it?
144 Carney SGC Decision, supra note 129. The record shows that Dr. Fremed followed this limitation. See supra notes 23-33, infra notes 950-53 and accompanying text.
145 The mediation field talks in terms of the “core values” of mediation. For a discussion of the core values of mediation, see Carol L. Izumi & Homer C. La Rue, Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent, 2003 J. Disp. Resol. 67, 86 (2003). The authors argue:
The three core values of self-determination, mediator neutrality, and confidentiality are interdependent qualities that define mediation as it was originally envisioned and gave rise to the promise of mediation as a distinct alternative to adjudication. These values are integral to the legitimacy of mediation as a consensual, flexible, creative, party-driven process to resolve disputes.
Id.; see also infra note 566.
146 In re Strong, No. UPL 99-008 (Conn. Statewide Grievance Committee 2000) (proposed decision) (on file with author).
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148 In re Strong, No. UPL 99-008, at 1.
149 Id. at 1-2.
150 Id. at 2.
151 Id.; see also Judicial Branch, State of Conn., Do It Yourself Divorce Guide 44 (2005), available at http://www.jud.ct.gov/Publications/ FM179.pdf (“A trained mediator can help you and your spouse reach an agreement on major issues, including property division, child custody, child support payments, and a visitation (or parenting time) schedule.”).
152 In re Strong, No. UPL 99-008, at 2.
153 Id.
154 Id. For the first time, the Reviewing Committee clearly articulated those specific activities that constitute the practice of law and attempted to tie them to more specific definitions of the practice of law. See infra notes 417-21 and accompanying text.
155 In re Strong, No. UPL 99-008, at 2.
156 Id.; see also State Bar Ass’n of Conn. v. Conn. Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958).
158 Id. (emphasis added).
159 For a discussion of the “incidental activities” or “incidental services” exception, see infra notes 457-78 and accompanying text.
160 In re Strong, No. UPL 99-008, at 3. Without saying so, the Reviewing Committee may have recognized that the courts providing this information (1) targeted parties who would likely appear pro se in court, and (2) had not regulated which mediators--lawyer or non-lawyer--could participate in court-connected mediation. See supra note 13, infra note 643 and accompanying text.
161 In re Strong, No. UPL 99-008, at 3. The confidentiality statute provides:
(b) Except as provided in this section, by agreement of the parties or in furtherance of settlement discussions, a person not affiliated with either party to a lawsuit, an attorney for one of the parties or any other participant in a mediation shall not voluntarily disclose or, through discovery or compulsory process, be required to disclose any oral or written communication received or obtained during the course of a mediation, unless (1) each of the parties agrees in writing to such disclosure, (2) the disclosure is necessary to enforce a written agreement that came out of the mediation, (3) the disclosure is required by statute or regulation, or by any court, after notice to all parties to the mediation, or (4) the disclosure is required as a result of circumstances in which a court finds that the interest of justice outweighs the need for confidentiality, consistent with the principles of law.
(c) Any disclosure made in violation of any provision of this section shall not be admissible in any proceeding.
(d) Nothing in this section shall prevent (1) the discovery or admissibility of any evidence that is otherwise discoverable merely because such evidence was presented during the course of the mediation, or (2) the disclosure of information for research or educational purposes done in cooperation with dispute resolution programs provided the parties and specific issues in controversy are not identifiable.
162 In re Strong, No. UPL 99-008, at 3 (referring to Am. Bar Ass’n Section of Dispute Resolution, Resolution Calling for the Inclusion of People from Multiple Professions in Court-Connected Mediation Programs (Apr. 28, 1999), available at http://www.abanet.org/dispute/webspolicy.html). The text of the resolution appears infra note 688.
163 In re Strong, No. UPL 99-008, at 3.

Id. (emphasis added). In making this statement, the SGC seems more directly to apply the “incidental services” exception.

Id. See discussion supra notes 142–45 about the inability of a nonlawyer-mediator to understand two of the three cautions.


In re Decker, No. UPL 99-015, at 1.

Id.

Id.

Id.; see also Divorce Mediation Model, Conn. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 35 (1988) (“Divorce mediation is a useful service that attorneys frequently are capable of performing and, with proper precautions, are authorized to perform under prevailing standards of professional conduct.”).

In re Decker, No. UPL 99-015, at 2 (emphasis added).


Id.

Carney SGC Decision, supra note 129, at 1 (emphasis added).

Id.


Strong SGC Decision, supra note 164 (emphasis added).

Id.; In re Strong, No. UPL 99-008, at 1-2.


Carney SGC Decision, supra note 129, at 1; Strong SGC Decision, supra note 164.

In re Strong, No. UPL 99-008, at 1-2.

Yale Divorce Research, supra note 98, at 105, 116-17.

Id. at 105.

Id. at 105, 117.
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Id. at 121.

Id. at 122.

Id. at 106, 115.

Id. at 115.

See id. at 141-44, 148-49; see also Andrea Kupfer Schneider & Nancy Mills, What Family Lawyers Are Really Doing When They Negotiate, 44 Fam. Ct. Rev. 612, 613, 616 tbl.4 (2006) (finding that the percentage of adversarial lawyers has increased from 27% to 36% over a twenty-five year period, with 24.6% of family lawyers characterized as “ethically adversarial” and another 14.8% of family lawyers characterized as “unethically adversarial”).

Yale Divorce Research, supra note 98, at 148. “Twenty-three percent of questionnaire respondents, and 32.7% of those handling more than 10 divorces for plaintiffs per year, phrased their responses specifically in terms of advocacy of their client’s position, as opposed to an equitable adjustment between the parties.” Id. at 149 (footnotes omitted).

Id. at 161 n.224.

Id. at 141 tbl.4.

Id.

Id. at 156 tbl.8. The authors called this wait a “particularly wasteful expenditure[] of attorney time, given the perfunctory character of the actual hearing[].” Id. at 156 n.210.

Id. at 146 n.165.

Id. at 154 n.200.

Id. at 123-24, 127.

Id. at 126-28.

Id. at 126. About 62% of pro se parties also filed their claim for hearing within 120 days after the complaint; lawyers handling the files moved as expeditiously in only 27.4% of the cases they handled. Id. at 126 n.91.

Id. at 126-27 & n.97.

Id. at 127.

Id. at 134.

Id. at 137. Many attorneys used several double-spaced pages waiving “Marital Rights” that would not likely benefit parties if one person died in the time between the signing of the separation agreement and the entry of the divorce decree. On average, thirty days elapsed during this interval in the divorces studied. Id. at 137 n.140. One attorney drafted a seventeen-page agreement using form clauses for a “couple with no children, no alimony payments, and no specified property or deeds to divide.” Id. at 137 n.142. Sixty-four percent of the separation agreements directed or recorded the transfer by quit claim of one spouse’s interest in real property. The remaining agreements required a sale of the property and a division of the proceeds. Id. at 135 n.134. This data suggests that divorcing parties use quit claim deeds frequently to resolve real property issues and that they are one of two primary options available to the parties. Accordingly, a competent mediator, like Dr. Fremed, would likely understand the general implications of both options as part of his or her training or experience. See discussion supra notes 16-22 and accompanying text.

Yale Divorce Research, supra note 98, at 127.

Id. at 127 & nn.102-03.
208 Id. at 128.

209 Id.

210 Id. at 124 n.84, 128 (pro se parties misspelled “irretrievable breakdown”; one pro se party used the wrong size of paper; another pro se party had to retype his complaint when he omitted a mandatory datum).

211 Id. at 128.

212 Id.

213 Id. at 138.

214 Id. at 156. UPL enforcement of the lawyer monopoly over those tasks made lawyers appear as “overcompensated clerks.” Id. This monopoly may contribute to the poor reputation of divorce lawyers. See id. See also Rhode, supra note 98, at 40 (citing belief that lawyers are “self-protective, monopolistic, or greedy,” and charge “exorbitant” fees).

215 Yale Divorce Research, supra note 98, at 141 tbl.4.

216 Id. at 138-39.

217 Id. at 139. The study also showed that 79% of the interviewed clients in cases handled by lawyers got no tax advice. Id. Six interviewees said they had to consult accountants for that advice. Id. at 140. Only 5% of surveyed lawyers identified tax advice as one of the most important functions in uncontested divorces. Id. at 141 tbl.4. Lawyers infrequently manipulated the settlements in a way to gain a tax advantage. Id. at 139 n.151. The study found no correlation between the giving of that advice and the need for it given the issues raised in the divorce. Id. at 139-40. To have received tax advice from the lawyers, parties had to have had children, owned a home, and had joint annual income in excess of $15,000. Id. at 140 n.154 & tbl. F. Even then, only when all three traits were present did the number of couples receiving tax advice exceed one third. Id.

218 Id. at 138. The authors note that to the extent the argument rests on “the insertion of extra detail into decrees and separation agreements,... only 25.7% of the lawyer-initiated files contained decrees or agreements which included one or more of the following: (a) provision for life insurance; (b) detailed visitation rights; (c) imposition of responsibility for financing education of minor children; (d) detailed allocation of personal property; [or] (e) detailed division of debts.” Id. at 138-39.

219 Id. at 141 tbl.4. As the authors point out, no one has a professional claim on negotiating, with many courts relying on court-connected lay domestic relations officers to help parties negotiate elements of the divorce process. In 1974-75, Connecticut courts referred 1,764 contested matters to these officers. Id. at 146 & n.168. Connecticut, at the time, empowered them to “attempt the reconciliation and adjustment of differences between the parties to dissolution of marriage and legal separation proceedings, particularly when there are minor children involved.” Conn. Practice Book § 398(e) (1975). Obviously, courts increasingly use mediators for this purpose today. In 2007, Tennessee passed legislation requiring courts to refer all cases of divorce or separate maintenance to mediation, unless a court finds domestic abuse within the marriage. Pub. 519 Tenn. Code Ann. § 36-4-131 (2007). The instruction booklet that accompanies one divorce kit identifies twenty-five states that offer or require mediation in the divorce context. See Everything You Need to File for Divorce: Instruction Booklet 6-7 (2005).

220 Yale Divorce Research, supra note 98, at 141 tbl.4. This data suggests that the mediation and mental health professionals could claim that lawyers have engaged in the unauthorized practice of mediation or the unauthorized practice of psychiatry, psychology, or social work! In 1970, the ABA Code of Professional Responsibility prohibited the few lawyers trained in mental health care to indicate that training on their business cards. They could not list themselves as “Marriage and Family Counselors” in the Yellow Pages if they also listed themselves as “attorneys.” Id. at 152 n.189. In addition, the Yale study authors noted that “numerous commentators have observed [that] legal training does not provide adequate preparation for personal counseling.” Id. at 152. They suggested that by allowing parties to use lay specialists and divorce kits, parties could better afford to get the mental health counseling they needed. Id. at 153. The study authors also noted that attorneys rarely referred clients to counseling professionals. Id. at 153 n.192. Only one surveyed attorney identified it as a lawyer’s most important function. Id. In contrast, mediator ethics codes require mediators to
refer parties to other professionals when the mediator is not competent by training or experience to provide the needed advice. See discussion supra note 27 and infra note 341 and accompanying text.

221 Yale Divorce Research, supra note 98, at 152.

222 Id. at 116.

223 Id. at 130.

224 Id. at 140. One commentator quoted S. Schoonmaker, Chairman of the Connecticut Bar Association's Family Law Section, as reporting opposition by divorce lawyers to the change to no-fault divorce in the state. These lawyers believed the change “would ‘dry up this business’ by permitting potential clients to divorce themselves.” Id. at 108 n.16 (quoting Michael Wheeler, No-Fault Divorce 124 (1974)). Lawyers have a significant interest in the pro se mediation divorce controversy. In 2004, 10,300 people were divorced in Connecticut. U.S. Census Bureau, Statistical Abstract of the United States: 2006 tbl.117 (2006), http://www.census.gov/prod/2005pubs/06statab/vitstat.pdf.

225 Yale Divorce Research, supra note 98, at 165.

226 Id. at 165 & n.240.

227 Id. at 166 & n.243 (mentioning the systems in Denmark, Norway, Iceland, Sweden and Japan); Rhode, supra note 98, at 89-90 & n.367 (describing systems in France and Great Britain); id. at 6 n.16 (noting the system in Great Britain).

228 Yale Divorce Research, supra note 98, at 166.

229 Twain, supra note 1, at 24.

230 Letter from Mark A. Dubois to Michael Bowler, supra note 76 (emphasis added). This letter indicates that the Chief Disciplinary Counsel may have already pre-judged the issues and may have referred the matter as a test case in response to the comments of the then-Chief Justice. See id. Unfortunately, neither the bar nor the Connecticut Supreme Court published the decision against Dr. Fremed. Accordingly, it would have little educational or precedential value, except to the extent that it became the subject of this article. Connecticut has a new Chief Justice, who may have played a role in the adoption of the new Superior Court rule that exempts mediators from the definition of the practice of law. See E-mail from Kate W. Haakonsen to author, supra note 14.

231 Letter from Mark Dubois to Michael Bowler, supra note 76. The author notes that the original concerns of Judge Vilardi-Leheny and of the Chief Disciplinary Counsel related to the drafting activities of Dr. Fremed. Id. Arguably, the scope of the disciplinary proceeding expanded without proper notice to Dr. Fremed. See infra notes 300-06 and accompanying text.

232 Telephone Interview with Dr. Resa Fremed, supra note 22; see CCDM Mediation Standards (Conn. Council for Divorce Mediation & Collaborative Practice 2001).

233 CCDM Mediation Standards (providing aspirational guidelines for members of the organization). Section 51-88 of the Connecticut General Statutes prohibits the practice of law by persons who are not attorneys admitted to practice in Connecticut. The statute provides the following sanctions:

(b) Any person who violates any provision of this section shall be fined not more than two hundred and fifty dollars or imprisoned not more than two months or both. ...(c) Any person who violates any provision of this section shall be deemed in contempt of court, and the Superior Court shall have jurisdiction in equity upon the petition of any member of the bar of this state in good standing or upon its own motion to restrain such violation.


234 Telephone Interview with Dr. Resa Fremed, supra note 22.

235 Id.
See infra notes 564-73 and accompanying text (discussing ACR’s October 2006 affirmation of its earlier statement on UPL in the mediation context).

See Paula M. Young, Insurance Coverage for Mediator Malpractice, Ethics Grievance, and UPL Claims: Are You Aware that You are Going Bare? or There’s No There There passim (March 11, 2008) (unpublished manuscript, on file with South Texas Law Review) [hereinafter Young, Going Bare] (examining malpractice insurance coverage available to lawyers, psychologists, family therapists, social workers, and mediators for claims arising from their mediation practices).

Letter from Michael Bowler, Statewide Bar Counsel, Statewide Grievance Comm., State of Conn. Jud. Branch, to Administrative Judge, Official Reporter, Attorneys Tracie Molinaro and Margarita Moore, Mr. William Murphy, and Attorney Kate Haakonsen (Oct. 3, 2005) (on file with author). Molinaro, Moore, and Murphy served as the members of the Reviewing Committee of the Statewide Grievance Committee. Molinaro and Murphy attended the disciplinary hearing. Moore participated in the Proposed Decision after apparently reading the transcript of the hearing. See discussion infra note 939 and accompanying text.

Instructions for pending Unauthorized Practice of Law Hearing (Rev. 10.05) (on file with author).

The parties could request additional time for the hearing on the scheduled day or on a second hearing day. Id.

Disciplinary Counsel’s Prehearing Memorandum, supra note 50. Exhibit A to the brief consisted of the transcript of the Wright's divorce hearing held before Judge Vilardi-Leheny. See Divorce Transcript, supra note 39. An abridged version of that hearing transcript appears at Appendix A to this article. Exhibit B to the Prehearing Memorandum consisted of the three SGC decisions and the Reviewing Committee Proposed Decisions in the Carney, Strong and Decker proceedings. Exhibit C consisted of e-mails from other states’ UPL regulators. See infra notes 249-55 and accompanying text. Exhibit D consisted of the Colorado UPL Guidelines. See infra note 758-62, 807-12, & 852-66 and accompanying text.

Disciplinary Counsel’s Prehearing Memorandum, supra note 50, at 2.

Id. at 3.

Id. Even at the end of Dr. Fremed’s disciplinary hearing, the Chief Disciplinary Counsel did not take a position on the case. Based on the statement in this brief, one could infer that he did not think he had proved by “clear and convincing” evidence that Dr. Fremed had violated the UPL statute. See discussion infra note 1024 and accompanying text; Disciplinary Proceeding Transcript, supra note 34, at *115-16.

Disciplinary Counsel’s Prehearing Memorandum, supra note 50, at 2 (quoting State Bar Ass’n of Conn. v. Conn. Bank & Trust Co., 140 A.2d 863, 870-71 (Conn. 1958)).

Id. at 2 (quoting Conn. Bank, 140 A.2d at 871 (quoting Grievance Comm. v. Payne, 22 A.2d 623, 626 (Conn. 1941))).

Disciplinary Counsel’s Prehearing Memorandum, supra note 50, exhibit c, at 1 (reproducing E-mail from Melvin Hirshman, Md. Bar Counsel, to Mark Dubois, Chief Disciplinary Counsel, Court Operations Div., State of Conn.-Judicial Branch (Sept. 27, 2005, 15:25:00 EST)) (advising: “In Maryland non-lawyers can mediate but can't give legal advice. However, they might reduce to writing what the parties agree to without any input as to legality.”).

Id. exhibit c, at 2 (reproducing E-mail from Katherine Fox, Gen. Counsel, Utah State Bar, to Mark Dubois, Chief Disciplinary Counsel, Court Operations Div., State of Conn.-Judicial Branch (Sept. 26, 2005, 17:38:00 MST)) (advising: The Utah Supreme Court just approved a new Authorization to Practice Law rule [Rule 1.0] which addresses your question. Link is http:// www.utcourts.gov/resources/rules/ucja/ch13a/htm. Heretofore, we have just had UPL policies based largely on limited case law. The bottom line now expressly set forth in the new rule is that while non-lawyer mediators may assist parties in divorce
proceedings and draft a “memo of understanding,” non-lawyers are not permitted to draft pleadings to implement the agreed upon settlement nor may they give legal advice.

Having said that, there is a related current hot controversy brewing about a new ethics opinion addressing the role of a lawyer representing parties in divorce mediations and whether the mediator lawyer can draft pleadings for BOTH parties evidencing the mediated agreement. Ethics opinions say “no” for obvious conflict of interest prohibitions but there were dissenters on the ethics opinion committee and our governing board is asking our court to take a look at it.).

251 Id. exhibit c, at 6 (reproducing E-mail from Stark Ligon, Executive Dir. of the Ark. Supreme Court Comm. on Prof'l Conduct, to Mark Dubois, Chief Disciplinary Counsel, Court Operations Div., State of Conn.-Judicial Branch (Sept. 26, 2005, 16:02:00 CST)) (advising: [M]any non-lawyers are certified by our AR State ADR Commission in the family law area, even in court-annexed mediations, and as far as I can tell that includes the authority to prepare mediation agreements that include legal issues such as property division and issues touching child custody, support and visitation. I know of mediations where the attorneys for the parties send their clients to the mediation session without the attorneys - did some as a mediator myself in the past. I assume the client has the option to review any proposed agreement with counsel, probably by telephone, before signing off at the mediation. I do not think we have ever looked at this as UPL.).

252 Id. exhibit c, at 7 (reproducing E-mail from Jonathan Coughlan, Disciplinary Counsel for the Supreme Court of Ohio, to Mark Dubois, Chief Disciplinary Counsel, Court Operations Div., State of Conn.-Judicial Branch (Sept. 26, 2005, 15:59:00 EST)) (advising: “In Ohio, non lawyers can mediate divorce cases. They can not give legal advice nor draft agreements. I tell lawyer mediators the same thing - no legal advice and no drafting of agreements. No Ohio law on this that I know of.”). 

253 Id. exhibit c, at 8 (reproducing E-mail from Don Lundberg, Exec. Sec. of the Ind. Supreme Court Disciplinary Comm'n, to Mark Dubois, Chief Disciplinary Counsel, Court Operations Division, State of Conn.-Judicial Branch (Sept. 26, 2005, 16:11:00 EST)) (advising: “Same with Indiana. [Nonlawyers may mediate family law matters.] But the troublesome aspect of the case is where the non-lawyer mediator prepares legal docs for the parties to submit to the court. We're struggling with this right now.”). 

254 Id. exhibit c, at 9 (reproducing E-mail from Terri Costonis, Staff Member, Bd. of Prof'l Responsibility of the S. Ct. of Tenn., to Mark Dubois, Chief Disciplinary Counsel, Court Operations Division, State of Conn.-Judicial Branch (Sept. 26, 2005, 16:36:00 EST)) (advising: Tennessee has 3 formal ethics opinions on this issue (attached) [83-F-039, 85-F-098, & 90-F-124], but they are not very recent. The last two do permit some non-lawyer mediation. Our bar association is in the process of determining the ongoing validity of old Formal Ethics Opinions like those above, which were decided when Tennessee followed the old model Code, as opposed to now when we have a version of the Model Rules. Our Supreme Court rule on such mediation also permits non-lawyers to become qualified to perform this service: www.tsc.state.tn.us/opinions/tsc/rules/TNrulesofcourt/06supct25_end.htm#31.). For a discussion of the three opinions mentioned in this e-mail, see infra note 450.

255 Id. exhibit c, at 10 (reproducing E-mail from Lori S. Holcomb, Dir. of the Fla. Bar's Unlicensed Practice of Law Dept't, to Mark Dubois, Chief Disciplinary Counsel, Court Operations Division, State of Conn.-Judicial Branch (Sept. 26, 2005, 16:02:00 EST)) (advising: “Florida does not have any case law on the subject but has taken the same position. Under Florida's rules for certified court-appointed mediators, a mediator in a family law matter does not have to be an attorney.”). 

256 The e-mail request assumes facts later proved in error. Dr. Fremed had not drafted the Separation Agreement submitted by the Wrights to the court. In addition, it fails to make a distinction between MOUs, which the mediator does not intend the parties to submit to court, and separation agreements, court forms, and pleadings which the parties intend to submit to court. The inquiry simply refers to “agreements.”

257 Id. exhibit c, at 1-10 (reproducing E-mail from Mark Dubois, Chief Disciplinary Counsel, Court Operations Division, State of Conn.-Judicial Branch, to recipients identified supra notes 249-55). The inquiry assumes that Dr. Fremed drafted the Separation Agreement the parties submitted to the court. The testimony at the hearing proved she had drafted the Parenting Plan attached as Appendix A, which Mr. Wright's lawyer, Barbara Flanagan, then reviewed, adopted, and attached to her draft of the Separation Agreement. Thus, [Dubois's] inquiry improperly framed the question and likely affected the kinds of responses he received to his e-mail.
See discussion supra notes 249-50 & 252.

See discussion supra notes 249?51.

See discussion supra notes 252?53.

Disciplinary Counsel's Prehearing Memorandum, supra note 50, at 2. A canvas of seven bar counsel hardly constitutes a “trend.” Moreover, the question to which they responded gave rise to some ambiguity in their responses.

Alternative Dispute Resolution Section, Colo. Bar Ass'n, Recommended Guidelines Regarding Unauthorized Practice of Law Issues in Mediation (2005) [hereinafter Colorado UPL Guidelines].

Instead, the Chief Disciplinary Counsel attached them as an exhibit and referred to them as evidence of a national trend indicating that a mediator “should not prepare documents for filing with the court, and may not give legal advice.” Disciplinary Counsel's Prehearing Memorandum, supra note 50, at 3. As noted supra notes 30 & 32?33, and infra notes 953 & 962?65, and accompanying text, Dr. Fremed did not draft any documents “for filing with the court.”


See discussion infra notes 753?57, 800?06 & 867?68 and accompanying text.


Respondent's Hearing Brief, supra note 23, at 5. This statement still defines the issues very broadly.

Respondent's Hearing Brief, supra note 23, at 7.

Id.


Model Standards of Practice for Family and Divorce Mediation (2000). The ABA House of Delegates, the Association of Family Courts and Community Professionals, and the Association for Conflict Resolution approved the Divorce Model Standards. Id. CCDM links people visiting its website to these standards of ethics, probably because CCDM, the Connecticut courts, or mediation program directors in the state have not developed their own set of aspirational or mandatory ethics standards for mediators. See http://www.ctmediators.org/standards.htm.

Respondent's Hearing Brief, supra note 23, at 8?9. See Am. Bar Ass'n, Compendium of Professional Responsibility Rules and Standards, R. 1.6 22 (2007) (requiring confidentiality of client information). The annotated transcript appearing as Appendix B to this article highlights other aspects of the mediator's distinct role. See also Disciplinary Proceeding Transcript, supra note 34, at *13-14 & *17-18 and accompanying footnotes.

This article briefly discusses these tests infra notes 451?52. Haakonsen apparently had no hope that the Reviewing Committee could or would apply the more narrow “attorney-client relationship” test for UPL. Few states have adopted the “client-relationship” test for UPL, and then most often in the context of court appearances. See discussion infra note 453.

Respondent's Hearing Brief, supra note 23, exhibit 1 (including Yellow Page advertising and marketing brochure). See discussion supra notes 23?33 and accompanying text.

At the time she made this statement, the e-mails, which became the first basis for finding she had practiced law without a license, had not been admitted to the record and no one knew they existed. See Disciplinary Proceeding Transcript, supra note 34, at *83?87.
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278 Id.


281 Respondent's Hearing Brief, supra note 23, at 14. In applying the “parallel” paradigm in the UPL context, mediators must still conform to prevailing norms of mediator ethics. Haakonsen did not make this additional point.

282 Id. at 16.

283 Id. at 15-16.

284 The referenced standards provide:
Family and divorce mediation (“family mediation” or “mediation”) is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.
Model Standards of Practice for Family and Divorce Mediation Overview and Definitions (2000).

285 Respondent's Hearing Brief, supra note 23, exhibit 1. The advertisement consisted of the name of her business, its address, and her phone number.

286 Id.

287 Id. exhibit 2.

288 Id.

289 Id. exhibit 3.

290 Id. exhibit 4.

291 Id. exhibit 5.

292 Id. exhibit 6. Haakonsen cited these standards in her brief for the purpose of asserting that the roles of a lawyer and mediator are distinct. Id. at 6-8. She did not further highlight those distinctions.

293 Id. exhibit 7. Haakonsen referred in the Respondent's Hearing Brief only to the definition of mediation found in these standards. Id. at 14-15.

294 Id. exhibit 8.

295 See discussion supra notes 45, 54, 59 and accompanying text. See also Disciplinary Proceeding Transcript, supra note 34, at *62.
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296  See discussion supra note 56.

297  See discussion supra note 57.

298  Respondent's Hearing Brief, supra note 23, at exhibit 9 (defining mediation). See discussion supra note 161 and accompanying text.

299  See discussion infra notes 937-1030 and accompanying text.


301  Id. at 27 (reproducing E-mail from Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation, to Diana Brady Wright, Certified Meeting Prof'l, Global Event Mgmt (Oct. 26, 2004).

302  Id. (reproducing E-mail from Diane Brady Wright, Certified Meeting Prof'l, Global Event Mgmt, to Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation (Oct. 26, 2004, 20:18:22 PDT).

303  Id. at 38 (reproducing E-mail from Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation, to Diana Brady Wright, Certified Meeting Prof'l, Global Event Mgmt (Oct. 26, 2004), introduced as Disciplinary Counsel's Hearing exhibit 1, supra note 300, at 38.

304  Id. at 38 (reproducing E-mail from Diane Brady Wright, Certified Meeting Prof'l, Global Event Mgmt, to Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation (Oct. 26, 2004, 20:32:01 PDT).

305  Id. at 40 (reproducing E-mail from Diana Brady Wright, Certified Meeting Prof'l, Global Event Mgmt, to Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation (Dec. 21, 2004, 20:12:32 PST).

306  Id. at 41 (reproducing E-mail from Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation, to Diana Brady Wright, Certified Meeting Prof'l, Global Event Mgmt (Dec. 21, 2004).

307  Twain, supra note 1, at 177.


309  Id. at 1. For a discussion of the e-mail, see Disciplinary Proceeding Transcript, supra note 34, at *87, and discussion infra at notes 338-91 and accompanying text.

310  Proposed Decision, In re Fremed, No. UPL 05-002, at 1. For a discussion of the e-mail, see Disciplinary Proceeding Transcript, supra note 34, at *87, and infra text accompanying notes 392-93.

311  Proposed Decision, In re Fremed, No. UPL 05-002, at 1.

312  Id. at 2.

313  Id. (quoting Statewide Grievance Comm. v. Patton, 683 A.2d 1359, 1361 (Conn. 1996)).

314  Id. (quoting Patton, 683 A.2d at 1361 (quoting State Bar Ass'n v. Conn. Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958))).

315  Id. at 2 (quoting Patton, 683 A.2d at 1361 (quoting Conn. Bank, 140 A.2d at 870)).

316  Id. at 2. But unlike the decisions in Carney and Strong, and like the decision in Decker, the SGC did not give a cautionary reminder that she “take steps to limit [her] written summaries and mediation discussions to the core work of mediation, to take steps not to practice law, and to inform [her] customers that they should seek the assistance of an attorney.” Strong SGC Decision, supra note 164, at 1-2.


Letter from Kate W. Haakonsen to Maureen A. Horgan, supra note 319, at 2. See also discussion infra note 341.

Letter from Kate W. Haakonsen to Maureen A. Horgan, supra note 319, at 2. The testimony about attorney Flanagan's role in the process at this time in the divorce process remains unclear. She testified that she had had her last conversation with Dr. Fremed in December 2004, that Mr. Wright did not renew his retainer on December 23, 2004, that she last worked on the file that same day, and that Mr. Wright terminated her representation of him on January 25, 2005, when he paid his final bill. Disciplinary Proceeding Transcript, supra note 34, at *58-59.

Id. at 2. See also discussion infra note 341.

Id. at 2. See also discussion infra note 341.

Id. at 2.

Id. at 2.

Id. at 2. See also discussion infra note 341.

Id. at 2. See also discussion infra note 341.

Id. at 2. See also discussion infra note 341.

Id. at 2. See also discussion infra note 341.

E-mail from Kate W. Haakonsen, Partner, Brown, Paindiris & Scott, LLP, to author (Feb. 15, 2008, 13.32:00 EST) (on file with author). The introduction to the record of these e-mails raises due process issues.


Disciplinary Proceeding Transcript, supra note 34, at *83-87.

Disciplinary Proceeding Transcript, supra note 34, at *85.

Disciplinary Proceeding Transcript, supra note 34, at *83-87.


Id. at 177-78.

Twain, supra note 1, at 177-78.

Disciplinary Proceeding Transcript, supra note 34, at *99-102.

Divorce Transcript, supra note 39, at 21.

In applying the “authorized practice of mediation” paradigm, this analysis relies primarily on two aspirational codes of ethics and two mandatory state codes of ethics. See Model Standards of Conduct for Mediators (2005); Model Standards of Practice for Family and Divorce Mediation (2000); Fla. Rules for Certified and Court-Appointed Mediators (2000); Standards of Ethics and Prof'l Responsibility for Certified Mediators (Judicial Council of Va. 2005).

Disciplinary Proceeding Transcript, supra note 34.
See discussion supra note 205 and accompanying text for the use of quitclaim deeds by divorcing parties.

Disciplinary Proceeding Transcript, supra note 34, at *104-06. Judge Vilardi-Leheny also understood the distinction between legal advice and legal information. See Divorce Transcript, supra note 39, at 27 (“You are without counsel here. I cannot tell you what the law is, but I've pointed you to the portion of the booklet relating to child support deviations.”) Most mediator ethics codes limit the ability of a mediator to give legal advice. They also often constrain the circumstances in which mediators can provide legal information. These ethical limitations arise out of a concern that offering advice or information can change the dynamic of the negotiations between the parties. The advice or information may favor one of the parties. It therefore presents the risk that it will undermine party self-determination or affect the parties’ perception of the mediator’s impartiality, implicating two of the three core values of mediation. See discussion supra note 145 about the core values of mediation. The 2005 Model Standards provide as follows:

The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

Model Standards of Conduct for Mediators Standard VI.A.5 (2005). Another standard defines party self-determination as “the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”

Id. Standard I.A. However, the standards caution that “[a] mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.”

Id. Standard I.A.2. The Divorce Model Standards describe the mediator as “an impartial facilitator... [who] may not impose or force any settlement on the parties.” See Model Standards of Practice for Family and Divorce Mediation Standard III.A.1 (2000). They also provide that a “mediator shall not provide therapy or legal advice.”

Id. Standard VI.B. However, a mediator “should facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging the participants to consult appropriate experts.”

Id. Standard VI.A. Another standard allows the mediator to give “information that the mediator is qualified by training or experience to provide” so long as that act is consistent with standards governing self-determination and mediator impartiality. Id. Standard VI.B. The Florida Standards of Conduct provide:

(a) Providing Information: Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.

(b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.

(c) Personal or Professional Opinion. 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. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. 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.

Fla. Rules for Certified and Court-Appointed Mediators R. 10.370(a)-(c) (2000). The Committee Notes to this rule state: The primary role of the mediator is to facilitate a process which will provide the parties an opportunity to resolve all or part of a dispute by agreement if they choose to do so. A mediator may assist in that endeavor by providing relevant information or helping the parties obtain such information from other sources... While a mediator has no duty to specifically advise a party as to the legal ramifications or consequences of a proposed agreement, there is a duty for the mediator to advise the parties of the importance of understanding such matters and giving them the opportunity to seek such advice if they desire.

Id. R.10.370 committee's note. The Florida rules make the mediator “responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination.” Id. R. 10.310(a). The Committee Notes to this rule state:

On occasion, a mediator may be requested by the parties to serve as a decision-maker. If the mediator decides to serve in such a capacity, compliance with this request results in a change in the dispute resolution process impacting self-determination, impartiality, confidentiality, and other ethical standards. Before providing decision-making services, therefore, the mediator shall ensure that all parties understand and consent to those changes.

Id. R. 10.310(a) committee's. note. See also Lela P. Love & John W. Cooley, The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwarny, 21 Ohio St. J. On Disp. Resol. 45, 58 (2005) (describing the dangers to the core values of mediation from mediator evaluations). Finally, the Florida rules provide that “[a] mediator shall respect the role of other professional

Virginia's Standards of Ethics and Professional Responsibility for Certified Mediators provide:
1. The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant. 2. A mediator shall give information only in those areas where qualified by training or experience. 3. When providing information, the mediator shall do so in a manner that will neither affect the parties' perception of the mediator's impartiality, nor the parties' self-determination.

Standards of Ethics and Prof'l Responsibility for Certified Mediators § F (Judicial Council of Va. 2005) (emphasis added). The Virginia Ethics Committee, on which the author of this article serves, is currently revising these standards. Accordingly, provisions cited in this article may be different by the time of its publication. See also Supreme Court of Va., Virginia Court Rules and Procedure, sec II. Va. Rules of Prof'l. Conduct R. 2.10(b)(2) & cmt. 3 (2008) (similar language). A Virginia Supreme Court rule, however, gives lawyer-mediators more flexibility in their roles:
(c) A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent.... (d) A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.

Id. R. 2.11(c)-(d) (emphasis added). Taken together, the Virginia Rules of Professional Conduct and the Virginia SOEs prevent a mediator from offering legal advice, but allow a mediator to provide information in specific contexts. They authorize a lawyer-mediator to provide legal information under certain conditions and to provide at least three types of case evaluation, subject to the constraints of maintaining impartiality and party self-determination. Id. R. 2.11(c)-(d) & cmt. 7.

As discussed elsewhere in the article, Dr. Fremed had the experience and training to discuss quitclaim deeds as a potential option for handling marital property. See discussion supra notes 19-22 and accompanying text.

Cooley, supra note 8, at 73-74.


Id. at *92-93, *99-101.

Id. at *100, 102.

Id. at 113.

Standards of Ethics and Prof'l Responsibility for Certified Mediators § J (Judicial Council of Va. 2005). Every mediator ethics code has provisions governing party self-determination. Many expressly preclude actions by mediators that have a coercive or undue influence on party decision-making. The 2005 Model Standards define self-determination as “the act of coming to a voluntary, uncoerced decision.” Model Standards of Conduct for Mediators Standard I.A (2005). The standard further provides that a mediator “shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.” Id. Standard I.B. The Divorce Model Standards describe self-determination as a “fundamental principle of family mediation” and supports parties in making “voluntary and informed decisions.” Model Standards of Practice for Family and Divorce Mediation Standard I.A (2000). The Florida rules instruct that a mediator “shall not make substantive decisions for any party.” Fla. Rules for Certified and Court-Appointed Mediators R. 10.310(a) (2000). Another provision sates: “A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation.” Id. R. 10.310(b). Additionally: “A mediator must not substitute the judgment of the mediator for the judgment of the parties, coerce or compel a party to make a decision,... or in any other way impair or interfere with the parties' right of self-determination.... Special care should be taken to preserve the party's right to self-determination if the mediator provides input to the mediation process.” Id. R. 10.310(b) committee's note. The Virginia SOEs provide: “The mediator may not coerce a party into an agreement, and shall not make decisions for any party to the mediation process.” Standards of Ethics and Prof'l Responsibility for Certified Mediators § E.3 (Judicial Council of Va. 2005). Every mediator ethics code requires the mediator to ensure he or she remains impartial and free of bias towards or against a party to the mediation. See, e.g., Model Standards of Conduct for Mediators Standards II & III (2005); Fla. Rules for Certified and Court-Appointed Mediators R. 10.330 & 10.340 (2000);

Standards of Ethics and Prof'l Responsibility for Certified Mediators § J (Judicial Council of Va. 2005).

Standards of Prof'l Conduct for Mediators Standard V.B (N.C. Supreme Court 1998), available at http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Default.asp (providing mandatory standards for certified and non-certified mediators participating in the superior court Mediated Settlement Conference Program, the district court Family Financial Settlement Program, or the Pre-litigation Farm Nuisance Mediation Program). Several ethics codes envision the mediator's role as “maximizing the exploration of alternatives or options.” See discussion supra note 284 and infra notes 607, 642 and accompanying text.


See discussion infra note 570.

Disciplinary Proceeding Transcript, supra note 34, at *102.


Model Standards of Practice for Family and Divorce Mediation Overview and Definitions (2000).

Id. Standard VIII.A.


Id. R. 10.310. See discussion supra note 341 of the committee's note to this rule.

Standards of Ethics and Prof'l Responsibility for Certified Mediators § D.1 & cmt (Judicial Council of Va. 2005).

Id. The mediation process typically consists of the following stages: (1) initiation of the mediation process, including the execution of the agreement to mediate; (2) pre-mediation submissions and briefs; (3) pre-mediation conference or phone calls; (4) the mediation session consisting of (a) the mediator's orientation, (b) the remarks or stories of the parties, (c) additional information gathering, (d) the expression and acknowledgment of emotions, (e) the identification of issues, interests, and impediments to agreement, (f) the formulation of an agenda, (g) overcoming impediments to settlement, (h) generating options for settlement; (i) assessing and selecting options for settlement, and (j) concluding the session, including a signed mediated agreement, an agreement to use another ADR process, an agreement to return to litigation, or identification of the additional steps parties must take to resume negotiation or settlement discussions; and (5) post-session tasks, including (a) court filings, (b) payments due under the mediated agreement, and (c) other performance due under the mediated agreement. See Harold I. Abramson, Mediation Representation 74-82 (2004).


Ala. Code of Ethics for Mediators art. I (providing guidelines for all mediators, but serving as a basis for removal from the mediator roster maintained by the Alabama Center for Dispute Resolution); Requirements for the Conduct of Mediation and Mediators art. II.C (Ark. Alternative Dispute Resolution Comm'n 2001), available at http://courts.state.ar.us/pdf/0516_conduct.pdf (applying to all mediators included on the Arkansas ADR Commission Roster of Mediators and may serve as a basis for disqualification from roster; Commission recommends other mediators adhere to the requirements); Standards of Prof'l Conduct for Mediators pmbl. (N.C. Supreme Court 1998); Tenn. Standards of Prof'l Conduct for Rule 31 Neutrals § 1(b), reprinted in Rules of the Supreme Court R. 31 app. A (2007) (providing mandatory standards for Rule 31 ADR proceedings and neutrals serving pursuant to Rule 31; does not affect ADR neutral practice in private sector).
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364 See discussion infra note 568.


367 Id. R. 10.370(c) committee's note.

368 Id. R. 10.370(b).

369 Id. R. 10.370(c).


372 Id. § V.C.

373 See discussion infra note 568.

374 See discussion infra note 569.

375 See discussion infra note 570.


378 Id. at *90-92 & *102-03.

379 Id. at *90-92 & *102.

380 Id. at *92 & *101-03.

381 Id. at *101-02.

382 Id. at *92-93 & *99-103.


384 “Have you considered getting legal advice about deducting the value of the note from Angel's share of the estate? How do you think a judge might view a signed note compared to a recollection of a verbal statement?” Id. at 12.

385 “Did you understand Angel's point about honoring the representations and intentions of your father? Do you appreciate that Martin is more persuaded by a signed note than by your report about a statement made many years ago?” Id.

386 “Angel is not liable on her adult daughter's promissory note. The testator's granddaughter will probably be found liable on the written promissory note despite parole evidence to the contrary.” Id.

387 “You will not win this case in court. You have a very slim chance of prevailing with that argument.” Id.

388 Id.

389 Id. at 12-13.

390 Id. at 13.
Cooley, supra note 8, at 74. Cooley makes the argument that the attempt of the mediation field to advise nonlawyer-mediators how to avoid engaging in the practice of law will lead to these negative affects on the field. Id. Obviously, application of the “law practice” paradigm in a specific situation involving a nonlawyer-mediator can have the same affect, only more directly.

See discussion supra note 341.

Disciplinary Proceeding Transcript, supra note 34, at *44.


See discussion infra note 568.

Id.

See discussion infra note 569.


Id. § D.1.d cmt. (emphasis added).


Id. R. 10.420(c) committee notes.

Id. R. 10.370 committee notes.


The mediation field should establish legislation and court rules that define and protect the drafting role of mediators. Otherwise, the UPL statutes, rules, and court decisions, most of which preclude any type of drafting if it involves “legal instruments,” make nonlawyer-mediators vulnerable to UPL charges. See discussion, infra notes 417-21 and accompanying text.

See discussion infra notes 800, 827 and accompanying text.
For a list of statutes, court rules, and case law defining the practice of law, see Am. Bar Ass'n Task Force on the Model Definition of the Practice of Law, State Definitions of the Practice of Law app. A (2003), available at www.abanet.org/cpr/model-def/model_def_statutes.pdf. The author has updated the list of statutes and court rules identified in Appendix A, but she has not updated the list of cases. See discussion infra notes 418-20. See generally 7 C.J.S. Attorney & Client § 29 (2004 & Supp. 2007) (discussing the effects of unauthorized practice of law as to proceedings and transactions); R.E. Heinselman, Annotation, What Amounts to Practice of Law, 111 A.L.R. 19 (1937) (detailing various interpretations of what constitutes the unauthorized practice of law); S.C.S., Annotation, What Amounts to Practice of Law, 125 A.L.R. 1173 (1940) (supplementing 111 A.L.R. 19).

See, e.g., Ark. Bar Ass'n v. Block, 323 S.W.2d 912, 914 (Ark. 1959) (stating that it is impossible to define the “practice of law” and requiring a case-by-case analysis of facts); Fought & Co. v. Steel Eng'g & Erection, Inc., 951 P.2d 487, 495 (Haw. 1998) (defining UPL as “fruitless,” but explaining that courts will focus on acts that affect the legal rights of another party, such as legal advice, document drafting, and other services); Bd. of Overseers of the Bar v. Mangan, 763 A.2d 1189, 1193 (Me. 2001) (admitting that statutes never defined “practice of law” or UPL and requiring a case-by-case analysis; finding that other courts have identified prohibited activities as including preparing documents, giving legal advice, or “the application of legal principles to problems of any complexity”); Cardinal v. Merrill Lynch Realty/Burnet, Inc., 433 N.W.2d 864, 867 (Minn. 1988) (admitting no precise line exists between authorized acts and UPL; conceding that other persons can do many acts done by lawyers every day “without wrongful invasion of the lawyers' field”); Pulse v. N. Am. Land Title Co. of Mont., 707 P.2d 1105, 1109 (Mont. 1985) (finding no clear definition); State ex rel. Johnson v. Childs, 23 N.W.2d 720, 723 (Neb. 1946) (stating that the power to define UPL is lodged with the court, finding that an all inclusive definition is too difficult to fashion, and determining violations on a case-by-case basis by considering “whether the defendant purported to exercise the legal training, experience and skill of an attorney”); In re Opinion 33, 733 A.2d 478, 484-86 (N.J. 1999) (determining on a case-by-case practical, rather than theoretical, basis whether acts are UPL by weighing the public interest in competing public policies and conditioning permitted conduct in a way to protect the public interest); State v. Niska, 380 N.W.2d 646, 648 (N.D. 1986) (finding no inclusive definition); Or. State Bar v. Sec. Escrows, Inc., 377 P.2d 334, 337-40 (Or. 1962) (finding no statutory definition; requiring a case-by-case analysis; prohibiting person from drafting or selecting documents, giving legal advice when “informed or trained discretion must be exercised in the selection or drafting of a document to meet the needs of the persons being served,” and “any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties”); Bd. of Comm'r's v. Petersen, 937 P.2d 1263, 1267-68 (Utah 1997) (requiring a case-by-case determination).

See, e.g., Ga. Code Ann. § 5-19-51 (2005) (prohibiting a person from “render[ing] legal services of any kind in actions or proceedings of any nature”); Ind. Code Ann. § 33-43-2-1 (West 2004) (prohibiting a person from engaging “in the business of a practicing lawyer”); N.H. Rev. Stat. Ann. § 311:7 (LexisNexis 2005) (“No person shall be permitted commonly to practice as an attorney in court unless he has been admitted by the court and taken the oath....”); R.I. Gen. Laws § 11-27-2 (2002) (prohibiting a person from “doing of any act for another person usually done by attorneys at law in the course of their profession” or preparing or drafting “any instrument which requires legal knowledge and capacity and is usually prepared by attorneys”); Tex. Gov't Code Ann. § 81.101 (Vernon 2005) (prohibiting a person from rendering any service “requiring the use of legal skill or knowledge” or preparing “instrument[s], the legal effect of which under the facts and conclusions involved must be carefully determined”); N.H. Sup. Ct. R. 35 cmt. 1 (stating there is no all-inclusive definition, but explaining that former ethical consideration suggested that the practice of law “relates to the rendition of services for others that call for the professional judgment of a lawyer... [and] [t]he essence of the professional judgment of a lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client”); Wash. Gen. Application Ct. R. 24 (prohibiting a person from “app[lying]... legal principles and judgment with regard to the circumstances...[and]...[h]is educated ability to relate the general body and philosophy of law to a specific legal problem of a client”).
or objectives of another entity or person[] which require[s] the knowledge and skill of a person trained in the law”); State Bar Ass’n v. Conn. Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958) (applying the “customary function” test discussed infra note 450 and accompanying text); Cont’l Cas. Co. v. Cuda, 715 N.E.2d 663, 668-69 (Ill. App. Ct. 1999) (prohibiting a person from giving advice or services when it requires the use of legal knowledge or skill); Iowa Sup. Ct. Comm’n v. Sturgeon, 635 N.W.2d 679, 681-82 (Iowa 2001) (finding a nonexclusive definition which precludes at least court appearances, legal advice, preparing legal instruments, and any time services call for “professional judgment of a lawyer” or when person needs “to relate the general body and philosophy of law to a specific legal problem of a client”); Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408, 412 ( Nev. 1958) (“The actual practices of the community have an important bearing on the scope of the practice of law.”); In re Jackman, 761 A.2d 1103, 1106 (N.J. 2000) (“One is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required.”); Childe, 23 N.W.2d at 723 (stating that power to define UPL is lodged in court who should consider whether the “defendant purported to exercise the legal training, experience and skill of an attorney”); R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 416, 419-20 (Okla. 1972) (prohibiting a person from “the rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent”; declining to list specific acts that constitute practice of law); Sec. Escrows, Inc., 377 P.2d at 339 (finding no definition in statute, requiring a case-by-case analysis, and prohibiting a person from drafting or selecting documents, giving legal advice when “informed or trained discretion must be exercised in the selection or drafting of a document to meet the needs of the persons being served,” and “any exercise[ing] intelligent choice, or an informed discretion in advising another of his legal rights and duties”); Petersen, 937 P.2d at 1267-68 (prohibiting a person from providing services requiring the “knowledge and application of legal principles to serve the interest of another”; concluding that payment of a fee for the services makes it more likely that the acts constitute the practice of law).

420 Ala. Code § 34-3-6(b) (LexisNexis 2007) (prohibiting a person from representing someone as an advocate, drawing papers, pleadings, or documents, or performing any act in a tribunal that settles or determines controversies; prohibiting a person from, for consideration, giving legal advice or counsel or drawing a paper, document, or instrument affecting or relating to legal rights; for consideration, securing rights or redressing wrongs for another person; as a vocation, “enforce[ing], secur[ing], settl[ing], adjust[ing] or compromis[ing] default[ed], controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense”; prohibiting a person from drafting deeds, conveyances, or mortgages); Alaska Stat. § 08.08.230 (1999) (referring to Alaskan Bar Rules); Ga. Code Ann. § 5-19-50 (2005) (prohibiting a person from appearing in court on behalf of another, preparing pleadings, conveying, preparing legal instruments “of all kinds,” giving title opinions, giving legal advice, or serving “for others in any matter connected with the law”); Kan. Stat. Ann. § 33-43-2-1 (1995) (prohibiting a person from professing to be a practicing attorney, conducting the trial of a case, and engaging in the business of a practicing lawyer); La. Rev. Stat. Ann. § 37:212(A) (2007) (prohibiting a person from making court appearances, drafting pleadings, giving legal advice, drafting documents, redressing a wrong or enforcing a right for another, or giving title opinions); Md. Code Ann., Bus. Occ. & Prof. § 10-101(h) (LexisNexis 2004) (prohibiting a person from giving legal advice, representing another before a unit of state government, advising the administration of probate of an estate, preparing real estate title instruments, preparing or helping to prepare any form or document filed in court, giving advice about a filed court case, or “performing any other service that the Court of Appeals defines as practicing law”); Miss. Code Ann. § 73-3-55 (LexisNexis 2004 & Supp. 2007) (prohibiting a person from writing or dictating any pleading for a fee, giving legal advice, writing or dictating bills of sale, deeds, wills, or certificates of abstract of title); Mo. Ann. Stat. § 484.010 (West 2004) (prohibiting a person from appearing in court as an advocate, drafting papers, pleadings, or other documents in connection with any body having authority to settle controversies, giving advice for valuable consideration, drafting documents or instruments that affect legal rights for valuable consideration, or securing property rights for another for valuable consideration); N.C. Gen. Stat. § 84-2.1 (2007) (prohibiting a person from performing any legal service with or without compensation, including, but not limited to, the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, preparing or aiding in the preparation of probate petitions or orders, abstracting or giving opinions on titles, drafting or filing petitions in judicial tribunals, “assisting by advice,” or giving opinions about legal rights; but list does not limit what could fall within the general definition of the practice of law); N.M. Stat. Ann. § 36-2-27 (LexisNexis Supp. 2001) (prohibiting unlicensed person from practicing law in a court or in commence, conducting, or defending an action, or holding him- or herself out as a lawyer); N.Y. Judiciary Law § 476-a (McKinney 2005) (cross-referencing the criminal code without further delineation of the prohibited acts; “any other act forbidden by law”; noting that certain acts are punishable by criminal contempt without further delineation); R.I. Gen. Laws § 11-27-2 (2002) (prohibiting a person from appearing in court or other tribunal, giving advice, “acting as a representative or on behalf of another person to commence, settle, compromise, adjust, or dispose of any civil or criminal case,” preparing or drafting a will, codicil, corporate-related documents, or “any instrument which
requires legal knowledge and capacity and is usually prepared by attorneys’); Tenn. Code Ann. § 23-3-101 (Supp. 2007) (prohibiting a person from, for valuable consideration, giving legal advice, drafting, procuring, or assisting in drafting any paper, document, or instrument affecting a person’s legal rights, or “the doing of any act... in a representative capacity,” or securing any property rights for another person, appearing as an advocate before any body having the authority to settle controversies, drafting pleadings or other court related documents, or soliciting clients to provide those services); Tex. Gov’t Code Ann. § 81.101(a) (Vernon 2005) (prohibiting a person from preparing pleadings on behalf of a “client,” giving advice, rendering any service “requiring the use of legal skill or knowledge,” preparing wills, contracts, or “other instruments, the legal effect of which under the facts and conclusions involved must be carefully determined.”); id. § 83.001 (prohibiting a person from preparing a legal instrument affecting title to real estate, including deeds, deeds of trust, notes, mortgages, and transfer or release of liens); Wis. Stat. Ann. § 757.30 (West Supp. 2007) (prohibiting a person from appearing in court, for compensation, giving professional advice or rendering legal service, or using words indicating person is a lawyer); W. Va. Code Ann. § 30-2-4 (LexisNexis 2007) (prohibiting a person from holding oneself out as an attorney to the public); id. § 30-2-5 (same, only as to corporate actors; also precluding a corporation from giving legal advice, soliciting claims for the purpose of bringing an action based on the claim, settling the estate of an insolvent debtor, or representing another in litigation); Alaska Bar R. 63 (prohibiting a person from representing oneself as an attorney, representing another before a court or an adjudicative governmental body, for compensation, giving legal advice or preparing legal documents that effect legal rights); Alaska Ct. R. 15(b) (prohibiting a person from “holding oneself out as an attorney”; giving legal advice, appearing on behalf of another before a mediator, arbitrator or before an adjudicatory body, representing a client in a deposition or other discovery matter, negotiating or transacting “any matter for or on behalf of a client with third parties,” or handling a client’s funds); Ariz. Sup. Ct. R. 31(a) (prohibiting a person from providing legal advice, preparing any document in any medium that will affect legal rights of a specific person, expressing legal opinions, representing another person in a judicial or other proceeding, including a mediation or arbitration, preparing any court filing, “negotiating legal rights or responsibilities for a specific person,” using indicators that the person is a lawyer (e.g., Esq. or J.D.)); Colo. Ct. R. 201.3(2) (prohibiting a person from giving legal counsel, drafting documents and pleadings, giving legal advice about the law, preparing or trying cases in courts and other judicial bodies, or being employed as a judge, law clerk, or teacher of law); D.C. Ct. App. R. 49 (prohibiting a person from preparing legal documents, preparing or expressing legal opinions, making court appearances, preparing claims or pleadings, or giving legal advice); Ky. Sup. Ct. R. 3.020 (prohibiting a person from giving legal advice); La. R. Prof'l Conduct 5.5 (prohibiting a person from holding oneself out as an attorney; giving legal advice, making a court appearance, representing another in a deposition or other discovery matter, “negotiating or transacting any matter for or on behalf of a client with third parties,” or otherwise engaging in activities defined as UPL); Va. Sup. Ct. R. Pt. 6, § 1 (“[I]t is from the relation of attorney and client that any practice of law must be derived.... The gravity of the consequences to society resulting from abuses of this relation demands that those assuming to advise and to represent others shall be properly trained and educated, and be subject to a peculiar discipline.” Practice of law includes advising another “in any matter involving the application of legal principles to facts or purposes or desires,” preparing legal instruments of any character, or representing the interest of another before a tribunal “otherwise than in the presentation of facts, figures or factual conclusions, as distinguished from legal conclusions....”); Wash. Gen. Application Ct. R. 24 (prohibiting a person from giving legal advice, selecting, drafting, or completing legal documents or agreements, representing someone in court or other adjudicative proceeding, or negotiating legal rights or responsibilities); Wyo. Sup. Ct. Bar Ass'n Organ. & Gov't R. 11 (prohibiting a person from advising others and taking action in matters connected with law, preparing legal instruments, or appearing before tribunals); People v. Merch. Protective Corp., 209 P. 363, 365 (Cal. 1922) (prohibiting a person from giving legal advice and preparing legal instruments); Baron v. City of Los Angeles, 469 P.2d 353, 357-58 (Cal. 1970) (stating that statute does not define UPL and so legislature implicitly adopted definition found in 1922 court decision); Koscove v. Bolte, 30 P.3d 784, 786 (Colo. Ct. App. 2001) (prohibiting a person from protecting, enforcing, or defending a person’s legal rights or counseling, advising, and assisting persons in connection with their legal rights); Marshall-Steel v. Nanticoke Mem'l Hosp., Inc., No. 98A-10-001, 1999 WL 458724, at *6 (Del. Super. Ct. June 18, 1999) (prohibiting a person from furnishing to another advice or services implying the possession and use of legal knowledge and skill); State ex rel. the Fla. Bar, 140 So. 2d 587, 590-91 ( Fla. 1962) (requiring a case-by-case analysis, but listing court appearances, legal advice, and drafting legal instruments as prohibited acts if they affect “important rights of a person under the law” and protection of the rights requires knowledge not possessed by the average person); Idaho State Bar v. Villegas, 879 P.2d 1124, 1126 (Idaho 1994) (prohibiting a person from giving legal advice, making court appearances, and drafting documents that secure legal rights); Mass. Conveyancers Ass'n, Inc. v. Colonial Title & Escrow, Inc., No. Civ. A. 96-2746-C, 2001 WL 669280, at *5 (Mass. Dist. Ct. June 5, 2001) (stating that a “comprehensive definition would be impossible to frame”); prohibiting a person from enforcing legal claims, establishing legal rights, forming opinions about the rights and legal methods used to enforce them, giving legal advice, or drafting documents which create, modify, surrender, or secure legal rights); Miss. Comm’n on
State Bar v. Cramer, 249 N.W.2d 1, 7 (Mich. 1976). The fuzzy definitions for the practice of law and the unauthorized practice of law draw heavy criticism. See, e.g., Rhode, supra note 98, at 81. The author has concluded from her research that the decisions often appear outcome driven, even if purportedly supported by the application of legal principle to the facts of the case.

Id. at 46-47. Rhode quotes an ABA official who admitted that “all kinds of other professional people are practicing the law almost out of necessity.” Id. at 48 (quoting J.P. Straus, then-Chairman of the ABA’s Standing Comm. on Nat'l Conference Groups).

Nolan-Haley, supra note 10, at 269. Nolan-Haley describes the efforts of the ABA over the last two decades to loosen the UPL doctrine and to give non-lawyers greater participation in some activities typically defined as the practice of law. Id. She describes similar efforts by states. Id.

Am. Bar Ass'n Task Force on the Model Definition of the Practice of Law, Definition of the Practice of Law (Draft Sept. 18, 2002) [hereinafter Model Definition], available at http://www.abanet.org/cpr/model-def/model_def_definition.html. The Model Definition apparently served as the model for the new Connecticut Superior Court rule discussed supra note 75 and accompanying text. The Connecticut rule provides a broader definition of the “practice of law,” but also lists more exceptions to the definition, including exceptions for court clerks, real estate agents, tax return preparers, persons appearing in administrative agencies under certain circumstances, mediators, and legal assistants. Conn. Super. Ct. R. 2-44A(a)-(b).

See discussion infra note 451 and accompanying text.

Model Definition, supra note 427, § (c) (emphasis added).
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430 Id. § (d). The other exemptions allowed practice under a limited license, pro se representation, and providing services under the supervision of an attorney. Id. In a comment to the draft, the Task Force explained, “The conduct... must be targeted toward the circumstances or objectives of a specific person. Thus, courts have held that the publication of legal self-help books is not the practice of law.” Id. cmt. 1.


432 Model Definition, supra note 427, § (e). See Statement of Bruce Meyerson, Hearing Before the Am. Bar Ass’n Task Force on the Model Definition of the Practice of Law, in Seattle, Wash. (Feb. 7, 2003), available at http://www.abanet.org/cpr/model-def/task_force_transcript.pdf; Letter from Bruce Meyerson, Am. Bar. Ass’n Section of Dispute Resolution, to Arthur Gavin, Center for Professional Responsibility, Am. Bar. Ass’n (Dec. 20, 2002) [hereinafter Meyerson Letter on Model Rule], available at http://www.abanet.org/cpr/model-def/dispute.pdf. Meyerson argued that the Model Definition should exclude arbitration and mediation because no “‘client’ relationship of trust [or] confidence exist[ed]” in those circumstances. Id. at 1. He asserted that common to the typical tests for UPL “is the underlying premise that the consumer or ‘client’ has placed their [sic] trust and confidence in the provider of the ‘legal’ service and is relying upon the provider of the legal service to protect their [sic] individual interests.” Id. at 3. He also asserted that a majority of bar ethics opinions and court rules “studied” had similarly found that no client relationship of trust or reliance existed between the mediator and participants in mediation. Id. at 3-4. He also noted that Rule 2.4 of the ABA Model Rules of Professional Conduct now made a distinction between the role of lawyer in his or her representational capacity and in his or her role as a mediator. Id. at 5. Finally, he discussed how even evaluative mediators do not engage in the practice of law, disputing the conclusions found in the Virginia UPL Guidelines, again because no attorney-client relationship exists. Id. at 6-7. As noted infra note 453, very few states tie the test for UPL to the existence of an attorney-client relationship. As an aspirational statement of what the law should be Meyerson’s statements make great sense, but they do not reflect current state UPL law.

433 Letter from R. Hewitt Pate, et al., Acting Asst. Att’y, U.S. Dep’t of Justice and the Fed. Trade Comm., to Task Force on the Model Definition of the Practice of Law, Am. Bar. Ass’n (Dec. 20, 2002) [hereinafter FTC Letter on Model Rule], available at http://www.usdoj.gov/atr/public/comments/200604.pdf. The federal government agencies opposed the rule as overbroad and anti-competitive. Id. at 2. It could force consumers to use lawyers when they would otherwise choose to use lay providers. Id. at 7. It could eliminate competition and drive up the cost of lawyers’ services even for persons who would have otherwise chosen to use a lawyer. Id. It could hurt consumers by denying them sources of service that would better serve their needs. Id. at 8. Finally, it would reduce competition from out-of-state service providers. Id. Any UPL law should protect consumers against identified harm. Most court decisions enforcing UPL statutes fail to find any factual evidence of consumer harms. Id. at 10. Moreover, less restrictive means exist to protect consumers. For instance, Virginia allows real estate closings by lay persons after adopting a statute that “requires the state to regulate them, providing safeguards through licensure, registration, and the imposition of financial responsibility and rules for handling settlement funds.” Id. at 11. According to the commenting agencies, this approach “is clearly a more procompetitive approach than an outright ban on lay closings.” Id.; see also Rhode, supra note 98, at 94-96 (describing less restrictive alternatives to UPL regulation). See generally discussion infra notes 710-24 and accompanying text about the evidence of consumer harm in the mediation context.


435 Id.

436 Id.

437 Id.

438 ABA Task Force Recommendation, supra note 435, at 1; Model Rules Of Prof’l Conduct R. 5.5(a)-(b) (2007).

439 For a discussion of the “foreign” lawyer issue in the context of the cross-state reach of lawyer websites and e-mail communications, see generally Michael W. Loudenslager, E-Lawyering, The ABA’s Current Choice of Ethics Law Rule & the Dormant Commerce


Rhode, supra note 98, at 6-11 (providing a brief history of UPL regulation). Rhode reports that a survey of UPL court decisions issued before 1930 consisted of 98 pages, but decisions reported from 1930 to 1937 consisted of 619 pages. Id. at 8-9.

Some of these exemptions arose over the last several decades as negotiated “Statement of Principles” between competing professions. Id. at 9-10, 20, 47-48. Many states rescinded any formal statements after the Justice Department and the Federal Trade Commission began investigating state bars in the late 1970s for anti-competitive behavior, especially market segmentation that arose from these Statements of Principles. Id. at 9-10. The Federal Trade Commission expressed ongoing concern about the Model Definition of the Practice of Law proposed by an ABA Taskforce in 2002. See FTC Letter on Model Rule, supra note 434.

A Wisconsin couple wished to divorce amicably, and they thought they could cut costs by using the services of a “divorce mediator,” a person who had a Ph.D. but was not an attorney. When the mediator drafted the couple's marital settlement agreement, costly mistakes were made when trying to divide the couple's jointly owned businesses, resulting in frustrating and expensive litigation just a few years later.

Rhode, supra note 98, at 88-94 (discussing that breaches of confidentiality by lay providers of real estate or divorce services seem “fairly remote”; admitting that conflicts of interest could arise in some circumstances involving representation by lay persons; and that lawyers and lay persons may both lack moral integrity, but that the evidence of lay misfeasance “is sparse” with little evidence of “fraud, misrepresentation, or misappropriation of funds”).

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See generally Andrew S. Morrison, Comment, Is Divorce Mediation the Practice of Law? A Matter of Perspective, 75 Cal. L. Rev. 1093, 1096-1107 (1987). This student-authored work describes and criticizes the five tests in detail. See generally id. The student-author's conclusion that nonlawyer-divorce mediators are not engaged in the practice of law, but that lawyer-divorce mediators are engaged in the practice of law falls apart quickly under close analysis. See id. at 1117, 1123-25. Nolan-Haley uses a different organizational scheme. She identifies the “professional judgment” test, the “traditional area of practice” test, and the “incidental legal services” test. Nolan-Haley, supra note 10, at 263. Under the organizational scheme discussed briefly in this article, the “incidental legal services” test functions as an exception to the five tests for the practice of law. See discussion infra notes 449-53, 457-78 and accompanying text. Other exceptions include the following: (1) personal non-lawyer representation; (2) nonlawyer representation before state and federal administrative agencies; (3) small claims court representation; (4) representation by supervised law students in a clinical program; (5) a publisher's First Amendment right to create and sell do-it-yourself legal kits; and (6) completion of forms by scriveners who give no legal advice. See Nolan-Haley, supra note 10, at 263-64, 264 n.133; Rhode, supra note 98, at 77-80 (data showing that lay representatives in Workers’ Compensation and public utility proceedings perform without objection in many jurisdictions). For a discussion of the use of do-it-yourself legal kits, books, and software see Sarah R. Cole, Nancy H. Rogers & Craig A. McEwen, Mediation: Law, Policy & Practice § 10:5, 10-40 n.27 (2d ed. 2007) (listing cases discussing kits); William H. Brown, Legal Software and the Unauthorized Practice of Law: Protection or Protectionism, 36 Cal. W. L. Rev. 157, 166-68 (1999) (discussing cases analyzing do-it-yourself kits and books); Cynthia L. Fountaine, When Is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment, 71 U. Cin. L. Rev. 147 (2002) (same); French, supra note 112, at 101-07 (same); Patricia J. Lamkin, Annotation, Sale of Books or Forms Designed to Enable Laymen to Achieve Legal Results Without Assistance of Attorney as Unauthorized Practice of Law, 71 A.L.R.3d 1000 (1976) (same); Joshua R. Schwartz, Note, Laymen Cannot Lawyer, But Is Mediation the Practice of Law?, 20 Cardozo L. Rev. 1715, 1726-27 (1999) (same); Rhode, supra note 98, at 3, 84, 74 n.286, 84 n.335, 84 n.336 (discussing cases involving kits and forms). The cases involving the use of legal software may apply to nonlawyer-mediators who use child support software when facilitating party decision-making. See also discussion of cases analyzing scrivener's activities in Schwartz, supra, at 1726; Cole, Rogers & McEwen, supra, § 10:5, 10-40 n.25 (listing cases involving scriveners).

See list of state definitions, supra notes 418-20; see also Hoffman & Affolder, supra note 10, at 20. The article describes the “affecting legal rights” test:

This test defines the practice of law as those activities affecting a person's legal rights--an extremely broad test. Mediations involving litigation matters by definition involve the parties' legal rights. Even in non-litigated matters (such as neighborhood, family or organizational disputes), however, a mediation can affect the parties' legal rights if mediation results in a legally enforceable settlement agreement. Id.

Courts frequently cite State Bar Ass'n of Connecticut v. Connecticut Bank & Trust Co., 140 A.2d 863 (1958), as the source of this test. See also list of state definitions supra notes 418-20; Hoffman & Affolder, supra note 10, at 20. The article characterizes the test as follows:

This broad test poses the question of whether mediation is commonly understood to be a part of the practice of law in the community. Factors that would inform this determination might include, for example, the extent to which lawyers in a given community, as opposed to non-lawyers, routinely provide mediation services. Id. The author believes Hoffman & Affolder's characterization of the test further broadens it. It could cause UPL regulators to conclude that mediation is the per se practice of law. See, e.g., Bd. of Prof'l Resp. of Sup. Ct. of Tenn., Formal Ethics Op. 83-F-39 (1983) (concluding that divorce mediation is the practice of law and precluding a mediation practice with a nonlawyer-mediator); Bd. of Prof'l Resp. of the Sup. Ct. of Tenn., Formal Ethics Op. 85-F-98 (1985) (distinguishing Opinion 83-F-39 and finding that a
Christian conciliation or mediation program would not constitute the practice of law and so a lawyer may participate in the program with nonlawyer-mediators; attempting to distinguish earlier opinion by stating that secular mediation, in contrast to church-related program, is for profit and stating that secular lawyer-mediators “are giving legal advice..., representing both parties in the dispute,” resolving the dispute rather than focusing on the repair of the relationship; Bd. of Prof'l Resp. of Sup. Ct. of Tenn., Formal Ethics Op. 90-F-124 (1990) (reconsidering and clarifying Opinions 83-F-39 and 85-F-98 by stating that if divorce mediators adopt the practices outlined in the Standards of Practice for Family and Divorce Mediators of the Academy of Family Mediators, supra note 27, then divorce mediation is not the practice of law and a lawyer mediator may practice with nonlawyer-mediators). In contrast, even the Connecticut SGC would apply the “customary function” test to specific acts of the mediator, not to mediation itself. See discussion supra note 138-44 and accompanying text.

This test asks whether the mediator is engaged in activities “relating the law to specific facts”--in essence, whether the mediation is an evaluative process. Professor Carrier Menkel-Meadow, for example, argues that when a mediator evaluates the strengths and weaknesses of the parties' case by applying legal principles to a specific fact situation, he or she is engaged in the practice of law. Id.

This test asks whether the parties who use a mediator believe they are receiving legal services. Evidence of what services the parties think they may be getting can sometimes be found in the advertising materials of the mediator, or in a written agreement to participate in mediation. Under this test, whether the mediator is engaging in legal practice could be different in every case, depending on the perspectives of the individual parties. Id.

This test asks whether the relationship between the mediator and the parties is tantamount to an attorney-client relationship. One factor affecting the determination in the context of mediation might be whether the parties in mediation were represented by counsel--either at the negotiating table with the mediator and the parties, or in close consultation with the parties during the mediation but not actually attending mediation sessions. If not, there is greater risk in some situations that the parties could view the mediator as performing the role of the attorney.

Id. The ABA's Model Rules of Professional Conduct for lawyers defines the neutral role of a mediator as “the lawyer assist[ing] two or more persons who are not clients of the lawyer to reach a resolution of a dispute.” Model Rules Of Prof'l Conduct R. 2.4(a) (2007) (emphasis added). Very few of the statutes, court rules, or court cases use the attorney-client relationship test to analyze UPL in connection with all prohibited acts. Most states identify that relationship as pertinent only in the context of court appearances. See, e.g., Ga. Code Ann. § 5-19-50 (2005) (defining the practice of law as “representing litigants” or “any action taken for others in any matter connected with the law”); id. § 5-19-51 (prohibiting a person from practicing or appearing “as an attorney at law for any person”); La. Rev. Stat. Ann. § 37:212(A) (2007) (prohibiting a person from making “in a representative capacity” court appearances “as an advocate”); Md. Code Ann., Bus. Occ. & Prof. § 10-101(h) (LexisNexis 2004) (prohibiting a person from representing another before a unit of state government); Mo. Ann. Stat § 484.010 (West 2004) (prohibiting a person from appearing in court “as an advocate in a representative capacity” or drafting papers, pleadings, or other documents “in such capacity” in connection with any body having authority to settle controversies); R.I. Gen. Laws § 11-27-2 (2002) (prohibiting a person from appearing in court or other tribunal “as the attorney, solicitor, or representative of another person” or “acting as a representative or on behalf of another person to commence, settle, compromise, adjust, or dispose of any civil or criminal case”); Wis. Stat. Ann. § 757.30 (West Supp. 2007) (prohibiting a person from appearing in court as an “agent, representative or attorney, for or on behalf of any other person”); W. Va. Code Ann. § 30-2-4 (LexisNexis 2007) (prohibiting a person from practicing or appearing “as an attorney-at-law for another in a court of record in this State”); Alaska Bar R. 63 (prohibiting a person from representing another before a court or an adjudicative governmental body); Alaska Sup. Ct. R. 15(b) (prohibiting a person from engaging in a number of activities on behalf of a “client” or for a “client”); Ariz. Sup. Ct. R. 31 (prohibiting a person from “representing another” person in a judicial or other proceeding, including a mediation or arbitration); D.C Ct. App. R. 49 (defining the practice of law as advice or services “where there is a client
relationship of trust or reliance’

454 Applying one of the exceptions to the practice of law makes these tests less draconian.


457 Rhode, supra note 98, at 47-48. Some of these exemptions reflect earlier Statements of Principle with these professional groups. A good analysis of the incidental services exception in the context of real estate brokers appears in Shane L. Goudey, Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers, 76 Or. L. Rev. 889, 897-913 (1996). See also Ala. Code § 34-3-6(b) (LexisNexis 2007) (apparently exempting persons providing uncompensated legal advice or document drafting); see id. § 34-3-6(c) (exempting persons who secure, settle, adjust or compromise defaulted, controverted or disputed accounts, claims or demands between a person with whom they have privity or when in the relation of employer and employee in the ordinary sense; exempting persons who care for their own business, claims and demands exempting persons who prepare abstracts of title, certify, guarantee or insure titles to property, and exempting persons who help someone prepare a simple affidavit or statement of fact used to support title policies, so long as they are not recorded); Alaska Stat. § 08.08.230(b) (exempting legal assistants); Ariz. Sup. Ct. R. 31(c) (exempting, among other listed exemptions, persons who do not charge a fee to represent someone before the Department of Economic Security, a board hearing, or a quasi-judicial hearing; exempting corporate officers representing the corporation in justice court, police court, or certain administrative hearings; exempting persons representing parties in small claims court; exempting public accountants and other persons in connection with some tax-related activities; exempting courts that create and distribute form documents for use in courts; exempting certified legal document preparers; exempting mediators working pro bono or at the appointment of the court who facilitate and write mediation agreements, or file those agreements with courts; and mediators certified as legal document preparers); id. at 31(d) (defining mediator, but not expressly excluding service as a mediator); Colo. Sup. Ct. R. 201.3(4) (exempting law professors licensed in another state during the time they are full-time professors in Colorado); D.C. Ct. App. R. 49(b)(2) cmt. (exempting relationships that “lack[] the essential features of an attorney-client relationship”; accordingly the rule does not cover law professors, industrial relations supervisors, law clerks, paralegals, summer associates, tax accountants, real estate agents, title company attorneys, securities advisors, pension consultants, or mediators or other ADR service providers); Ky. Sup. Ct. R. 3.020 (exempting persons who draw an instrument to which he is a party and corporate officers who appear for a corporation in small claims court); La. Rev. Stat. Ann. § 37:212(B) (2007) (exempting persons who care for their own business claims or demands; exempting persons who prepare abstracts of title, insure titles; exempting notary publics; exempting persons who appear in small claims court for a corporate employer to recover debts; exempting judges); Md. Code Ann., Bus. Occ. & Prof. § 10-102 (LexisNexis Supp. 2007) (exempting persons who appear on their own behalf, title insurance companies that examine and insure titles, collection company adjusting or collecting commercial claims, and a salaried lawyer who represents a corporation in court or other government body); Minn. Stat. Ann. § 481.02, subdiv. 3 (West 2002) (providing sixteen exemptions, including persons who must draft a will in an emergency, labor unions, persons drawing farm leases, notes, and chattel mortgages without a fee, persons answering legal questions posted in a farm journal, owners of rental property, legal assistants, sole shareholders appearing on behalf of the corporation, and real estate brokers, in certain narrow circumstances); Miss. Code Ann. § 73-3-55 (LexisNexis 2004 & Supp. 2007) (exempting title or abstract companies acting through a licensed attorney or chartered title or abstract companies with paid up capital of $50,000 or
more); N.C. Gen. Stat. § 84-2.1 (2007) (“[UPL does not include] the writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers authorized [by statute] or by mediators of personnel matters for [the University of North Carolina or a constituent institution].”); Tex. Gov’t Code Ann. § 81.101 (Vernon 2005) (exempting providers of legal information through websites, books, forms, computer software, or similar products “if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney”); id. § 81.1011 (exempting employees or volunteers of the Texas Department on Aging in connection with the preparation of medical powers of attorney or documents designating guardians); id. § 83.001 (exempting licensed real estate brokers or salesmen and persons involved in “the lease, sale, or transfer of any mineral or mining interest in real property”); Utah Code Ann. § 78-9-101 (2002) (exempting persons who represent their own interests in a cause of action to which the person is a party “in his own right and not as an assignee”); Wis. Stat. Ann. § 757.30 (West 2001 & Supp. 2007) (exempting persons who give professional legal advice or services “incidental to his or her usual or ordinary business”); Va. Sup. Ct. R. Pt. 6, § I, R. 1 (exempting a person who is regular employee acting for his employer in giving advice; exempting from the drafting limitation all notices or contracts incident to the regular course of conducting a licensed business; and exempting an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to facts and figures that he or she presents to a tribunal when that representation does not involve the examination of witnesses or preparation of pleadings); Wash. Ct. Gen. Application R. 24(b) (exempting persons engaged in limited practice in indigent representation, for educational purposes, by emeritus members, by house counsel, by legal interns, by closing officers, or by foreign law consultants; also exempting court house facilitators pursuant to court rule, lay representatives authorized by administrative agencies or tribunals to appear before them, persons serving as a mediator, arbitrator, conciliator, or facilitator, persons participating in labor negotiations, arbitrations, or conciliations arising under collective bargaining agreements, persons “[p]roviding assistance to another to complete a form provided by a court for protection” under a harassment or domestic violence prevention statutes when the person completing the form charges no fee, legislative lobbyists, persons selling legal forms in any format, or nonlawyer assistants supervised by a lawyer; also exempting activities preempted by federal law, and such other activities the supreme court decides are not UPL; protecting ability of persons or entities to provide information of a general nature about the law and legal procedures to members of the public); Pioneer Title Ins. & Trust Co. v. State Bar of Nev., 326 P.2d 408, 412-13 (Nev. 1958) (discussing incidental services exemption). But see Or. State Bar v. Sec. Escrows, Inc., 377 P.2d 334, 339 (Or. 1962) (rejecting “artificial or haphazard tests as custom, payment, or the quality of being ‘incidental.’”). Some exceptions appear in other provisions of the statutory code. See Goudey, supra, 916 n.117 (describing other statutory exemptions in Oregon).

458 Goudey, supra note 457, at 899 (quoting Lowell E. Baier, The Developing Principles in the Law of Unauthorized Practice of Real Estate Brokers, 9 ST. LOUIS U. L.J. 127, 128 (1964)); See also Dept of Dispute Resolution Servs., Supreme Court of Va., Guidelines on Mediation & the Unauthorized Practice of Law (1999) [hereinafter Virginia UPL Guidelines], available at http://www.courts.state.va.us/drs/ulp/preface.html. The Virginia UPL Guidelines consist of several chapters posted on the Virginia Supreme Court’s website. This article refers to them hereinafter as the Virginia UPL Guidelines and will reference specific chapters as appropriate. See generally Rhode, supra note 98, at 82-83 & nn.325-28 (discussing the incidental legal services that real estate brokers provide as a part of their employment). A UPL regulator could respond to this argument in the mediation context by limiting the practice to lawyers. The field would survive, but this approach would give public protection greater weight than the public interest in a more diverse mediation field. See discussion infra pages 632-90 and accompanying text.

459 See Julie A. Flaming, Note, Avoiding the Unauthorized Practice of Law: Proposed Regulations for Paralegals in South Carolina, 53 S.C. L. Rev. 487, 488, 492-97, 500-01 (2002) (discussing how South Carolinian paralegals may inadvertently engage in UPL because the state does not require any formal training for the job, surveying applicable law involving paralegals, and proposing regulations for paralegal practice); Merle L. Isgett, The Role of the Legal Assistant: What Constitutes the Unauthorized Practice of Law, in Litigation Techniques for Legal Assistants: Becoming a More Effective Member of the Litigation Team 1991, at 7, 13-15 (PLI Litig. & Admin. Practice, Course Handbook Series No. 423, 1991) (concluding that the activities of a legal assistant are not UPL “as long as they are limited to work of a preparatory nature, [including] legal research, investigations, or the composition of legal documents,” especially when conducted under the supervision of a lawyer); Debra Levy Martinelli, Are You Riding a Fine Line? Learn to Identify and Avoid Issues Involving the Unauthorized Practice of Law, Utah B.J., Dec. 2002, at 18 (suggesting that the only way to avoid the unauthorized practice of law and its consequences is to work under the supervision of an attorney).

460 Rhode, supra note 98, at 81 & n.321 (noting that accountants are often more familiar with tax law than the average attorney); see also Matthew A. Melone, Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption from State
Unauthorized Practice of Law Rules, 11 Akron Tax J. 47, 78-79, 83, 98-102 (1995) (concluding that UPL restrictions should not apply to certified public accountants; arguing that the application of the “incidental services” exemption to accountants is unworkable; finding that CPAs are well-suited to master and apply tax law and that their historical role in the tax return field shows they can handle these matters without significant risk to the public; and finding that the remedial rationale for UPL restrictions is met by the independent ethical duties and remedial schemes applicable to accountants).

See generally Marjorie A. Shields, Annotation, Unauthorized Practice of Law--Real Estate Closings, 119 A.L.R.5th 191, 195 (2004) (discussing whether lending institutions, real estate brokers, title insurers, and corporations engage in UPL when involved in lay conveyancing and real estate closing activities); Michael C. Ksiazek, Note, The Model Rules of Professional Conduct and the Unauthorized Practice of Law: Justification for Restricting Conveyancing to Attorneys, 37 Suffolk U. L. Rev. 169, 182-87 (2004) (discussing whether non-lawyers should conduct real estate transactions in light of the ABA’s Model Rules of Professional Conduct); Goudey, supra note 457, at 904-11 (surveying case law on the incidental services exemption in the real estate broker context and finding that a minority of courts apply it to allow the public convenience to outweigh public protection so that brokers may draft all instruments; finding a minority of other courts that do not apply the exception believing that the public interest requires protection from incompetent lay representation; and finding that most courts allow some drafting activities by real estate brokers, typically preliminary documents including listing agreements, offers, acceptances, and standardized sales contracts, but not mortgages, deeds, deeds of trust, deeds of release, promissory notes, assignments, and satisfactions).

See generally Jay M. Zitter, Annotation, Drafting of Will or Other Estate-Planning Activities as Illegal or Unauthorized Practice of Law, 25 A.L.R.6th 323, 334 (2007) (discussing cases in which courts have considered whether acts by nonlawyers in the context of wills, trusts, or other estate-planning instruments constitutes the unauthorized practice of law); Michael Hatfield, Pro Se Executors--Unauthorized Practice of Law, or Not?, 59 Baylor L. Rev. 329, 347-50, 354-70 (2007) (discussing whether executors in Texas qualify for the pro se exception to UPL).


See generally J.A. Bryant, Jr., Annotation, What Activities of Stock or Securities Broker Constitute Unauthorized Practice of Law, 34 A.L.R.3d 1305, 1306 (1970) (finding only two cases on the topic including Grievance Committee of the Bar of Fairfield County v. Dacey, 222 A.2d 339 (Conn. 1966) (discussed supra notes 112-128 and accompanying text), and a Florida case enjoining securities broker from giving legal advice concerning the ownership and disposition of property).


See re Adoption of a New Court Operating Rule 25 (Mo. S. Ct. Dec. 21, 2007) (en banc) (order adopting guidelines for Missouri court clerks and court staff on what information they may and may not provide to pro se litigants), available at http://www.courts.mo.gov/file/NEW%20COR%2025.pdf; see also discussion of permissible activities of court clerks in Colorado infra note 808 and accompanying text.

Lea Krivinskas, “Don’t File!”: Rehabilitating Unauthorized Practice of Law-Based Policies in the Credit Counseling Industry, 79 Am. Bankr. L.J. 51, 64-68 (2005) (expressing concern that credit counseling agencies provide legal advice to debtors about bankruptcy even though they have a conflict of interest with those debtors and are not legally trained to provide that advice).

See Anthony Bertelli, Should Social Workers Engage in the Unauthorized Practice of Law?, 8 B.U. Pub. Int. L.J. 15, 24-31, 45-47 (1998) (arguing that UPL restrictions should not apply to social workers trained to provide routine legal services to poor persons; describing incidental services exemption to the practice of law).

See Charles J. Condon, How to Avoid the Unauthorized Practice of Law at the Reference Desk, 19 Legal Reference Services Q. 165, 169-173 (2001) (making strong distinction between the role of law librarian as information provider and the role of legal advisor to pro se library patrons; suggesting ways to continue to play a service role for those patrons while staying within ethical constraints); Paul D. Healey, Pro Se Users, Reference Liability, and the Unauthorized Practice of Law: Twenty-Five Selected Readings, 94 Law.
Libr. J. 133, 135 (2002) (surveying UPL literature in the library context; concluding risk of liability arising in the library context is remote as long as librarians serve as “experts on finding information” rather than serving as “experts on the information found”); Mills, supra note 456, at 180 (suggesting how librarians can “handle with care this very sensitive area of public service”).

Rhode, supra note 98, at 82 & n.326.

Goudey, supra note 457, at 900-01.

Id. at 911-13.

Mills, supra note 456, at 184 (“Any rule which holds that a layman who prepares legal papers or furnishes other services of a legal nature is not practicing law when such services are incidental to another business... completely ignores the public welfare.” (quoting Agran v. Shapiro, 273 P.2d 619, 625 (1954))).

Id. (noting that an incidental service constitutes the practice of law if “difficult or doubtful legal questions are involved which, to safeguard the public reasonably demand the application of a trained legal mind” (quoting Gardner v. Conway, 48 N.W.2d 788, 796 (1951))).

2004 ABA Survey of UPL, supra note 77, chart II; Rhode, supra note 98, at 9-10, 20, 47-48 (discussing negotiated “Statement of Principles” between competing professions); see also discussion of “incidental services” exception to UPL supra notes 457-78 and accompanying text.

For a discussion of the ethics guidelines created for legal assistants that help them avoid UPL, see Martinelli, supra note 459, at 21 (discussing the ethics guidelines promulgated by the National Association of Legal Assistants and the National Federation of Paralegal Associations and suggesting specific precautions for legal assistants; advising legal assistants to disclose their status as a non-lawyer in all identification and marketing materials, including business cards and letterhead, to avoid creating an attorney-client relationship, to avoid entering any fee agreements with clients, to avoid giving legal advice, to avoid unsupervised court appearances, to conduct legal research under a lawyer's supervision, and to draft all legal documents for a lawyer's review). See also Model Rules Of Prof'l Conduct R. 5.5 cmt. 3 (2007) (“Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services.”).

2004 ABA Survey of UPL, supra note 77, chart II.

Id., intro.

See Virginia UPL Guidelines, supra note 458, ch. 1, § 2.

Id.

Id.; see also Goudey, supra note 457, at 902-11 (describing case law relating to the drafting activities of real estate brokers).

Disciplinary Proceeding Transcript, supra note 34, at *12-13, *60, *69-71. However, the Reviewing Committee incorrectly found that Dr. Fremed helped the parties calculate the child support amount appearing in the final Separation Agreement. Proposed Decision, In re Resa Fremed, No. UPL 05-002, at 1-2 (Statewide Grievance Comm. March 9, 2006) (on file with author).


French, supra note 112, at 96 (citing id.). In 1995, the New Jersey Supreme Court applied a similar balancing test to a case involving residential real estate closings. In re Opinion No. 26 of Comm. on Unauthorized Practice of Law, 654 A.2d 1344, 1346 (N.J. 1995) (“We determine the ultimate touchstone--the public interest--through the balancing of the factors in the case, namely, the risks and benefits to the public of allowing... such activities.”).

Mediators may even need to define the term “interests” for the lawyer-dominated UPL disciplinary bodies. Those of us who train lawyers or law students as mediators know that they may have difficulty grasping this concept. See generally Roger Fisher, William Ury & Bruce Patton, Getting To Yes: Negotiating Agreement Without Giving In 40-41 (Penguin Books 2d ed. 1991) (Interests are a party's needs, desires, concerns and fears. “Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide.” In other words, a party can choose between a number of different positions that all serve a particular interest.).
Id. at 15, 58-59. At the time she conducted her empirical research through April 1981, only Arkansas, Colorado, District of Columbia, Missouri, and Texas included non-lawyer members on their disciplinary bodies. Id. at 15. In 1981, only realtors had a significant voice as members of UPL disciplinary bodies. Id. at 59 n.211.

Rhode, supra note 98, at 58-59.

Id. at 59-60 (citing Charles W. Wolfram, Barriers to Effective Participation in Regulation of the Legal Profession, 62 Minn. L. Rev. 619, 642-43 (1978), who argued that the appointment of lay members constitute “public relations efforts” rather than “genuine attempts” to affect regulatory process). One member of the Review Board in Dr. Fremed’s disciplinary proceeding, William D. Murphy, did not have a J.D. degree. Mr. Murphy is a retired public school teacher, who became in 2005 a full-time minister. Telephone Interview with William D. Murphy, Retired, in Danbury, Conn. (Jan. 24, 2008). By statute, one third of the SGC members must be non-lawyers. Conn. Practice Book § 2-33 (2008).

Connecticut declined to participate in Rhode's survey out of concern for the then-pending antitrust investigation of the Federal Trade Commission. Rhode, supra note 98, at 5 n.14, 14 n.50.

Id. at 16.

Id. at 19.

See id. at 15-16.

Id. at 23-27. Rhode suggested that the high rate of success in judicial proceedings reflected careful selection of cases to take that route. Her interviews revealed that disciplinary bodies did not take formal action in complaints that might lead to adverse precedents that might “open the floodgates” to lay practice. Rhode suggested that this approach, especially when laymen would not likely incur the cost of litigation, put the disciplinary bodies “out of step with evolving case law.” Id. at 28.

Id. at 21. Her research of reported decisions found only six cases during 1979 to 1980. Connecticut, for example, has not published its UPL dispositions involving nonlawyer-mediators. See State of Connecticut Judicial Branch Statewide Grievance Committee, http://www.jud.ct.gov/SGC/faq.htm (the list of recent Grievance Decisions does not include the UPL dispositions involving nonlawyer-mediators).

Rhode, supra note 98, at 44.

Id. at 31.

Id. at 30.

Id.

Id. at 36 (Rhode cautioned that these perceptions may not express the opinion of some bar members).

Id. at 33.

Id. at 34.

Id. at 38.

Id.; see also Yale Divorce Research, supra note 98, at 114 n.43-46 (noting that New York and Oregon looked hard for harm to consumers from the use of legal kits and found none; that the decisions assembled at Appendix I to the article did not mention any inadequacies in the lay form preparation advice; and that courts “long disregarded the absence of injury to consumers”).

Rhode, supra note 98, at 38.

Id. (e.g., accountants and real estate companies).
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527  Id. at 38.

528  Id. at 39.

529  Id. at 40.

530  Id.

531  Id. (some respondents admitted that if the public knew more about the enforcement activities, they would be less likely to support them).

532  Id. at 48.

533  Id. at 39, 48, 54-58. Even the reformed structure in Virginia has its weaknesses. Id. at 58.

534  Id. at 35.

535  See id. at 48, 51-53 (discussing the problems with impartiality encountered when disciplinary bodies are made up of members of the group that is being regulated).

536  Id. at 62.

537  Id. at 45-48.

538  Id. at 48-62.

539  Id. at 62-70; see also id. at 6 (“In a culture where law plays so dominant a role in dispute resolution, broad constraints on the ability of laymen to give and receive legal assistance raise substantial first amendment concerns.”). See Fountaine, supra note 448, at 159-68, for a discussion of the free speech issues raised by UPL restrictions on the use of interactive legal software that allow the public and professionals to prepare legal documents for themselves and others and arguing that the application of UPL restrictions to interactive legal software is content-based regulation and so subject to strict scrutiny by courts.

540  Rhode, supra note 98, at 44.

541  Nolan-Haley, supra note 10, at 270.

542  Id. at 281 (describing the two sets of practice rules as a source of “divisiveness in the mediation profession”). Virginia has two sets of rules governing evaluative interventions by mediators. Under the rules of professional conduct for lawyers, lawyer-mediators may evaluate the “strengths and weaknesses of [legal] positions; assess the value and cost of alternatives to settlement; assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role, and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.” Va. Sup. Ct. R. Pt. 6, Sec. II, R. 2.11(d) (West 2007). Nonlawyer-mediators are bound by the Virginia Standards of Ethics, which do not incorporate the provisions found in the rules of professional conduct for lawyers. Standards of Ethics and Prof'l Responsibility for Certified Mediators §§ B, E & F (Judicial Council of Va. 2005). Professors Bush and Folger have suggested that the field may require several sets of mediator ethics codes based on the style of mediation the mediator uses. Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: The Transformative Approach to Conflict 264 (rev. ed. 2005). This regulatory approach would recognize the pluralistic character of the field. Id. at 9. It would allow regulation of the field while respecting three of the distinct and divergent stories of the mediation field. See id. at 9-15; See also Model Standards of Conduct for Mediators pmbl. (2005); Alison E. Gerencser, Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must Be Changed, 50 Fla. L. Rev. 843, 857-64 (1998) (rejecting a “one size fits all” approach to writing mediator standards of practice and recommending standards of conduct for different types of mediation); see also John Lande, How Will Lawyering and Mediation Practices Transform Each Other?, 24 Fla. St. U. L. Rev. 839, 854-57 (1997) (expressing skepticism for a “single-school” or “a single, relatively pure, conception of mediation” for philosophical and pragmatic reasons; favoring a pluralistic approach because of the value in having a diverse market of legitimate options for “both mediation buyers and sellers.”).
See Cole, Rogers & McEwen, supra note 448, § 10:5, at 10-43-10-44 (commenting that very few decisions regarding UPL of any kind are made in any given year).

For instance, in Connecticut, Dr. Fremed faced a fine of “not more than two hundred and fifty dollars or imprisonment of not more than two months or both.” Conn. Gen. Stats. Ann. § 51-88(b) (West 2005).

Nolan-Haley, supra note 10, at 239. In general, courts have enforced UPL statutes in seven types of cases over the past three decades: “employment issues raised at administrative hearings, divorce, adoption, child support, insurance, real estate, and mortgage cases.” Id. at 265.

See generally Werle v. R.I. Bar Ass’n, 755 F.2d 195 (1st Cir. 1985) (focusing on whether the members of the Rhode Island Bar Association Committee on Unauthorized Practice of Law enjoyed either absolute or qualified immunity); Commonwealth of Va. v. Steinberg, No. CL-96-504 (Va. Cir. Ct. 1996). See also Cole, Rogers & McEwen, supra note 448, § 10.5, at 10-36 nn.4-4.10.

Nolan-Haley, supra note 10, at 283.

Id. at 285.

Id. at 285-86.

Id. at 287.

Id. at 289-90; Geetha Ravindra, When Mediation Becomes the Unauthorized Practice of Law, 15 Alt. to High Cost Litig. 94, 101 (1997) (describing the training the Virginia Department of Dispute Resolution Services and the Virginia State Bar provided to mediators about the differences between legal advice and legal information and between MOUs and an agreement; the instructors also gave advice about writing MOUs and using legal boilerplate).

Id. at 288. See also discussion of “incidental services” exception supra at notes 457-78 and accompanying text.

See Phyllis E. Bernard, Dispute Resolution and the Unauthorized Practice of Law, in Dispute Resolution Ethics: A Comprehensive Guide 89, 89 (Phyllis Bernard & Bryant Garth eds., ABA 2002); Peter S. Adler, Lawyer & Non-Lawyer Mediation: Speculations on Brewing Controversy, 33 Nat'l Inst. Disp. Resol. F. 45, 46 (1997); Bermant, supra note 447, at 48 (concentrating on asking the right questions about UPL and mediation); James B. Boskey, Mediation & the Practice of Law: Two Sides of Different Coins, 33 Nat'l Inst. Disp. Resol. F. 39, 39-41 (1997); Cooley, supra note 8, at 75 (arguing that Virginia's UPL Guidelines frame the wrong question and provide little help to mediators about lawful behavior); Dorothy Della Noce, Mediation Could Be the Practice of Law, but It Doesn't Have to Be, 33 Nat'l Inst. Disp. Resol. F. 16 (1997); Derek A. Denckla, Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters, 67 Fordham L. Rev. 2581 (1999) (examining an overview of legal and ethical parameters of mediation and the practice of law); David Gage & Melinda Ostermeyer, Mediation: One Discipline or Many?, 33 Nat'l Inst. Disp. Resol. F. 12 (1997) (examining the questions in the context of mediation in business disputes and presenting a case for an “interdisciplinary approach to the question of who should be mediators”); Garth, supra note 447, at 34 (arguing that the question of whether mediation is the UPL is poorly framed and that the reason for the question at all is the increasing promotion of mediation from the judiciary); Bruce A. Green, Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions from the “Legal Ethics” Perspective, 73 Ind. L.J. 665, 668 (1997) (noting that courts can define the practice of law so expansively that it includes activities non-lawyers should be permitted to perform); Fiona Furlan et al., Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?, 14 J. Am. Acad. Matrimonial L. 267, 276-78 (1997); Hansen, supra note 503, at 62; Hoffman & Affolder, supra note 10, at 22-23 (calling for a new approach to analyzing UPL in the mediation context and suggesting that greater regulation of mediators may discourage regulation by those outside the field); Bonnie S. Kleiman, Mediation: An Empowering Process, 33 Nat'l Inst. Disp. Resol. F. 8, 9 (1997); Kimberlee K. Kovach, Mediation the Practice of Law? Not!, 33 Nat'l Inst. Disp. Resol. F. 37 (1997); James M. McCauley, Professional Responsibility, 39 U. Rich. L. Rev. 315 (2004) (reviewing unauthorized practice of law rulings in Virginia); Carrie Menkel-Meadow, Is Mediation the Practice of Law?, 14 Alternatives to High Cost Litig. 57 (1996) (arguing that mediation is the practice of law, especially when mediators predict court outcomes or evaluate the merits of the parties' legal positions); Meyerson, supra note 453, at 123-24 (1996) (arguing that mediators do not practice law, but they should be permitted to give certain types of broad legal advice); Morrison, supra note_
448, at 1096-1107 (examining the five tests courts use to determine if someone is engaged in UPL, finding that the tests yield a line of decisions consistent only in their inconsistency, and concluding that non-lawyer-divorce mediators are not engaged in the practice of law, but that lawyer-divorce mediators are); Nolan-Haley, supra note 10 (arguing that UPL guidelines leave nonlawyer-mediators unsure of permitted practices, asserting that the consumer protection rationale of UPL regulation is a “myth,” demonstrating how nonlawyer-mediators regularly engage in the practice of law, and calling for greater honesty in the way we protect mediation parties); Lemoine D. Pierce, Is Mediation the Practice of Law? Questions Arising Out of the Crisis Within the Legal Community, 33 Nat'l Inst. Disp. Resol. F. 31 (1997); Schwartz, supra note 448 (concluding that facilitative mediators engage in the practice of law when they make editorial suggestions to the memorialized agreement rather than serving merely as a scrivener; further concluding that evaluative mediators who give legal opinions and predictions regarding disputed facts engage in the practice of law); Ravindra, supra note 551, at 94, 101 (analyzing recent case law and ethics opinions on UPL in Virginia); Larry Ray & Prudence Kestner, Is Mediation the Practice of Law?, 33 Nat'l Inst. Disp. Resol. F. 1, 1, 5 (1997) (explaining that the question has been unnecessarily dichotomized and discussing who is asking the questions about mediation and UPL and their motives); Teresa Meehan Rudy, Mediation: Increasing the Access to Justice, 33 Nat'l Inst. Disp. Resol. F. 10, 10-11 (1997) (focusing on the broader question of “what is the practice of law” and arguing that the practice of law should be “deregulated so consumers can have more choices about the providers from whom they may buy legal services”); Donald T. Weckstein, In Praise of Party Empowerment--And of Mediator Activism, 33 Willamette L. Rev. 501 (1997) (discussing why all evaluative or activist mediators should be required to incorporate self-determination, informed consent, and non-coercion into their mediations if they choose to deviate from traditional facilitative methods); Terry Wheeler et al., A Defining Moment for the Mediation Movement, 33 Nat'l Inst. Disp. Resol. F. 22, 22-23 (1997) (concluding that evaluative mediation is the practice of law, but “real” mediation is not); Wolf, supra note 447, at 40, 41-42 (describing five approaches to determining whether a mediator is engaged in UPL). See generally Cole, Rogers & McEwen, supra note 448, § 10:5 (general application of UPL principles to mediation situations).

See generally 2002 ABA UPL Resolution, supra note 431 (explaining the ABA's stance on the issue). This article discusses the 2002 ABA UPL Resolution infra notes 556-63 and accompanying text. It discusses the 2004 ACR Proposed Policy Statement infra notes 566-73 and accompanying text.

Nolan-Haley states that the 2002 ABA UPL Resolution should “signify a substantial contribution to the development of mediation as a distinct profession” because the resolution reflects the thinking of lawyer and non-lawyer members of the section. Nolan-Haley, supra note 10, at 274-75. She also characterizes the resolution as one of three types of responses to managing the UPL problem in mediation practice. They are: (1) distinguishing between legal information and advice; (2) carve-out exceptions to UPL; and (3) official resolutions and positions. Id. at 271-75.

The efforts of the ABA Section of Dispute Resolution seem to coincide with the efforts of the ABA Task Force on the Model Definition of the Practice of Law occurring at about the same time. See discussion supra notes 426-38 and accompanying text.

See supra notes 27, 32, 341 and accompanying text.

2002 ABA UPL Resolution, supra note 431, at 1; see also Coben & Thompson, supra note 412, at 141 (describing the 2002 ABA UPL Resolution as providing “[g]ood practice suggestions”).

2002 ABA UPL Resolution, supra note 431, at 2.

Id. at 4; see also infra notes 775-823 and accompanying text. By providing this guidance, the analysis again focuses on consumer protection, but as defined by the governing standards of mediator ethics. The analysis turns on whether the mediator is competent to have those conversations either by training or experience. See infra note 341 and accompanying text.

2002 ABA UPL Resolution, supra note 431, at 2.

Jonathan A. Beyer, Practicing Law at the Margins: Surveying Ethics Rules for Legal Assistants and Lawyers who Mediate, 11 Geo. J. Legal Ethics 411, 416-17 (1998) (characterizing mediation as the practice of law would “seriously threaten established methods for providing mediation services” by, among other things, triggering Model Rules 2.2 (intermediary), 5.5 (UPL restrictions) and 5.7 (law related services)). The ABA deleted Rule 2.2 in later drafts of the rules. See Carrie Menkel-Meadow, When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals, 44 UCLA L. Rev. 1871, 1911-15 (1997), for a discussion on the
conflicts faced by lawyer-mediators when ADR is considered the practice of law); Matt Wise, *Separation Between the Cross-Practice of Law and Mediation: Emergence of Proposed Model Rule 2.4, 22 Hamline J. Pub. L. & Pol'y 383, 398-99 (2001)* (suggesting ABA must decide when lawyer-mediators may be practicing law before codifying model rule that applies to lawyers serving as neutrals); Arthur Garwin, *Double Identity: Ethics Issues do not Disappear for Lawyers who Serve as Mediators, A.B.A. J., June 1998, at 88, 88* (warning lawyers to remember that even though mediation is not classified as the practice of law, professional conduct rules may still apply).

2002 ABA UPL Resolution, supra note 431, at 3. The author of this article faces this situation as a mediator practicing in Virginia, but licensed as a lawyer in other jurisdictions.

ACR Adopts Resolution on the Unauthorized Practice of Law, supra note 464. See Model Standards of Conduct for Mediators (2005), for a copy of the standards of conduct adopted by the Association for Conflict Resolution.

Assoc. for Conflict Resolution, Unauthorized Practice of Law (UPL)/ Authorized Practice of Mediation (APM), http://www.acrnet.org/about/initiatives/publicpolicy/upl.htm. The policy statement identifies mediation as a practice distinct from law. It lists those mediation activities a mediator should be able to conduct without engaging in UPL so long as they are conducted consistently with mediation's core values. It identifies the following values as the foundation of mediation practice: (1) party self-determination; (2) voluntariness; (3) mediator impartiality; (4) conflict of interest disclosure; (5) informed consent; (6) competence; (7) confidentiality; and (8) commitment to process. Assoc. for Conflict Resolution Bd. of Dir., *The Authorized Practice of Mediation: Proposed Policy Statement of the Association for Conflict Resolution 4-7 (Aug. 28, 2004)*, http://www.acrnet.org/pdfs/upl-draftrpt-aug04.pdf [hereinafter 2004 ACR Proposed Policy Statement].

2004 ACR Proposed Policy Statement, supra note 566 at 1; see also Hoffman & Affolder, supra note 10, at 23 (“[T]he job of making the difficult [ethical] determinations, which implicate passionately debated principles of mediation ethics and practice, should be in the hands of mediators not prosecutors.”).

2004 ACR Proposed Policy Statement, supra note 566, at 9. Mediators engage in the “proper mediation practice” when they:•assess the willingness of the parties to engage in mediated negotiations, and in that context, if relevant to the parties, assist them in discussing their alternatives and options;•provide information and make recommendations as to the structure and ground rules of the mediation process to assist the parties in their voluntary participation in the process at its inception and on a continuing basis;•draft proposed agendas for discussion;•draft mediation participation agreements;•describe, explain and/or interpret court rules concerning the mediation process;•describe confidentiality and its limits;•facilitate the parties' conversation about applicable law;•provide oral and written summaries to the parties of discussions during the process;•facilitate the parties' discussion regarding their assessments of the strengths and/or weaknesses of their respective cases;•prepare agreements that incorporate only the terms agreed to by the parties;•in the context of family mediation, work with parties to complete child support worksheets; and•engage in the ministerial function of filing a settlement agreement or other settlement form with a court in a court-ordered mediation, depending on applicable law and local court rules and custom.

Id. at 10. Mediators engage in “improper mediation practice” when they:•hold themselves out as a legal representative of the parties;•state that, by virtue of having a mediator, parties to a mediation do not need a lawyer;•advise parties about their legal rights or responsibilities, or imply that a party can rely on the mediator to protect her or his legal rights;•draft an agreement that goes beyond the terms specified by the parties;•coerce a decision (explicitly or implicitly);•interfere with or ignore the parties' self-determination;•fail to act with impartiality;•apply legal precedent to the specific facts of the dispute; and•offer any personal or professional opinion as to how the court (judge or jury) in which a case has been filed will resolve the dispute.

Id. at 11. The ACR Board identified the following activities as falling in the “increased scrutiny” category:•proposing options for parties' consideration;•recommending a specific course of action; or•providing any personal or professional evaluation of the strengths or weaknesses of the case, either directly or implicitly, even when it is not intended to coerce the parties or direct a resolution.
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Id. at 10-11. This language echoes similar language in the ABA Section of Dispute Resolution, Resolution on Mediation and the Unauthorized Practice of Law. 2002 ABA UPL Resolution, supra note 431, at 5.


See Robert M. Sondak, Access to Courts and the Unauthorized Practice of Law: 10 Years of UPL Advisory Opinions, Fla. Bar J., Feb. 1999, at 14, 14, 20 (illustrating how the Supreme Court of Florida has developed an advisory opinion system to help determine what should be considered the unauthorized practice of law in order to protect the public from "incompetent, unethical, or irresponsible representation.").

Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct, Op. 96-30 (June 5, 1997) (deciding that, until a state court ruled otherwise, a lawyer may enter a contract with a non-lawyer entity to provide mediation services because it would not constitute aiding UPL); Me. Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar, Op. 149 (May 10, 1995) (stating that a lawyer-mediator may establish relationship with non-lawyer enterprise to offer mediation services, but mediator must stay vigilant that parties are not seeking legal advice as opposed to dispute resolution services); Md. State Bar Comm. on Ethics, Op. 2003-02 (allowing association of lawyer-mediator with nonlawyer-mediator "[t]o the extent that [the] practice is limited to court-ordered mediation as defined by [the statute]... If, however, either you or your partners engage in any other form of mediation or ADR, this may entail the practice of law..."); Or. State Bar Ass'n, Op. 1991-101 (July 1991) (stating that a mediator can join with non-lawyer in a mediation practice as long as they do not practice law by applying a general body of legal knowledge to the problem of a specific entity or person, but lawyer may not work as the nonlawyer-mediator's agent or employee in providing legal services to others; further stating that so long as lawyer-mediators and nonlawyer- mediators do not practice law, they may share fees); Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 83-F-39 (Jan. 25, 1983) (concluding that divorce mediation is the practice of law and precluding a mediation practice with a nonlawyer-mediator); Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 85-F-98 (Aug. 22, 1985) (distinguishing Formal Op. 83-F-39, supra, and finding that a Christian conciliation or mediation program would not constitute the practice of law and so a lawyer may participate in the program with nonlawyer-mediators; attempting to distinguish its earlier opinion by stating that secular mediation, in contrast to church-related program, is for profit; stating secular lawyer-mediators "are giving legal advice and are representing both parties in the dispute," and they resolve the dispute rather than focus on the repair of the relationship); Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 90-F-124 (Dec. 14, 1990) (reconsidering and clarifying Formal Ethics Op. 83-F-39, supra, and Formal Op. 85-F-98, supra, by stating that if divorce mediators adopt the practices outlined in the Standards of Practice for Family and Divorce Mediators of the Academy of Family Mediators, then divorce mediation is not the practice of law and a lawyer mediator may practice with nonlawyer-mediators); Va. State Bar Standing Comm. on Legal Ethics, Op. 1368 (Dec. 12, 1990) (establishing guidelines for creation by lawyer-mediators of a corporation that will provide mediation services and split fees with the lawyer-mediators; stating that a lawyer-mediator may give legal information and act as "scrivener."); see generally Cole, Rogers & McEwen, supra note 448, § 10:4 (discussing joint ventures between lawyers and non-lawyers providing mediation services).

Miss. Bar, Ethics Op. 241 (Nov. 20, 1997) (stating mediation is not the practice of law, but lawyer-mediator must comply with lawyer ethics rules governing advertising and feeder constraints); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 678 (Jan. 10, 1996) (stating that a lawyer-mediator may not participate in a divorce mediation referral service that is not sponsored or approved by the bar association because the committee presumes that lawyer-mediators will be rendering legal services and so they remain subject to bar rules on advertising); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1987-1 (Feb. 23, 1987) (stating that a lawyer may not allow a mediator to advertise that her business is located in the lawyer's law offices because it could unintentionally convey that the mediator will provide legal services; further stating that a lawyer could be deemed encouraging UPL through this advertising "ploy"); S.C. Bar Ethics Advisory Comm., Op. 94-10 (June 1994) (advising in context of advertising issues, that "[m]ediation is not a legal service... ); Utah State Bar Ethics Advisory Opinion Comm., Op. 97-03 (Apr. 25, 1997) (allowing direct solicitation of mediation business by mail and for profit so long as solicitation makes clear that the mediation services "are not legal services and that no attorney-client relationship will be established."); see generally Cole, Rogers & McEwen, supra note 448, § 10:3 (discussing the restrictions on advertising faced by lawyer-mediators).

Me. Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar, Op. 137 (Dec. 1, 1993) (stating that a lawyer mediator may draft divorce judgment and other ancillary documents such as promissory notes and deeds so long as the mediator remains neutral, reflects the parties' resolution of the matter in the documents, and encourages parties to consult with independent legal counsel to review draft
documents; construing language of bar rule broadly to find that “settlement agreement” can include ancillary documents that may be necessary to reflect fully the parties' resolution of the matter); State Bar of Mich. Standing Comm. on Prof'l and Jud'l Ethics, Op. RI-278 (Aug. 12, 1996) (stating that a lawyer mediator may draft MOU, must advise pro se parties to obtain independent legal advice about draft agreement, and “should ... discourage [party] from signing any agreement which has not been so reviewed”; further stating that a lawyer mediator is not per se prohibited from preparing pleadings required to implement parties' MOU, but activities would be the practice of law and not mediation; accordingly, lawyer would have to comply with Michigan Rules of Professional Conduct 1.7 and 2.2 and other ethics duties); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 736 (Jan. 3, 2001) (stating that a lawyer-mediator may not draft and file separation agreement and divorce papers on behalf of spouses as joint clients unless the lawyer can satisfy the “disinterested lawyer” test of DR 5-105(c)); Or. State Bar Ass'n Op. 1991-101 (July 1991) (stating that a lawyer mediator may draft settlement agreement under DR5-105 if he or she advises and encourages parties to seek independent legal advice, but mediator cannot represent one or both parties in placing the agreement in the records of the court); Utah State Bar Ethics Advisory Opinion Comm., Op. 02-10 (Dec. 18, 2002) (advising that “a lawyer may advise a mediator on issues likely to arise in the course of the mediation but may not advise the mediator how to prepare the divorce agreement and court pleadings” even in simple, uncontested divorces because it would constitute assisting UPL; further advising that in the context of unbundled legal services, the committee would allow a lawyer to represent a divorce mediation party in the limited capacity of preparing pleadings so long as the client gave informed consent to the limited role); Utah State Bar Ethics Advisory Opinion Comm., Op. 05-03 (Sept. 30, 2005) (advising that a lawyer-mediator who “drafts the settlement agreement, complaint, and other pleadings to implement the settlement and obtain a divorce for the parties... is engaged in the practice of law and attempting to represent opposing parties in litigation.” A lawyer may only do this if he satisfies a four part inquiry: (1) [t]he lawyer reasonably believe[s] that the representation of both parties will not adversely affect the relationship with either in this directly adverse representation. (2) The parties are firmly committed to the terms arrived at in mediation, the terms are faithful to both spouses' objectives and consistent with their legal rights, there are no remaining points of contention, and the lawyer can competently fashion the settlement agreement and divorce documents. (3) Both parties give fully informed consent. (4) The lawyer mediator makes known to the court the nature of his dual role.

Five members of the committee dissented from the opinion.


Fla. Rules for Certified and Court-Appointed Mediators R. 10.900 (2000) (describing the scope and purpose, appointment, membership and terms, meetings, opinions and their effect, confidentiality, and support of the committee)

Comm. on Ethics, Ga. Comm'n on Dispute Resolution, Advisory Op. 6 (June 14, 2005) (advising that a mediator cannot prepare a court order for the parties, even at the request of a judge or judicial officer, because under Georgia law preparation of a court order would constitute the practice of law; further advising that if a lawyer-mediator prepared a court order it would constitute impermissible legal advice under the mandatory ethics codes for mediators); Id. Advisory Op. 7 passim (Jan. 3, 2007) (advising that mediation is not the practice of law; advising that court-connected mediators are expected to help parties prepare settlement agreements or MOUs; advising that “Georgia's state-created child support worksheets, schedules, Excel spreadsheet, and on-line calculator” are tools that mediators, whether lawyer or non-lawyer, may use to help parties calculate child support; advising that mediator may not make judgments for the parties about “the inputs to the calculations and deviations,” but may help the parties negotiate these issues). The Florida Mediator Ethics Advisory Committee (Fla. MEAC) has issued fifteen advisory opinions discussing whether a mediator may mix professional roles, give legal advice, provide information, provide evaluations, or draft certain types of documents. See Fla. Mediator Ethics Advisory Comm., Op. 95-002 (1995) (describing the mediator's role and the inappropriateness of a mediator giving legal advice); Fla. Mediator Ethics Advisory Comm., Op. 96-002 (1996) (describing the need for a mediator to decline a court appointment when it would compromise the mediator's integrity); Fla. Mediator Ethics Advisory Comm., Op. 96-003 (1997) (advising that a mediator may not advise or ask about missing claims, but may ask if a party has sought legal advice); Fla. Mediator Ethics

The Florida disciplinary system does not determine whether a mediator has engaged in UPL, but it does rule on whether a mediator has violated a standard of ethics governing certified mediators. The violations that may overlap with a UPL violation include giving legal advice, evaluating the merits of a case, claim or defense, predicting the trial outcome, or predicting the ruling of a specific judge if the case went to trial. Since 2000, The Florida Mediator Qualifications Board (Fla. MQB) has ruled in eleven grievances raising allegations that the mediator mixed his or her professional roles in an impermissible way. See Fla. Mediator Qualifications Bd., Op. 2000-005 (2000) (alleging that the mediator improperly gave an evaluation of the strengths of a claim or defense; case dismissed for lack of probable cause); Fla. Mediator Qualifications Bd., Op. 2001-002 (2001) (alleging that the mediator improperly predicted what a specific judge would do if the case went to trial; case dismissed for lack of probable cause); Fla. Mediator Qualifications Bd., Op. 2001-004 (2001) (alleging that the mediator predicted that party would lose at trial; dismissed that portion of the case for lack of probable cause); Fla. Mediator Qualifications Bd., Op. 2001-007 (2001) (alleging the mediator provided professional advice or opinion by recommending the party accept the last offer of the other party; case dismissed for lack of probable cause); Fla. Mediator Qualifications Bd., Op. 2002-002 (2002) (alleging the “mediator presented her own proposal regarding a custody arrangement” and so gave improper professional advice or an opinion; case dismissed because of no actual damage); Fla. Mediator Qualifications Bd., Op. 2002-005 (2002) (alleging the mediator mixed professional roles by serving as a divorce mediator and family counselor at the same time; case dismissed); Fla. Mediator Qualifications Bd., Op. 2002-004 (2002) (alleging that the mediator provided legal advice to one party in a divorce mediation; later, that party hired the mediator as her attorney; the mediator agreed to get additional ethics training, send a letter of apology, and waive attorneys’ fees); Fla. Mediator Qualifications Bd., Op. 2002-006 (2002) (alleging that the mediator told one party she would lose if the case went to trial and that she would make a terrible witness; the mediator agreed to get additional training, including ethics training, to observe certified mediators, and to get mentoring from certified mediators; mediator failed to satisfy terms of agreement; eventually the mediator agreed not to serve as a mediator in any court-connected mediations); Fla. Mediator Qualifications Bd., Op. 2005-003 (2005) (alleging, among other things, that the mediator gave advice to opposing counsel; case dismissed for lack of probable cause); Fla. Mediator Qualifications Bd., Op. 2005-004 (2005) (alleging that the mediator behaved “more like... the attorney for the plaintiff than a mediator” and by telling the complainant that if “you go to court, you need to be on medication and heavy drugs.” The hearing panel imposed sanctions requiring the mediator to pay the costs of the proceeding; get additional training on cultural and diversity awareness; mediator appealed sanctions; chief justice reversed sanctions as not supported by the facts in the record.); Fla. Mediator Qualifications Bd., Op. 2006-008 (2006) (alleging mediator switched to parenting coordinator role; case dismissed for lack of probable cause). Grievances Filed with the Florida Mediator Qualifications Board, Mediator Qualifications Board Grievances Filed April 1, 2000-Present Summary (on file with the author).

Cooley, supra note 8, at 77.

Id.

The selected codes should operate as examples of the types of provisions that govern acts or communications that might be deemed UPL under the “law practice” paradigm. The author could have considered the mandatory ethics codes of Georgia and North Carolina,
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states with well-developed mediation infrastructures. She declined to do so. The author does consider later in the article the UPL guidelines these states developed for their mediators. See infra notes 747-57, 800-06, 813-16, 867-72 and accompanying text.


“In September 2002, a committee comprising members of the ABA, ACR, and the AAA began revising [the model standards developed a decade earlier by members of the field].” After an extended drafting, review, and comment period, the Joint Committee of drafters developed its April 2005 draft and presented it to its sponsoring organizations for their approval. “On August 9, 2005, the ABA House of Delegates adopted the standards, with one revision dealing with contingent fees.” On August 22, the Board of Directors of ACR adopted the revised standards. “On September 8, 2005, the AAA completed the adoption process.” Young, Rejoice!, supra note 348, at 203-06 (providing a history of the Revised 2005 Model Standards of Conduct for Mediators).


Id. at 76-77.

Id. at 71, 76.

Id. at 312-13.

Id.; see also Bush & Folger, supra note 542, at 22-26 (describing the value of conflict transformation).

Cloke, supra note 591, at 312-13.

Id. at 14, 17, 18, 45.

See infra notes 601-04 and accompanying text.


Leonard L. Riskin, Mediator Orientations, Strategies and Techniques, 12 Alternatives to High Cost Litig. 111, 111-13 (1994) (describing four styles of mediation based on how broadly the mediator defines the problem presented by the parties--and thus the depth of intervention the mediator is likely to take--and the role of the mediator, either facilitative or evaluative; according to this analytical scheme, a mediator could be: Facilitative-Narrow, Evaluative-Narrow, Facilitative-Broad, or Evaluative-Broad). The expanded discussion of his grid appears at Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Negot. L. Rev. 7, 17-38 (1996). See also Robert A. Creo, Mediation 2004: The Art and the Artist, 108 Penn St. L. Rev. 1017, 1022 (2004) (suggesting that mediators see two types of civil litigation impasse: (1) cases in which “the impasse is dominated by communication failure, tension between agent and principal, lack of creativity, and other process issues.” (2) cases in which the “impasse is a result of good faith difference [s] in evaluation of risk analysis, principles, or goals of the disputants.” In the first type of case, mediators help parties uncover existing value; in the second type of case, mediators help the parties create value. Mediators can use a facilitative style in the first type of case, but may need to use an evaluative style in the second type of case.); Kimberlee K. Kovach & Lela P. Love, Mapping Mediation: The Risks of Riskin's Grid, 3 Harv. Negot. L. Rev. 71, 73-100
(1998) (arguing that evaluative mediation should not be a part of the mediation map). The following discussion briefly describes the facilitative style discussed in these articles.

According to several authors, facilitative mediation—the style of mediation most frequently taught to new mediators—focuses on providing the parties consensus building process-skills. Mediators using this style assume that the parties are intelligent and capable and that they understand better than any mediator ever could the dispute and possible resolutions of it. Mediators using this style intend to enhance the participation of all parties involved in the mediation, generate party-to-party discussions, and reopen and improve channels of communication. They also use techniques designed to identify each party’s interest and needs underlying their hardened positions, help the parties evaluate unreasonable expectations, and help the parties identify solutions to the dispute through brainstorming and option generation techniques. Facilitative mediators generally show a preference for joint sessions rather than caucus and reserve caucus for times when the parties cannot talk to each other face-to-face. The mediator remains responsible for the process, but not for the outcome.

Paula M. Young, The Who of Mediation--Part I: A New Look at Mediator Styles?, http://www.mediate.com/articles/young15.cfm (citations omitted) [hereinafter Young, The Who of Mediation--Part I]. For a description of the evaluative style of mediation, see infra note 609 and accompanying text. See Schwartz, supra note 448, at 1728-46, in which the student author discusses facilitative and evaluative mediation and concludes that facilitative mediators engage in the practice of law when they make editorial suggestions to the memorialized agreement rather than serving merely as a scrivener; further concluding that evaluative mediators who give legal opinions and predictions regarding disputed facts engage in the practice of law. The student author's conclusions do not reflect Riskin's and other scholars’ view that mediation is a much more dynamic process than the descriptions of the two styles suggest. See Leonard L. Riskin, Who Decides What? Rethinking the Grid of Mediator Orientations, Disp. Resol. Mag., Winter 2003, at 22, 23 [hereinafter Riskin, Who Decides What?] (“[I]t is both problematic and difficult to label a particular move—let alone a mediator’s approach or orientation—as either evaluative or facilitative.”). See also Chris Guthrie, The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering, 6 Harv. Negot. L. Rev. 145, 150 (“[M]ediation is unlikely to be purely facilitative as long as lawyers serve as mediators.”); Tom Fisher, Advice by any Other Name..., 19 Conflict Resol. Q. 197, 203-04 (2001) (suggesting mediators can use several techniques to camouflage direct advice); Hoffman, supra note 4, at 108 (“What fuels these philosophical debates is quite basic: It's about turf. If lawyers define mediation as an evaluative, problem-solving activity requiring subject matter expertise, many fear they will tip the mediation playing field so far in the lawyers' direction as to drive all others from it.”); L. Randolph Lowry, To Evaluate or Not: That Is Not the Question!, Fam. & Conciliation Cts. Rev., Jan. 2000, at 48, 48-50, 55-58 (proposing that all mediators employ evaluative techniques and should understand when and how to use them rather than avoiding their usage); James H. Stark, The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator, 38 S. Tex. L. Rev. 769, 774 (1997) (suggesting evaluation happens along a continuum of interventions); Joseph B. Stulberg, Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock, 24 Fla. St. U. L. Rev. 985, 989 (1997) (suggesting a mediator should be able to move quickly between the orientations to engage the parties in constructive conversation); Samuel J. Imperati, Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation, 33 Willamette L. Rev. 703, 709-12 (1997) (discussing how mediators shift between facilitative interventions and other interventions identified with other models of mediation and advocating the use of the different approaches, including evaluative interventions, as long as the parties are informed of the role the mediator plays in a particular session); see also Love & Cooley, supra note 341, at 66-70 (describing precautions mediators should take in shifting to an evaluative role; mediator should engage in evaluation of legal issues only after: (1) giving an early and clear warning of the risks of evaluative interventions; (2) providing the basis and context for the evaluation; (3) urging the parties to get independent legal advice; and (4) going to the library to do adequate research).

602 Bush & Folger, supra note 542, at 81.


604 Compare Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 Alternatives to High Cost Litig. 31 (1996) (arguing that evaluative techniques are separate from traditional methods of mediation and that the practice of mediation should focus solely on facilitation), and Lela P. Love, The Top Ten Reasons Why Mediators Should Not Evaluate, 24 Fla. St. U. L. Rev. 937, 937-38 (1997) (illustrating how evaluative techniques are inconsistent with a mediator's role), with Imperati, supra note 601, at 741-42 (embracing both evaluative and facilitative mediation as long as the parties understand the style of mediation the mediator is using in the session), Meyerson, supra note 453, at 124 (arguing that mediators should give legal advice and case evaluation as
part of the services offered by mediators), Nolan-Haley, supra note 10, at 279 (“In reality, much of what passes for standard mediator techniques can be a form of explicit or implicit evaluation.... [I]t does not take too much to transform the act of inventing solutions into the practice of law.”), Stark, supra note 601, at 770-71 (endorsing evaluative mediation), Jeffrey W. Stempel, The Inevitability of the Eclectic: Liberating ADR from Ideology, 2000 J. Disp. Resol. 247, 282 (2000) (“[T]he image of lawyer as evaluator is hard-wired into the professional training, rules, and norms of the legal profession.... Lawyers who mediate in the evaluative style are also close to the traditional lawyer model of negotiating and advising clients. But lawyers who mediate facilitatively have departed from the traditional professional model. To the extent that [model] takes hold, the facilitative lawyer mediator has increased professional legitimacy, both in mediation circles and in lawyering circles.”), and Jeffrey W. Stempel, Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role, 22 Ohio St. J. on Disp. Resol. 619, 640-57 (2007) (discussing regulation of mediation and quoting Professor Julie McFarland's critique of ethics codes).

605 Cooley, supra note 8, at 77.

606 Honeyman, supra note 394, at 16-17. The preamble to the 2005 Model Standards also expressly states the five purposes of mediation: “[P]roviding the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.” Model Standards of Conduct for Mediators pmbl. (2005).

607 The Florida Supreme Court recognizes that “[t]he role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute. The ultimate decision-making authority, however, rests solely with the parties.” Fla. Rules for Certified and Court-Appointed Mediators R. 10.22 (2000). See also Ala. Code of Ethics for Mediators art. II(c) (defining the role of the mediator as: “assisting the disputing parties in identifying issues, facilitating communication, focusing the disputing parties on their interests, maximizing the exploration of alternatives, and helping the disputing parties reach voluntary agreements”); Requirements for the Conduct of Mediation and Mediators Standard 2.C (Ark. Alternative Dispute Resolution Comm’n 2001) (defining the role of the mediator in a similar way); N.J. Standards of Conduct for Mediators in Court-Connected Programs Standards I.A, I.B (2000), http://www.judiciary.state.nj.us/notices/n000216a.htm (“[T]he mediator is an impartial facilitator” whose primary role is to “facilitate a voluntary resolution of the dispute, allowing the parties the opportunity to consider all options for settlement.”); Standards of Prof’l Conduct for Mediators pmbl. (N.C. Supreme Court 1998) (“The mediator’s role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives.”); Tenn. Standards of Prof’l Conduct for Rule 31 Neutrals § 1(b) (“The role of [mediator] includes... assisting the parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach voluntary agreements.”); id. § 4(a) (mediator shall advise parties that mediator is “an impartial facilitator”). Virginia requires a mediator to “describe his style and approach to mediation” to the parties when initiating the mediation process. Standards of Ethics and Prof’l Responsibility for Certified Mediators § D.1.c (Judicial Council of Va. 2005).

608 See infra note 701.


610 Id.

611 Id. (citing Douglas Noll, Peacemaking: Practicing at the Intersection of Law and Human Conflict 91-92 (Cascadia Publ. House 2003)).

Young, The Who of Mediation--Part I, supra note 601 (citations omitted). Non-Binding Arbitration is “[a] procedure... conducted much like a (binding) arbitration, except that when the arbitrator issues the award after the hearing, it is not binding on the parties and they do not give up their right to a jury trial. In that case, the arbitrator's award is merely an advisory opinion.” JAMS, Arbitration Defined, http://www.jamsadr.com/arbitration/defined.asp.

Roselle L. Wissler, To Evaluate or Facilitate?, Disp. Resol. Mag., Winter 2001, at 35, 35. The study found that “when the mediator evaluated the case, parties were more likely to say that the mediation process was fair and the mediator understood their views.” Id. They had sufficient “opportunity to express their views, had input in determining the outcome, were satisfied with the outcome, and gained a better understanding of their own interests.... [yet] did not feel more pressured to settle.” Id.

The report found that in private civil mediations, eighty percent of survey participants thought a mediator's analytical input appropriate. They thought the following input would help in about half or more of their mediated cases: asking pointed questions, analyzing the strengths and weaknesses of the case, making a prediction about likely court results, suggesting ways to resolve issues, recommending a specific settlement, and applying some pressure to accept a specific proposal. Ninety-five percent of survey participants rated making suggestions important, very important, or essential to mediation. About seventy percent of survey participants rated giving opinions as important, very important, or essential to mediation. Am. Bar Ass'n Section on Disp. Resol. Task Force on Improving the Quality of Mediation, Final Report 14 (April 2006-March 2007), http://www.abanet.org/dch/committee.cfm?com=DR020600.


Id. at 366.

Id. at 368-69.

Id. at 369. See supra notes 346-75 and accompanying text, for a discussion of ethical constraints on a mediator's ability to generate options.

Goldberg, supra note 616, at 370.


Id. at 398-99. The data referenced by this footnote indicates that, for instance, sixty percent of survey respondents thought that being friendly, empathetic, likable and so on was a reason for the average mediator's success. Id. at 399.

Id. at 398 (bullets added).

Id. at 403. The author views this difference as further evidence of the contrast between the “law practice” paradigm and the “authorized practice of mediation” paradigm. Advocates in the study, most of whom were lawyers, seem to expect these types of behaviors from mediators and see them even when mediators may not be explicitly using them or using them at all. Interestingly, Goldberg saw no significant difference in the overall evaluations of mediators who were former judges and of mediators who had no judicial experience. Id. at 406 (“The former judges were neither significantly more often cited for their evaluation skills nor significantly less often cited for their process skills than were other mediators.”). Moreover, the results of the third study by Goldberg suggest that evaluative skills play a much smaller role in successful mediation than many assume. Id. at 403; see also infra text accompanying notes 628-31.

Id. at 408.

Id. at 408-09. See infra text accompanying notes 710-22, for a more detailed discussion of the data on harm to the public from mediator conduct.

The data in the parenthetical indicates that, for instance, forty-eight percent of survey respondents thought lack of integrity constituted counter-productive behavior on the part of the mediator. Id. at 399. These counter-productive behaviors also cross ethical boundaries for mediators. See supra note 145 and text accompanying notes 346-75.
Goldberg & Shaw, supra note 621, at 411 (bullets added).

Id.

Id. at 413.

Id.


See Nichol M. Schoenfield, Turf Battles and Professional Biases: An Analysis of Mediator Qualifications in Child Custody Disputes, 11 Ohio St. J. on Disp. Resol. 469, 478-80 (1996) (identifying the advantages of using mental health care professionals as mediators in child custody cases); Letter from Florida Institute of Certified Public Accountants to Supreme Court of Florida (Aug. 31, 2000) available at http://www.floridasupremecourt.org/clerk/comments/2005/index.shtml (responding to a brief regarding Amendments to Florida Rules for Certified and Court Appointed Mediators, No. SC05-998, and supporting change that would allow qualified nonlawyer-mediators to serve in cases referred by the circuit courts by explaining that other professionals (1) would expand and add diversity to the pool of mediators; (2) would allow parties to pick mediators with professional backgrounds best suited to the parties' needs; and (3) would allow participation of CPAs and other professionals with a problem-solving background, rather than an attorney's advocacy background; Florida already allowed certified public accountants to serve as mediators in county, family, and insurance mediations).


Cris Currie, Should a Mediator Also Be an Attorney?, Mediate.com, http://www.mediate.com/pfriendly.cfm?id=200. See also Hoffman, supra note 4, at 107 (“Some lawyers have entered the field of mediation like the proverbial bull in the china shop, with little regard for the hard work that pioneers in the field have done to develop standards for training, ethics, and qualifications.”).

Currie, supra note 636 (citing Raymond Albert, Mediator Expectations and Professional Training: Implications for Teaching Dispute Resolution, 1985 Mo. J. Disp. Resol. 73, 73-87 (1985)).

Nolan-Haley, supra note 10, at 238 (also recognizing how the legal profession views non-lawyers as getting “on the band-wagon” of mediation).

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See, e.g., Clark Freshman, Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation, 44 UCLA L. Rev. 1687, 1692-93, 1695, 1738 (1997) (suggesting that parties can use the personal values, community values, or legal norms as the values that apply in mediation; mediators may discuss legal norms more frequently simply because they are easier to predict and discuss than personal or community values or norms).

Standard VIII of the aspirational ethics code adopted by family mediators requires a family mediator to “assist participants in determining how to promote the best interests of children.” See Model Standards of Practice for Family and Divorce Mediation Standard VIII (2000). The standard encourages mediators to explore parenting plan options, to identify resources to help children cope with divorce, to discuss the affect ongoing conflict has on children, and to consider dispute resolution procedures for any conflicts about the parenting plan that arise in the future. Id.

Some critics of UPL regulation argue that it denies poor people access to the legal system. See Nolan-Haley, supra note 10, at 267. Sharon Press, Director of the Florida Dispute Resolution Center (Florida’s DRC), believes that perhaps fifty percent of domestic cases involve pro se parties in Florida. Telephone Interview with Sharon Press, Director of Florida’s DRC, in Tallahassee, Fla. (Nov. 25, 2005). Judge Sandra Vilardi-Leheny, Connecticut Superior Circuit Judge, also believes half of the parties seeking a divorce in her family court appear pro se. Telephone Interview with Sandra Vilardi-Leheny, Superior Court Judge, in Danbury, Conn. (Feb. 21, 2007). See supra notes 48-66 and accompanying text. See infra Appendix A for Judge Vilardi-Leheny’s role in Dr. Fremed’s story. See also Connie J.A. Beck & Bruce D. Sales, A Critical Reappraisal of Divorce Mediation Research and Policy, 6 Psychol. Pub. Pol’y & L. 989, 993-94 (2000) (citing two studies in Maricopa County, Arizona, two studies of California courts, and a study of sixteen courts nationwide indicating that in divorce and child custody mediations held since 1990 an average of seventy-two percent of the mediations involved at least one pro se party); Charlene E. Depner & Sonya Tafoya, Court-Based Child Custody Mediation: The California Experiment, ACResolution, Fall 2006, at 24, 25 (reporting statistics produced by the California Uniform Statewide Statistical Reporting System indicating that in sixty-nine percent of the 100,000 contested child custody and visitation cases handled annually through court-connected mediation programs, at least one party appears pro se); Craig A. McEwen & Roselle L. Wissler, Finding Out if It Is True: Comparing Mediation and Negotiation Through Research, 2002 J. Disp. Resol. 131, 133 (2002) (citing research showing that lawyers generally participate in mediations with their clients); Katherine R. Kruse, Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation, 8 Clinical L. Rev. 405, 413-14 n.19 (2002) (citing two sources reporting that up to eighty-eight percent of family law cases, not necessarily in mediation, involve one pro se party; also reporting that sixty-nine to seventy-two percent of Wisconsin cases filed in an urban area court involved at least one pro se party); Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 Minn. L. Rev. 1317, 1362 n.261 (1995) (analyzing data assembled by the National Center for State Courts and finding that lawyers played no role in mediation in forty-three percent of the 205 court-related divorce mediation programs studied); Yale Divorce Research, supra note 98, at 157 n.216 (census data indicating higher incidence of nonlegal separation among low-income individuals). In 1995, the ABA's Commission on Nonlawyer Practice reported that “as many as 70% to 80% or more of low-income persons are unable to obtain legal assistance even when they need and want it.” ABA Report with Recommendations, supra note 483, at 77. Many middle-class individuals also feel they cannot afford legal services provided by attorneys. Id. at 76.

See, e.g., E-mail from Jim Meditz, President, Virginia Mediation Network, to author (Jan. 30, 2008, 10:22:00 EST) (on file with author) and E-mail from Paula M. Young, Associate Professor of Law, Appalachian School of Law, to Greg Firestone, Florida Mediator, Joe Beauty, Agreements Unlimited, Sharon Press, Director of the Florida Dispute Resolution Center, Geetha Ravindra, Former Director of the Virginia Department of Dispute Resolution Services, Rebecca Magruder, St. Louis Mediator (Jan. 15, 2008, 19:32:00 EST) (on file with author) (asking them to distribute to nonlawyer-mediators the following questions: (1) What process skills do you think you use that think are most important to the mediation process?; (2) What personal attributes or characteristics make you most effective as a mediator?; (3) How does your professional background affect the way you mediate, if it does?; and (4) What is your profession of origin?).
For instance, responding mediators mentioned being “quiet” when appropriate; active listening; listening without judgment; asking open-ended questions; paraphrasing, summarizing, paying attention to non-verbal communication of parties; providing non-verbal communication with parties, especially eye-contact; ensuring parties to a dispute know that they have been heard and understood by the other party; asking parties to reflect on what the other has said and respond to it; encouraging each person to share facts and feelings without fear of judgment and interruption; and speaking about difficult issues in a direct non-judgmental manner—the opposite of avoidance or private caucus. See E-mail from Karen Brazell, Private Mediator, Proactive Communication and Mediation, to author (Feb. 1, 2008, 06:53:00 EST) (on file with author) (school-based mental health counselor); E-mail from Sue Bronson, Private Mediator, New Prospects Counseling Services, to author (Feb. 1, 2008, 14:41:00 EST) (on file with author) (psychotherapist); E-mail from Shirley Confino-Rehder, Private Mediator, to author (Jan. 30, 2008, 13:08:00 EST) (on file with author) (home designer); E-mail from Cyndy Martin, Executive Director, Community Mediation Center of Charlottesville, to author (Feb. 13, 2008, 06:42:00 EST) (on file with author) (former counselor); E-mail from Susan Oberman, Private Mediator, Common Ground Negotiation Services, to author (Feb. 11, 2008, 10:09:00 EST) (on file with author) (social work, hot-line counselor for abused women, child care center director, feminist organizer, and activist); E-mail from Jennifer Orenic, Shenandoah National Park, National Park Service, to author (Feb. 10, 2008, 07:57:00 EST) (on file with author) (wastewater treatment plant operator); E-mail from Isabelle Richmond, Private Mediator, to author (Feb. 10, 2008, 09:11:00 EST) (on file with author) (M.D., Ph.D., physician); E-mail from Jeff Shelton, Chesapeake, Virginia Community Services Board, to author (Jan. 31, 2008, 09:10:00 EST) (on file with author) (Ph.D., L.P.C., Mental Health/Substance Abuse Administrator). The author has not ascribed any of these comments to particular nonlawyer-mediators who responded to her questions. She has not indicated direct quotations with the use of quotation marks.

Responding nonlawyer-mediators said they created an emotionally safe environment; set ground rules for politeness; allowed some bickering if it appeared the person bickering needed to vent a little and hadn’t had a chance to do so before; and allowed respectful confrontation that requested or required accountability. E-mails, supra note 645 (without specific attribution of comments and without indicating direct quotations).

Negotiation skills nonlawyer-mediators used included: assisting parties in gaining clarity about their needs and in helping them create proposals; keeping clients from continually going into the past; focusing on the positive; acknowledging disputants’ cooperation; encouraging comfort with the process; facing reality to provide clarity and free up the parties' buried resources for new solutions to emerge; reminding the parties that a mediation is a negotiation and that in order to get what you want most, they must be willing to give up something in return in most cases; reflecting back the common goals of each person (especially best interest of the child); process coaching (i.e., helping people see different ways of making it easy for the other person to see things differently); allowing and facilitating brainstorming by all parties involved; asking each party for their ideal solutions—and then their proposals for compromise; noting their hard work toward a solution; supporting the growth of empathy from the moments of shared humanity; reality testing (“NOT” advice on outcomes, but recognizing probabilities, the “other’s” willingness or lack thereof, etc.); giving information or helping parties seek and share information as the exercise of informed consent, the basis for self-determination; looking for common ground; extracting the main points/issues in dispute; helping disputants come to a mutually acceptable agreement. E-mails, supra note 645 (without specific attribution of comments and without indicating direct quotations). One responding mediator said: “In family mediation, setting the tone in the beginning introductions... is very important. I usually talk about how conflict between parents causes a great deal of harm to their children and give them a handout also to this effect. As I am relating the different phases of the process, I use the pronoun ‘we’ so that they know I am working with both of them to come up with a plan. I enter their conflict and we become a triage that will work together to do what is best for their children.” E-mail from Jennifer Orenic, Shenandoah National Park, National Park Service, to author (Feb. 10, 2008, 07:57:00 EST) (on file with author) (wastewater treatment plant operator).

Many of the responding nonlawyer-mediators identified some of the same qualities identified in the Goldberg study, supra note 616, at 372-74. The personal qualities the responding mediators found helpful included intuition, empathy, patience, focus, sensitivity to the nuances of behavior and language, the ability to remain calm when parties are having inappropriate reactions, a soft and encouraging voice, flexibility, adaptability, humility in the role of mediator, the ability to process information quickly, trustworthiness (which derives from perceptions the parties develop of the mediator’s honesty, reliability, safety, experience, and emotional connectedness), intelligence, competence; and the ability to remain neutral. See e-mails, supra note 645 (without specific attribution of comments and without indicating direct quotations).
For example, one mediator said: “Genuine respect for individual strengths [seeing] the good intention behind behaviors, even problematic ones, and [being] reverent of the journey that led to the present situation. Like the natural healing potential of the body, I believe systems and individuals are self-regulating for a greater good.” E-mail from Sue Bronson, Private Mediator, New Prospects Counseling Services, to author (Feb. 1, 2008, 14:41:00 EST) (on file with author) (psychotherapist).

The nonlawyer-mediators identified the following helpful attitudes they held about the mediation process: just being fully present in the moment; the healing power of presence; not pre-judging the situation or the participants, while still retaining control of the session; writing concise agreements; refusing to force an agreement when one party is reluctant to agree; making as few assumptions as possible about the conflict; believing in the wisdom of the parties to make appropriate decision for themselves; questioning everything and welcoming the same questioning from parties; not thinking that going to court is a negative thing; encouraging parties to know and exercise their legal rights; not making the assumption that conflict is bad, that mediation is always the best decision, that we can overcome power imbalances in mediation, that joint custody is better for children, or that a parent who doesn't pay child support or who does the wrong things, doesn't care or want to be a good parent; making the process transparent by informing parties that they have a right to end a mediation if they determine that a mediator has lost his or her impartiality; and believing in the mediation process. See e-mails, supra note 645 (without specific attribution of comments and without indicating direct quotations).

E-mail from Jacqueline Baker, Private Mediator, to author (Jan. 30, 2008, 11:04:00 EST) (on file with author) (“recognize[ing] [the] warning signs of a mental health condition, abusive relationships, etc.”); E-mail from Karen Brazzell, Private Mediator, Proactive Communication and Mediation, to author (Feb 1, 2008, 06:53:00 EST) (on file with author) (“counseling background help[s] me encourage disputants to focus on [the] best interest of the child”); E-mail from C. Martin, Executive Director, Community Mediation Center of Charlottesville, to author (Feb. 13, 2008, 06:42:00 EST) (on file with author) (“I am a former counselor so I am sure that affects the way I mediate and the value I place on listening skills.”).

E-mail from Jacqueline Baker, Private Mediator, to author (Jan. 30, 2008, 11:04:00 EST) (on file with author) (“extensive knowledge of resources in the community”); E-mail from Sue Bronson, Private Mediator, New Prospects, to author (Feb. 1, 2008, 14:41:00 EST) (on file with author) (“[i]ntegrating theoretical concepts and practical application”).

E-mail from Jacqueline Baker, Private Mediator, to author (Jan. 30, 2008, 11:04:00 EST) (on file with author) (“extensive experience and training [in] working with people in crisis situations”); E-mail from Shirley Confino-Rehder, Private Mediator, to author (Jan. 30, 2008, 13:08:00 EST) (on file with author) (“work[jing] with a great diversity in culture, mind sets, education, economic and professions [that gives] me the ability to work with and communicate with almost anyone”); E-mail from Susan Oberman, Private Mediator, Common Ground Negotiation Services, to author (Feb. 11, 2008, 10:09:00 EST) (on file with author) (“As a mother and as someone who worked with many small children, I feel I have much experiential understanding of children, parents, and families. In addition, I have spent over forty years studying and researching the family as an institution.”); E-mail from Jennifer Orenic, Shenandoah National Park, National Park Service, to author (Feb. 10, 2008, 07:57:00 EST) (on file with author) (volunteer work with battered women); E-mail from Jeffrey Shelton, Chesapeake, Virginia Community Services Board, to author (Jan. 31, 2008, 09:10:00 EST) (on file with author) (“[E]xperience in courts during my career and working with [court] personnel [] helps me to prepare parties for the [court] system. As a therapist, I am sensitive to times when it is important to encourage parties to discuss old issues, e.g. where apology and forgiveness may be in order.”).

In Virginia, mediators may draft MOUs for the parties. See discussion infra note 824-48 and accompanying text.

When the author discussed this article at a faculty brown bag lunch, one of her colleagues made this comment. Interview with Stewart L. Harris, Associate Professor of Law, Appalachian School of Law, in Grundy, Va. (Nov. 30, 2007).


The ethics codes recognize that the choice of a mediator, including a nonlawyer-mediator, reflects party self-determination over the process. The 2005 Model Standards, for instance, state: “Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.” Model Standards of Conduct for
Mediators Standard I.A (2005). The Reporter's Notes to the 2005 Model Standards emphasize that the revised definition of mediation is not intended to "exclude any mediation style or approach consistent with Standard I's commitment to support and respect the parties' decision-making roles in the process." ABA, ACR & AAA, Reporter's Notes § V(A) at 7, available at http://moritzlaw.osu.edu/programs/adr/msoc/pdf/reportersnotes-april102005final.pdf (last visited Apr. 10, 2005) [hereinafter Reporter's Notes].

658 “Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence.” Model Standards of Conduct for Mediators Standard IV.A.1 (2005).

659 In re Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998 (Fla. Nov. 15, 2007) [hereinafter Amendments to Florida Rules for Certified and Court-Appointed Mediators], available at http://www.floridasupremecourt.org/clerk/comments/2005/index.shtml. The Committee making the proposal consisted of 18 members representing over: 336 years of legal or bar membership experience; 132 years of judicial experience; 131 years of mediation experience; 112 years of certified mediator experience; 11 years of trial court administrative experience; 19 years of full-time graduate level professor teaching experience; and 7 years of experience as a graduate level dean. See Response of the Alternative Dispute Resolution Rules and Policy Committee to the Florida Bar's Letter of August 10, 2006, In re Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998, at 6 (Fla. 2006), available at http://www.floridasupremecourt.org/clerk/comments/2005/index.shtml [hereinafter Response of Rules Committee].

660 See Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, in re Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998, at 3 (Fla. 2005) [hereinafter Florida Amendment Petition], available at http://www.floridasupremecourt.org/clerk/comments/2005/index.shtml (explaining that when Florida's Special Rules Committee recommended earlier that only bar members and judges serve as mediators in circuit court cases, they had hoped to gain quicker acceptance of mediation by the judiciary and the Florida Bar; with that goal met, the Florida Committee recommended that the Florida Supreme Court drop the limitation).

661 Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998, at 6-8. See also Florida Amendment Petition, supra note 660, at 3 ("[c]ompetency as a mediator is not inextricably linked to any specific academic degrees or professional license"). Under this new system, the author would have difficulty accumulating the points required for any of the certifications, primarily because she does not engage in the regular practice of mediation. Accordingly, she does not accumulate at least fifteen cases per year or a minimum of 100 mediations over a consecutive five-year period. See Fla. Rules for Certified and Court-Appointed Mediators R. 10.105 (2000). The author's 1500 hours of advanced education and training would only give her 40 points towards the 100 points required. Id.

662 Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998, at 5. See also Florida Amendment Petition, supra note 660, at 3 (stating “academic prerequisites... may not continue to have an entirely rational basis. Under Florida's present certification standards, a number of nationally known mediators... cannot be certified [including] Roger Fisher and William Ury... co-authors of Getting to Yes, as well as former President Jimmy Carter....").

663 Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998, at 5-6. Sixteen states impose no statewide roster, registration or certification requirements; sixteen states impose no educational or experiential requirements other than the required mediation training; ten states require mediators to be trained as lawyers (including Florida before the rule amendment); two states require at least a bachelor's degree; and six states create some flexibility in certification requirements. See N. Va. Mediation Serv., supra note 19, passim. Seven states require mediators to be licensed attorneys in particular types of cases. Id. at 30, 33, 40, 52, 64, 90, 107 (Idaho in civil cases; Indiana in civil cases; Louisiana for appointment under the Louisiana Mediation Act; Mississippi in court-annexed cases; New Mexico for the civil case settlement program in the First and Third Judicial Districts; South Carolina in civil court cases; and Washington in Superior Court health care claims cases).
Florida Amendment Petition, supra note 660, at 4 (explaining that in 1987 the “Committee attempted to mirror current practice at the time with regard to family mediation... [in which] it was common for family mediators to be mental health professionals rather than attorneys.”)

Id.

Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998, at 2 (quoting In re Petition of the Alternative Dispute Resolution Rules and Policy Comm. on Amendments to Fla. Rules for Certified and Court-Appointed Mediators, 931 So.2d 877, 880 (Fla. 2006)).

Id. at 6.

Florida Amendment Petition, supra note 660, at 5. The Rules Committee implicitly stated that parties should have the opportunity to choose mediators whose backgrounds indicate race, gender, or cultural competencies. In 2005, the roster of 2114 circuit court mediators in Florida showed little diversity: 88% were male, 1% were African-American, 4% were Hispanic, and less than .3% were of American Indian, Alaskan Native, or Asian descent. In contrast, Florida's general populace is 44.8% male, 14.6% African-American, 16.8% Hispanic, and 2% of American Indian, Alaskan Native, or Asian descent. The demographics of Florida's certified family mediators more accurately reflected the diversity in the general populace: 45% male, 6% African-American, 6% Hispanic, but less than .3% of American Indian, Alaskan Native, or Asian descent. Id.

Letter from John F. Harkness, Jr., Executive Director, the Florida Bar, to the Hon. Thomas D. Hall, Clerk of the Supreme Court of Florida, In re Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998 (Fla. 2006). See also the oral argument of Andrew Sasso on behalf of the Florida State Bar, In re Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998 (Fla. 2007), available at http://www.flcourts.org/gen_public/adr/SC05-998.shtml.

Letter from John F. Harkness, Jr., supra note 669, at 1. The Rules Committee noted that the bar did not address any of the Rules Committee's reasons for the recommended change. Response of Rules Committee, supra note 659, at 2-3. While the Florida Bar's Board of Governors authorized the letter, only 46 of its 52 members attended the discussion of the issue, and the letter did not reveal for the court the kind of experience they had with mediation or as mediators. Id. at 4. During the nearly fourteen month period in which the Rules Committee circulated the proposed rule for comment, it received no comments from the organized bar until the court ordered a response. Id. Only one attorney out of the 81,486 attorneys licensed to practice in Florida expressed any concern about the elimination of Florida bar membership as a prerequisite for certification. Id. at 7. The Rules Committee stated that even this comment admitted that legal competence “is not always vital in circuit court mediation.” Id. at 7-8. Of the remaining six comments the Rules Committee received from lawyers, four supported the change and two did not discuss it. Id. at 8. ACR and the Florida Chapter of Association of Family and Conciliation Courts also supported the change. Id.

Response of Rules Committee, supra note 659, at 2.

Id. at 10.

Id.

Id. Florida is one of a handful of states that monitors the quality of court-connected mediation through a grievance process. See Young, Take It or Leave It, supra note 13, at 804-14; Jamie Henikoff & Michael Moffitt, Remodeling the Model Standards of Conduct for Mediators, 2 Harv. Negot. L. Rev. 87, 98 (1997) (“Crucial to the functioning of codified restrictions [of professional conduct] is the existence of enforcement mechanisms... Mediators... face no consistent or predictable threat of enforcement.”). See also discussion infra note 710-15 and accompanying text.

Response of Rules Committee, supra note 659, at 13. That infrastructure includes: (1) a good moral character requirement; (2) training requirements; (3) educational requirements; (4) mediation experience; (5) supervision by mentors; (6) compliance with a mandatory code of ethics; (7) oversight through a mediator grievance or disciplinary system; and (8) continuing mediator education...
requirements. Id. In sharp contrast, Connecticut has few of these safeguards for mediator competence. See discussion supra notes 13-14 and accompanying text. For a discussion of other components of a regulatory infrastructure, see discussion supra note 13.

676 Response of Rules Committee, supra note 659, at 14.


678 Id.

679 Id.

680 Id.

681 Id.

682 See N. Va. Mediation Serv., supra note 19, passim.


684 Id. at 3.

685 Id. at 8.

686 Id. at 9.

687 Id. at 1, 8.

688 Its resolution provides:

The Section of Dispute Resolution has noted that many court connected ADR programs and other dispute resolution programs have restricted participation to neutrals who are lawyers. The Section believes that the eligibility criteria for dispute resolution programs should permit all individuals who have the appropriate training and qualifications to serve as neutrals, regardless of whether they are lawyers.

Am. Bar Ass'n ADR Policies Section of Dispute Resolution Council, Resolution Calling for the Inclusion of People from Multiple Professions in Court-Connected Mediation Programs (Apr. 28, 1999), available at http://www.abanet.org/dispute/webpolicy.html. See also Unif. Mediation Act §§ 9(c) & 9(f), Reporter's Notes (2001) (“No consensus has emerged in law, research, or commentary as to those mediator qualifications that will best produce effectiveness or fairness. As clarified by Section 9(f), mediators need not be lawyers.”), available at http://www.pon.harvard.edu/guests/uma/main.htm.


690 Hoffman, supra note 4, at 109 (“I believe that our diversity as a field is one of our strengths.”).

691 See, e.g., Model Standards of Conduct for Mediators Standard VI.A.5 (2005) (“Mixing the role of mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles.”); Model Standards of Practice for Family and Divorce Mediation Standard VLB (2000) (“The mediator shall not provide therapy or legal advice.”); Va. Court Rules and Procedures R. 2.11(c) and cmt. [7] (2008) (allowing a lawyer-mediator to provide legal information if he or she also advises the parties who are unrepresented or who attend the mediation without counsel that a lawyer should review the legal information provided by the mediator, but precluding him or her from giving legal advice).

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694 See, e.g., Standards of Ethics and Prof'l Responsibility for Certified Mediators § J (Judicial Council of Va. 2005).


697 See, e.g., Standards of Ethics and Prof'l Responsibility for Certified Mediators § J (Judicial Council of Va. 2005).

698 Id. Thus, in connection with the October 2004 e-mail Dr. Fremed sent Mrs. Brady Wright, a disciplinary body in Virginia would consider whether the conversation about the quitclaim deed “recommend[ed] [a] particular solution[] to any of the issues in dispute.” If so, she would have violated the Virginia mediator ethics code. The code reflects, however, concerns about party self-determination and mediator neutrality, not necessarily concerns about role mixing. See id. By protecting party self-determination and mediator neutrality, the codes help ensure consumer protection, as well. Mrs. Wright's testimony proves that she had independent legal counsel at the time she received the e-mail. Disciplinary Proceeding Transcript, supra note 34, at *92-93, *99-101. She discussed the quitclaim issue with that counsel. Accordingly, Dr. Fremed's e-mail did not, as Mrs. Wright testified, influence her self-determination, except to ensure that she discussed the issue with counsel and so reached a decision based on adequate information. A disciplinary body in Virginia, might consider these factors in analyzing the situation. It might also construe the e-mail as permmissible option generation. See discussion infra at notes 346-75 and accompanying text.

699 Most UPL statutes also fail to define these terms. See, e.g., Conn. Gen. Stat. Ann. § 51-88 (West 2005). See also 2004 ABA Survey of UPL, supra note 77, at chart II (showing nine surveyed jurisdictions plan to adopt a definition of the unlicensed practice of law).


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(applying to “[a]ny person serving as a mediator, whether certified or not”); S.D. Codified Laws § 25-4-58.2 (2004) (stating that family mediators “should conduct themselves and mediations according to the following principles”); Tenn. Standards of Prof'l Conduct for Rule 31 Neutrals § 1(a) (“[A]pplies to all Neutrals who participate in court-annexed dispute resolution proceedings, regardless of whether they are listed under Rule 31...”); Utah Ct. Rules R. 104 (2007), available at http://www.utcourts.gov/resources/rules/adr/104.htm (applying to all mediators on the court roster acting pursuant to the Utah Rules of Court-Annexed Alternative Dispute Resolution and the Code of Judicial Administration Rule 4-150); Standards of Ethics and Prof'l Responsibility for Certified Mediators § B (Judicial Council of Va. 2005) (applying to all certified mediators). The mandatory rules governing mediators appear as statutes, court rules, court orders, and internal operating procedures. Accordingly, they are difficult to research and this list may not be inclusive.

See Young, Take It or Leave It, supra note 13, passim, apps. A to I (describing the mediator disciplinary systems in Florida, Virginia, Georgia, Maine, and Minnesota; providing grievance data for those states plus North Carolina and Arkansas). See also Tenn. Standards of Prof'l Conduct for Rule 31 Neutrals § 11 (proceedings for discipline of Rule 31 mediators).

Some scholars argue that codes of ethics privilege certain styles of mediation and may curtail innovation in the field. See Lande, supra note 604, at 640-55.

ABA Section of Dispute Resolution, Comm. on Mediator Ethical Guidance, http://www.abanet.org/dch/committee.cfm?com=DR018600. The author of this article serves as one of its members. The other members of the Standing Committee are Dean James Alfini (South Texas College of Law), Prof. Robert Bordone (Harvard Negotiation Research Project), Prof. Jay Folberg (University of San Francisco), Prof. Lela Love (Cardozo Law School), Roger Deitz, Nancy Lesser, Leila Taaffe, Larry Watson, and Rebecca Westerfield. Geetha Ravindra and Michael Young originally chaired the committee. Two members, Ravindra and Taaffe, previously ran court-connected mediation programs in Virginia and Georgia, respectively. The other nonacademic members are in the private practice of ADR.

Young, Rejoice!, supra note 348, at 236-38.


The author of this article serves as the subcommittee’s co-chair, along with Prof. Bobbie MacAdoo (Hamline University Law School) and Prof. Timothy Hedeen (Kennesaw State University).

The subcommittee is still designing the database. The Appalachian School of Law has agreed to host the website and update it annually. It will be available at www.asl.edu.

Nolan-Haley, supra note 10, passim.

See Florida Amendment Petition, supra note 660, at 4. See discussion about the change in mediator qualifications for Florida mediators infra notes 659-76 and accompanying text. See generally Young, Take It or Leave It, supra note 13, at 804-14 & app. C (describing the Florida mediator disciplinary system and the grievances filed against Florida mediators).

Id. at 749.

Id. at 749-50 & app. C.

Id. at 774-76.

Id. at 775.

Id. at 749-50, 774-76 & app. C.

“From April 1991 to November 2006, Virginia's DRS functioned as a department within the Office of the Executive Secretary of the Supreme Court of Virginia. In December 2006, the department became a division within the Department of Judicial Services.” E-mail from Geetha Ravindra, former Director of Virginia's DRS, Virginia Dep't of Jud. Services, to author (Feb. 14, 2008, 13:44:00 EST)
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(on file with author). Virginia's DRS develops dispute resolution alternatives for court-connected programs and certifies mediators who wish to take court-referred mediations. Id.


Young, Take It or Leave It, supra note 13, at 756-62.

Id. at 764.


Young, Take It or Leave It, supra note 13, at 766-67.

Id. at 771.

Rhode, supra note 98, at 99.

Id.

Cooley, supra note 8, at 73. Cooley did not reference the UPL guidelines recommended by the task force created by the ABA Section of Dispute Resolution. See discussion supra notes 556-63 and accompanying text.

Cooley, supra note 8, at 74.

Id. Cooley makes the argument that the attempt of the mediation field to advise nonlawyer-mediators how to avoid engaging in the practice of law will lead to these negative affects on the field. Id. Obviously, application of the law practice paradigm in a specific situation involving a nonlawyer-mediator can have the same affect, only more directly. Id.


See Rhode, supra note 98, at 23. See generally 2004 ABA Survey of UPL, supra note 77, at 1-16 chart II (indicating which states have active UPL enforcement).

See discussion of the enforcement actions in Carney, Strong, Decker, and Fremed cases supra notes 129-83, 308-27 and accompanying text.

See discussion supra note 418.

See discussion supra note 129-83, 575-81 and infra notes 828-36.


The author began her mediation career in Missouri, which has little in the way of a regulatory infrastructure for mediators. Pou would likely characterize it as a “Low hurdle/Low maintenance” system. Pou, supra note 19, at 325. Based on her experience in providing ethics training, mediators in states like Florida and Virginia have a greater commitment to a facilitative style of mediation.
In states with little infrastructure, mediators can pursue a more evaluative style with little peer review or pressure to consider the risks of that style.

Florida, in contrast, has not. The Director of the Florida Dispute Resolution Center believes that mediators who strictly comply with the Florida Standards of Conduct will not face the problem of the unauthorized practice of law, because the standards emphasize party self-determination and mediator impartiality. Telephone Interview with Sharon Press, Director of Florida's DRC, in Tallahassee, Fla. (Aug. 12, 2005). The Florida Mediator Ethics Advisory Committee, however, has issued several advisory ethics opinions relating to practices that could be deemed the unauthorized practice of law. Mediators have posed questions to the Mediator Ethics Advisory Committee about giving legal advice in mediation, predicting how a specific judge would rule in the case, preparing for divorcing parties forms and pleadings the parties could then file with family courts, drafting the parties' settlement agreement, and the role of nonlawyers assisting pro se parties in mediation. These opinions provide very specific and helpful advice. See discussion supra note 580.

See definitions supra notes 418-20.


For a discussion of the history of this project, see Ravindra, supra note 551, at 94 and Virginia UPL Guidelines, supra note 458, preface.

Ravindra, supra note 551, at 94; Virginia UPL Guidelines, supra note 458, preface.

Virginia UPL Guidelines, supra note 458, ch. 2, §§ 1, 3. Virginia may also apply the “attorney-client relationship” test in some circumstances. See id., ch. 1, § 2.

As noted above, the Chief Disciplinary Counsel in the Fremed disciplinary proceeding may have missed this point. He attached the Colorado guidelines to his Prehearing Memorandum, but did not explain whether and why they provided a helpful analogy. See discussion supra notes 50, 243 and infra notes 758-59 and accompanying text.

Id. Under the Virginia rule, a person engages in the practice of law when:

1. One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
2. One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.
3. One undertakes, with or without compensation, to represent the interest of another before any tribunal—judicial, administrative, or executive—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.

Id. § I (D) The list is not exclusive. Id.

Virginia UPL Guidelines, supra note 458, ch. 1, § 4 (relying on Virginia's Standing Comm. on Legal Ethics UPL Op. 125 (1988), which permits employees of the Virginia Department of Transportation to file form deeds prepared by the attorney general's office, but potentially limiting the same activities of DOT consultants).


The North Carolina Dispute Resolution Commission (N.C. DR Commission) administers the standards, as a division of the Judicial Department, and is under the supervision of the Director of the Administrative Office of the Courts. N.C. Gen. Stat. § 7A-38.2(b) (2007). The N.C. DR Commission consists of five judges; a superior court clerk; four certified mediators; two practicing attorneys who are not mediators, including one family law specialist; and three citizens “knowledgeable about mediation.” Id. § 7A-38.2(c).

See N.C. Gen. Stat. § 7A-38.2(a) (2007). The revised mediation statute applies to mediators handling superior court, farm nuisance, and district court cases. See also N.C. Gen. Stat. § 7A-38.2(a) (2007) (authorizing the N.C. Supreme Court to adopt standards for the certification and conduct of mediators; allowing the court to adopt procedures to enforce the standards).

For a description of CCDM, see its website at http://www.ctmediators.org.

CCDM Mediation Standards II (Conn. Council for Divorce Mediation & Collaborative Practice 2001). When the author last visited the site on December 17, 2007, the Standards did not yet reflect the change in the definition of the practice of law designed to exempt mediators and other ADR neutrals. See discussion supra note 75.

For a discussion of the components of that regulatory infrastructure, see discussion supra note 13.

See discussion supra note 243 and accompanying text.


See discussion supra note 341 and accompanying text.

Virginia UPL Guidelines, supra note 458, ch. 2, § 2.

Id. ch. 2, § 4.

Id.

Id.

Id. See discussion infra notes 800-06 and accompanying text.


Id. However, the mediator may be engaged in UPL, may violate the mediator ethics code, and may (if a lawyer-mediator) violate the Virginia Rules of Professional Conduct if he or she added the following sentence: “Because you were contributorily negligent, you would not be able to recover damages if this case were to proceed to trial.” Id. The second sentence applies the law to specific facts, improperly gives legal advice under the mediator ethics code, and goes beyond the activities permitted under the legal ethics code because of the concerns about dual representation. Id.

Virginia UPL Guidelines, supra note 458, ch. 2, § 4. Donald Weckstein argues that UPL regulators should construe legal advice narrowly in the mediation context and require that both the mediator and the person receiving the advice have a mutual expectation that the advice will influence the recipient's behavior. Weckstein, supra note 553, at 534-44. Thus, frequent disclaimers by the mediator about his or her role in connection with legal advice would allow mediator activities that come closer to the borders of UPL. Id. Arguably, Dr. Fremed's October 2004 e-mail would find ample protection under this conceptualization of UPL. See discussion supra notes 303, 341-82 and accompanying text.


Id.

Id. The mediator ethics codes would view this statement as potentially compromising mediator neutrality and party self-determination, even if the mediator was competent to give the statement by virtue of his or her experience or training. Id.

Id.

Id. (recommending the use of open-ended questions that do not suggest a specific outcome or answer).

Id.

Id. This guideline may allow, for instance, the use of services like Jury Verdict Review and Analysis to assist parties. See Welcome to Jury Verdict & Analysis, http://www.jvra.com.


Id.

Id. ch. 3, § 3. Cf. Fla. Mediator Ethics Advisory Comm., Op. 2000-010 (2001) (advising that mediators are not required under the applicable ethics rules to go into detail about any specific statutory provisions or exceptions governing confidentiality, except to say that mediation communications are confidential, unless disclosure is required by law); Fla. Mediator Ethics Advisory Comm., Op. 2003-003 (2003) (expressing concern that even an attorney-mediator could misinterpret the statutory exceptions to confidentiality).

Virginia UPL Guidelines, supra note 458, ch. 2, §§ 2, 4.

Id. § 4 (“apply[ing] legal principles to facts in the mediation and predict[ing] the specific resolution of a legal issue” constitutes the practice of law).


Comm. on Ethics, Ga. Comm'n on Dispute Resolution, Advisory Op. 7, at 3. If the Georgia guidelines had applied in Dr. Fremed's disciplinary proceeding, they would have allowed her post-majority educational child support related activities. See discussion supra note 306, 392 and accompanying text. See Disciplinary Proceeding Transcript, supra note 34, at *20-23, *41, *49, *72-73, *82.


Id. at 2-3, 6.

Id. at 4-5. The guidelines give four examples. Example 1 provides:

Permissible: “The cash you said you receive at work each week needs to be counted as income. Let's talk about which category of income on this list you two think best describes this cash and your reason for choosing that category.”
Impermissible: “The cash you said you receive at work each week needs to be counted as income. Have you considered counting the cash as self-employment income, rather than as tips, so you get the benefit of the Self-Employment Tax Adjustment and reduce your Monthly Adjusted Income? You'll pay less child support that way.”

Id.

806

Id.

807 Colorado UPL Guidelines, supra note 262, at 9.

808 Id. at 9 n.20 (citing the Legal Advice vs. Procedural Information, available at the Self-Help Center at www.courts.state.co.us). Some of these constraints may reflect concerns about UPL, but they also reflect concerns about judicial branch neutrality.

809 Id. See also a discussion of permissible activities of court clerks in Missouri supra note 466 and accompanying text.

810 Id.

811 Id.

812 Id. The Colorado UPL Guidelines give examples of the types of permitted reality-testing questions. For example, a mediator could ask: “Have you thought about what happens if you go to court and lose?” “How do you think you can prove that in court?” “Even if you win in court, can you collect from this party?” “How long will it take to collect if you proceed in court through trial, [the] possibility of appeal, attempts to collect, etc.?” “How much of your time and energy will it take to see this case through in court (and [the] possible appeal)?” “How will proceeding in court affect your relationship with this person?” “How will taking an extremely adversarial stance affect your children?”

Id. at n.21. However, a mediator may need to refer a party to independent legal counsel depending on the response provided to this question. The Colorado UPL Guidelines do not suggest when a response might trigger that duty.

813 North Carolina UPL Guidelines, supra note 752, at 2. Virginia has adopted a similar definition in its guidelines. See supra note 489 and accompanying text.

814 The North Carolina standards provide:

A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

This section prohibits imposing one's opinions, advice, and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

Standards of Prof'l Conduct for Mediators Standard V.C (N.C. Supreme Court 1998). Thus, this proscription is not limited to legal or other professional advice. However, the next section provides: “[T]he mediator shall not provide legal or other professional advice. Mediators may respond to a party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C. above.” Id. Standard VI.

815 North Carolina UPL Guidelines, supra note 752, at 3. The guidelines do not offer other examples.

816 Standards of Prof'l Conduct for Mediators Standard VI (“A mediator may, in areas where he/she is qualified by training and experience, raise questions regarding the information presented by parties in the mediation session.”)


818 Id. (citing State Bar Ass'n of Conn. v. Conn. Bank & Trust, 153 A.2d 453, 458 n.3 (1959)).

819 Id.
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820 Id. at 10. Except, of course, in Dr. Fremed's case.

821 Id. Thus, the CCDM Mediation Standards talk in terms of the values of mediation (informed decision-making) and not necessarily in the terms of the “practice of law” paradigm. In this case, the values overlap to the extent UPL proscriptions truly seek to protect consumers.

822 Id. Thus, the CCDM Mediation Standards acknowledge party self-determination in the context of this decision, as well.

823 Id. at 9-10; Virginia UPL Guidelines, supra note 458, ch. 2, § 4; North Carolina UPL Guidelines, supra note 752, at 2-3; Colorado UPL Guidelines, supra note 262, at 8-10.

824 Virginia UPL Guidelines, supra note 458, ch. 3 passim (making no distinction in the terminology used to describe the instrument capturing the parties’ agreement). But see discussion supra notes 168 and accompanying text. See also Fla. Rules for Certified and Court-Appointed Mediators R. 10.420(c) (2000) (requiring certified mediators appropriately to memorialize “the terms of any agreement reached” and to “discuss with the parties and counsel the process for formalization and implementation of the agreement”).


826 Virginia UPL Guidelines, supra note 458, ch. 3, § 3. By comparison, the Florida Mediator Ethics Advisory Committee has issued seven advisory opinions discussing whether a mediator may draft certain types of documents. See Fla. Mediator Ethics Advisory Comm. opinions about mediator drafting activities, supra note 168.

827 Virginia UPL Guidelines, supra note 458, ch. 3, § 2.


829 Id.


831 Va. State Bar Standing Comm. on Legal Ethics, Op. 1368, at 1-2 (citations omitted). This last statement reminds lawyer-mediators that they often have concurrent duties under two or more ethics codes. The Virginia SOEs specifically contemplate this situation, in which conflicting duties can arise. Standards of Ethics and Prof'l Responsibility for Certified Mediators § P (Judicial Council of Va. 2005).


833 Virginia UPL Guidelines, supra note 458, ch. 3, § 2.

834 Id.

835 Id. § 3.

836 Id. Thus, under this formulation of the boundaries of law practice, the October 2004 and December 2004 e-mail communications of Dr. Fremed would likely be deemed incidental services of her mediation practice. See discussion supra notes 300-06. See also Disciplinary Proceeding Transcript, supra note 34, at *87-93.

837 Virginia UPL Guidelines, supra note 458, ch. 3, § 3. Parties, however, can request the inclusion of boilerplate provisions. Id. n.75. Cooley called the advice in the Virginia UPL guidelines of document drafting “inconsistent and incomprehensible.” Cooley, supra note 8, at 74. He found their “subtle distinctions... impossible to accurately discern and they defy compliance.” Id. He argued that the boundaries the guidelines set would be “difficult, in practice, to enforce.” Id. (quoting Hoffman & Affolder, supra note 10, at 21-22).
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838 Virginia UPL Guidelines, supra note 458, ch. 3, § 3 & n.76 (citing Va. Code Ann. § 8.01-576.11 (West 2007)).

839 Id.


841 Virginia UPL Guidelines, supra note 458, ch. 3, § 3.

842 See id.

843 Id.

844 Id.

845 For a discussion of the “four legals,” see discussion supra note 32. For an example of how the author to this article provides this information in her mediated settlement agreements, see discussion infra note 898.

846 In contrast, two ethics advisory opinions from Florida have suggested, without saying, that describing confidentiality in mediation and its exceptions could be deemed UPL. See discussion supra note 796.

847 Id.

848 Id.

849 The Virginia UPL Guidelines note that a broad reading of Va. Code Ann. § 8.01-576.4 (2007) would not limit the drafting activities of mediators. A broad reading, however, would be inconsistent with the current UPL scheme in Virginia and probably does not reflect the intent of the legislature in passing it. Virginia UPL Guidelines, supra note 458, ch. 3, § 2.

850 The only missing components of a comprehensive regulatory infrastructure in Virginia are moral character reviews and ethics advisory opinions. See Young, Take It or Leave It, supra note 13, at 814-30.

851 In writing this article, the author has wondered whether many of the restrictions found in mediator ethics codes would survive if mediators no longer had to fear UPL disciplinary proceedings. She has concluded they would survive because they support and reflect core values of mediation, especially party self-determination and mediator neutrality. We might see some changes in the proscriptions against document drafting, but few changes when it came to legal advice, option generation, or option evaluation. See, e.g., discussion supra notes 145, 340-92 and accompanying text.


853 Colorado UPL Guidelines, supra note 262, at 5-6. The remaining part of the statute provides: “If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.” Colo. Rev. Stat. Ann. § 13-22-308 (West 2005). If the Colorado UPL Guidelines had applied in Dr. Fremed’s disciplinary proceeding, they would have allowed her drafting activities, even as the Reviewing Committee misconstrued their breadth. See discussion supra notes 28-33, 42-47 and accompanying text. See also Disciplinary Proceeding Transcript, supra note 34, at *26-28, *32, *35, *52-53, *60, *62-64, *88, *89, *94.

854 Colorado UPL Guidelines, supra note 262, at 10.

855 Id. at 6.

856 Id. at 12.

857 Id. at 10.

858 Id. at 12.
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859 Id. at 6. Another part of the guidelines states, however, that mediators may not recommend to either party “which form to use or how to fill it out except as authorized by statute, trial court order or administrative rule.” Id. at 10.

860 Id. at 6 (concluding, without support, that any other forms would be outside the “ambit of the CDRA’s authorization to draft mediated agreements”).

861 Id. (“[I]nclude[ing] Parenting Plan, Separation Agreement (With Children) or Partial Separation Agreement or Information for the Court, Separation Agreement (Without Children) or Partial Separation Agreement or Information for the Court”). In certain circumstances, the mediator may also complete supporting documents like the Financial Affidavit and Worksheet A or B of the Child Support Obligation form. The Colorado UPL Guidelines do not explain the applicable circumstances, except to say that they “[d]epend[ ] on the situation of the parties.” Id.

862 Id.

863 Id. at 11.

864 Id.

865 Id. at 11-12. Dr. Fremed did exactly this. Attorney Flanagan, or the parties, attached the separate Parenting Plan to the filings the Wrights made in court. See Disciplinary Proceeding Transcript, supra note 34, at *38, *62, *89.

866 Id. at 12. Some UPL disciplinary bodies might construe this act as an appearance in court in violation of the applicable UPL proscriptions. See, e.g., Conn. Gen. Stat. Ann. § 51-88 (West 2005); see supra notes 418-20 and accompanying text (listing various statutes relating to the unauthorized practice of law). But see CCDM Mediation Standards III.5 (Conn. Council for Divorce Mediation & Collaborative Practice 2001) (suggesting, without adequate citation to authority, that nonlawyer-mediators should be able to help parties navigate the court systems and the forms it requires, so long as the mediator assesses “on a case-by-case basis,... their background, knowledge and the nature and complexity of the particular form in question”).


868 Id. at 3 (citing 2004 ACR Proposed Policy Statement, supra note 566).

869 The statutes do exempt the drafting activities of mediators in two narrow contexts. See N.C. Gen. Stat. Ann. § 84-2.1 (West 2007) (exempting “the writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers authorized [by statute] or by mediators of personnel matters for The University of North Carolina or a constituent institution”).

870 North Carolina UPL Guidelines, supra note 752, at 3.

871 Id.; see also supra note 32 and accompanying text (discussing other sample disclaimers).

872 North Carolina UPL Guidelines, supra note 752, at 3.

873 CCDM Mediation Standards (Conn. Council for Divorce Mediation & Collaborative Practice 2001). These practices did not insulate Dr. Fremed from disciplinary action. See supra notes 23-33 and accompanying text.

874 Id.

875 Id.

876 Id. This recommendation may reflect, without saying so, the accepted ethical constraints governing mediator competency. Mediators may only provide information if they are competent by training or experience to do so. See supra note 341. The author of this article suggests that CCDM’s advice is not consistent with the Connecticut UPL law in effect at the time of Dr. Fremed’s disciplinary proceeding. See supra notes 68-128 and accompanying text. The new Connecticut Superior Court rule exempting the activities of mediators from the definition of the practice of law certainly changes the situation.
Id. (emphasis added). This advice more closely reflects the UPL law in Connecticut.

Id.

Id. Again, a UPL disciplinary body could easily conclude that a UPL statute precludes an appearance before a tribunal on behalf of a person, including this type of appearance. See supra notes 418-20, 865 and accompanying text.

Colorado UPL Guidelines, supra note 262, at 6-7. Mediators taking private referrals, like Dr. Fremed in the Wright case, may not get the protection afforded by a court rule or order. They would need statutory protection to feel reassured. See id. at 7.

Nolan-Haley, supra note 10, at 280.

See supra note 147, 602 and accompanying text.

Virginia UPL Guidelines, supra note 458, ch. 2, § 5. “On the other hand, mediators whose style and practice tends more toward the evaluative end of the mediation spectrum may need to consider more carefully whether the questions that they raise or the statements that they make during mediation are permissible legal information or impermissible legal advice.” Id.

Telephone Interview with Sharon Press, Director, Florida Dispute Resolution Center, in Tallahassee, Fla. (Aug. 12, 2005).

Nolan-Haley, supra note 10, at 280; Virginia UPL Guidelines, supra note 458, ch. 2, § 5. See also supra note 32 (discussing the “four legals”).

Nolan-Haley, supra note 10, at 280. UPL regulators would have to accept these self-imposed distinctions to make this approach work. In other words, they would have to accept the “parallel” paradigm as adequate regulation and as an accurate description of the authorized practice of mediation. Cooley, supra note 8, at 78.

Nolan-Haley, supra note 10, at 280.

Cooley, supra note 8, at 78.

Virginia UPL Guidelines, supra note 458, ch. 2, § 5.

But see supra notes 441-42, 447 and accompanying text (indicating a market protection concern).

2004 ACR Proposed Policy Statement, supra note 566, at 12 (“It is imperative that each mediator is fully informed of the applicable [UPL and mediator] rules and standards.”).

See supra notes 167-83 and accompanying text (discussing how co-mediation with a licensed attorney may not insulate a nonlawyer-mediator from UPL disciplinary proceedings). In addition, lawyer-mediators who co-mediate with nonlawyer-mediators need to consider their exposure under UPL law that proscribes lawyers from aiding anyone in committing UPL. See supra notes 440, 575 and accompanying text.

Interactive websites will draw closer scrutiny from disciplinary bodies if they foster an ongoing business relationship through forums that allow potential parties to ask legal questions or otherwise “chat” with the mediator. Garret Glass & Kathleen Jackson, The Unauthorized Practice of Law: The Internet, Alternative Dispute Resolution and Multidisciplinary Practices, 14 Geo. J. Legal Ethics 1195, 1197 (2001).

For example, the author's Agreement to Mediate provides:

The Roles of the Mediator and Independent Legal Counsel:
You have chosen me, as the mediator, to serve as an independent neutral to aid you in your effort to settle the dispute. As the mediator, I will not decide who prevails in the dispute, and I will not render an award, verdict, or judgment, or otherwise determine fault or blame. The parties recognize that I am not acting as counsel to any party or rendering legal advice or services to either party in the mediation. You have the opportunity, at any time during the mediation, to consult with an independent lawyer, and I encourage you to do so. In the event you reach an agreement about this dispute, I encourage each of you to have any draft agreement reviewed by
an independent lawyer prior to signing the agreement, because the mediated agreement may affect your legal rights. Your counsel may attend the mediation session or sessions. My mediation style would be described as “facilitative.” Accordingly, I try to give the parties substantial control over the process, the topics we discuss, and the decision-making about how we proceed. I relinquish all control to the parties over the agreed outcome. I am also unlikely and reluctant to offer an evaluation of the strength and weaknesses of each party’s position, assess the value and cost of alternatives to settlement, or assess the barriers to settlement, unless the parties specifically request that I perform that type of evaluation. Because I am not licensed to practice law in Virginia, I cannot give you legal information specifically pertaining to Virginia law. I have been licensed to practice law in four other states, so I may, if you ask, describe applicable general common law principles, with the disclaimer that those principles may or may not be consistent with Virginia law. You will need to consult your independent lawyer for legal information reflecting Virginia law. I have provided to all parties a summary of my background that discloses my general subject matter expertise.

Paula M. Young, Agreement to Mediate 1 (on file with author). The Virginia UPL Guidelines suggest that the author could provide general information about the common law if she accompanies it with a disclaimer about her role, the limits of her experience and training, and the need to consult a Virginia lawyer for specific advice. See Virginia UPL Guidelines, supra note 458, ch. 2, §§ 4, 5. However, analysis of the UPL issues in this article suggest that some UPL disciplinary bodies could consider even this type of information the practice of law. A cautious mediator would not provide it. See Cooley & Love, supra note 383, at 13 (offering another response to a request for a legal evaluation or an opinion about a likely court outcome).

895 See supra notes 280, 470 and infra note 977 and accompanying text.

896 Lawyers routinely include these types of disclaimers in their e-mails, but they disclaim that the e-mail creates an attorney-client relationship, requires the recipient to keep communications confidential, or that responding e-mail contains legal advice. See Allen W. Chiu, Note, The Ethical Limits of eLawyerin: Resolving the Multijurisdictional Dilemma of Internet Practice Through Strict Enforcement, 2004 UCLA J.L. & Tech. 1, n.52 (quoting a disclaimer used by King and Spaulding on its website, which the author called the “mother of all legal disclaimers”). In states that apply the subjective “client reliance” test for UPL enforcement, these disclaimers may have less precautionary effect. The disciplinary body will still likely consider whether the consumer believed a client relationship existed. See supra note 452 and accompanying text.

897 See Disciplinary Proceeding Transcript, supra note 34, at *83-87.

898 The author’s Mediated Settlement Agreement form provides:
The parties acknowledge by signing below that the mediator has advised each party that:
a. The mediator could not represent either party as his or her legal counsel and that the mediator is precluded by Virginia ethics rules from giving legal advice to either party.
b. This mediated settlement agreement may affect the legal rights of the parties.
c. He or she had the right to consult with independent legal counsel at any time during the mediation and that the mediator encouraged each party to do so.
d. He or she has the right to have any agreement reached today reviewed by independent legal counsel or any other representative before he or she signs the agreement and makes it binding on him and her. By signing below, the party has waived that right unless he or she has expressly reserved that right in paragraph 3 above.

Paula M. Young, Mediated Settlement Agreement 1 (on file with author). By including this language in the draft settlement agreement, the author hopes to avoid a situation in which a party can successfully assert grounds for voiding the settlement agreement reached in mediation. The court may vacate an agreement and any related court order when:
1. The agreement was procured by fraud or duress, or is unconscionable;
2. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or
3. There was evident partiality or misconduct by the neutral, prejudicing the rights of any party.

failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.
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Id. In Virginia, these required disclosures are known as the “four legals.” See supra note 32.

900
See, e.g., supra notes 574-78 and accompanying text.

901
See supra note 733 and accompanying text.

902
See supra note 436 and accompanying text.

903
A scholar should consider updating the research conducted in 1976 by the Yale Project about pro se divorce proceedings. See supra notes 184-228 and accompanying text. In addition, a scholar could perform a similar research project comparing uncontested divorces in which parties proceed: (1) pro se; (2) using nonlawyer-mediators; (3) using lawyer-mediators; or, (4) using attorneys without the prior use of mediation. As time goes by, it will be increasingly more difficult to find a data pool in which a meaningful number of parties have not used mediation. See, e.g., 2007 Tenn. Pub. Acts, supra note 219, at 752-53 (requiring Tennessee courts to refer all cases involving divorce or separate maintenance to mediation unless the court finds domestic violence in the marriage). See generally Everything You Need to File for Divorce: Instruction Booklet, supra note 219 (listing twenty-five states offering or requiring mediation in the divorce context).

904
See supra note 13 (discussing the elements of those infrastructures).

905

906
To the extent the attorney-mediator community does not provide this type of litigation support to our non-lawyer brethren, we ourselves could be accused of anti-competitive market activities. See Fiona Furlan et al., Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators, 14 J. Am. Acad. Matrim. Law 267, 53-55 (1997).

907
See supra note 300-306, 330-33 and accompanying text; see also Disciplinary Proceeding Transcript, supra note 34, at *83-84, *87.

908
See supra notes 535-36; infra note 940 and accompanying text.

909

910
Rhode has noted that UPL disciplinary bodies have taken this approach to establish the precedent they desired, while avoiding litigation in cases that could set undesirable precedent. Rhode, supra note 98, at 27-28.

911
That fund should provide at least the estimated cost of the defense before a disciplinary body, the cost of a civil or criminal proceeding, and the cost of at least one appeal. We cannot expect individual mediators, who are typically uninsured for disciplinary proceedings, to bear the cost of establishing this favorable precedent. See generally Young, Going Bare, supra note 237 (discussing insurance coverage for mediators). Rhode describes a disciplinary action against the seller of do-it-yourself kits in West Virginia. Rhode, supra note 98, at 28. The state bar had had “some success” in preventing their sale through negotiated agreements and other informal enforcement processes. Id. However, supreme courts in other states, when non-lawyers challenged lower-level rulings, had almost uniformly struck down UPL restraints on the distribution of kits. Id.

912
See Nat'l Standards for Court-Connected Mediation Programs intro. (Ctr. for Dispute Settlement & Inst. of Judicial Admin. 1998), available at http://www.mbf.org/JAGWG2BADRNationalStandards.pdf (defining court-connected mediation programs as “any program or service, including a service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court”).

913
Id.

914
Id.

915
Id. §§ 8.1, 13.1.

Id. at 988.

Id. at 1003 (recommending that ADR provider organizations offer processes for receiving complaints against neutrals).

Id. at 997.

Id. at 1004.

Nat'l Standards for Court-Connected Mediation Programs §2.6 cmt. (Ctr. for Dispute Settlement & Inst. of Judicial Admin. 1998).

CPR-Georgetown Commission, supra note 916, at 997.

Id. at 985; see also Nat'l Standards for Court-Connected Mediation Programs intro.

CPR-Georgetown Commission, supra note 916, at 986 (stating that ADR providers should meet the parties' expectations “for fair, impartial and quality dispute resolution services and processes’”); Nat'l Standards for Court-Connected Mediation Programs Standard 11.1 cmt. (“Fairness of the mediation process requires that both courts and mediators protect the parties' ability to make free and informed choices about whether or not to settle.”).

Nat'l Standards for Court-Connected Mediation Programs intro.; see also CPR-Georgetown Commission, supra note 916, at 983-84 n.2, 984 n.4.

Diane Kenty et al., Session 3.19 on Responding to the Unhappy Consumer at the Association for Conflict Resolution Third Annual Conference, The World of Conflict Resolution: A Mosaic of Possibilities at 7-8 (Orlando, Fla., Oct. 15-18, 2003) (transcript on file with author). The author thanks the Association for Conflict Resolution for its permission to quote from the Conference Transcript.


See generally Young, Take It or Leave It, supra note 13 (comparing mediation regulatory systems in place in various states).

Rhode, supra note 98, at 97.

Cooley, supra note 8, at 77.

At least in the court-connected mediation context. See supra note 75.

935 Divorce Transcript, supra note 39. This transcript is not a verbatim summary. This version of the transcript omits testimony not directly pertinent to the discussion in this article. In addition, the author has omitted speech patterns that interrupt the flow of the recorded sentences. The author has indicated most of those changes through the use of square brackets or ellipses.

936 Id. at 7-8, 37-40, 42-44, 54.

937 Disciplinary Proceeding Transcript, supra note 34. This transcript is not a verbatim summary. This version of the transcript omits testimony not directly pertinent to the discussion in this article. In addition, the author has omitted speech patterns that interrupt the flow of the recorded sentences. The author has indicated most of those changes through the use of square brackets or ellipses. The footnotes to this hearing transcript provide the annotations reflecting the author's application of the "parallel" paradigm of the "authorized practice of mediation." However, the annotations discussing various mediator ethics codes do not attempt to describe or evaluate all the parallel provisions of the mandatory ethics codes. See supra note 701. The annotations focus instead on two aspirational codes and two mandatory codes, unless otherwise indicated. See supra note 27.

938 The hearing occurred over one and one half days. The Reviewing Committee held two prior hearings on the same day as they heard the Fremed case. The Fremed hearing started at about 11:30 a.m., shortly before a lunch break. Dr. Fremed and Attorney Flanagan testified that day. Diane Brady Wright testified the next day. The hearing ended about 5:00 p.m. on the second day. E-mail from Dr. Resa Fremed, Resa Fremed LLC, to author (Feb. 29, 2008, 11:43:00 EST) (on file with author). Attorney Haakonsen recalls that the hearing lasted only a day. E-mail from Kate W. Haakonsen, Partner, Brown, Paindiris & Scott, to author (Feb. 15, 2008, 13:32:00 EST) (on file with author).

939 Mrs. Moore did not attend the hearing. She apparently ruled after receiving a copy of the transcript. Disciplinary Proceeding Transcript, supra note 34, at *3.

940 Two of the panel members were lawyers. At the time of the Fremed hearing, they apparently had no training in mediation. Neither member returned the author's telephone calls or e-mails when she tried to confirm this fact. William D. Murphy had some training in mediation in the labor and employment context. Telephone Interview with William D. Murphy, Minister, in Danbury, Conn. (Jan. 24, 2008).

941 Assistant Bar Counsel appearing on behalf of the Statewide Grievance Committee. Disciplinary Proceeding Transcript, supra note 34.

942 The bracketed star numbers indicate the page in the original transcript on which the discussion or testimony appears.

943 Representing the Chief Disciplinary Counsel's Office. Disciplinary Proceeding Transcript, supra note 34.

944 See supra note 607 and accompanying text (giving different definitions of mediation and indicating that ethics codes typically make no distinction between divorce mediation and other forms of mediation).

945 See supra notes 601-31 and accompanying text (discussing mediator styles); see also supra notes 341-75, 607 (discussing the roles of the mediator identified in mediator ethics codes).

946 Professor Robert Mnookin coined the term "bargaining in the shadow of the law." See Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 950 (1979). More recently, he has described the issues the concept captures. See Robert H. Mnookin Et Al., Beyond Winning: Negotiating to Create Value in Deals and Disputes 101-05 (2000). The four basic issues that affect bargaining are:

- Substantive endowments: What laws apply to the case, and how do they affect the value of proceeding with litigation?
- Procedural endowments: What legal procedures apply, and how are they likely to affect the value of litigation?
- Transaction costs: What expenses will [the party] incur if they pursue litigation, and how should that affect their decision to settle?
- Risk preference: What are the client's risk preferences, and how will these affect the decision to litigate or settle?

Id. at 102.

947 Florida requires a mediator to help the parties consider the interests of persons affected by their decision-making who are not attending the mediation, such as the children of a divorcing couple. One rule requires the mediator to "promot[e] the awareness by the parties of the interests of non-participating persons." Fla. Rules for Certified and Court-Appointed Mediators R. 10.300 (2000). Another rule
provides: “A mediator shall promote awareness by the parties of the interests of persons affected by actual or potential agreements who are not represented at mediation.” Id. R. 10.320. The notes for this rule state: “In family and dependency mediations, the interests of children, grandparents or other related persons are also often affected. A mediator is responsible for making the parties aware of the potential interests of non-participating persons.” Id. R. 10.320 notes. However, the mediator still must respect party self-determination and cannot “advocate[e] a particular position.” Id. The Virginia SOEs impose a similar requirement. “Where appropriate, the mediator shall promote consideration of the interests of persons affected by actual or potential agreements who are not present or represented at the mediation.” Standards of Ethics and Prof'l Responsibility for Certified Mediators §E.5 (Judicial Council of Va. 2005); see also Ala. Code of Ethics for Mediators Standard 4(e) (“A mediator may promote consideration of the interests of persons who may be affected by an agreement resulting from the mediation process and who are not represented in the mediation process.”); Requirements for the Conduct of Mediation and Mediators Standard 4.E (Ark. Alternative Dispute Resolution Comm’n 2001) (same); Cal. Rules of Court tit. 3, R. 5.210(h)(5) (2007) (the mediator must “[c]onsider the health, safety, welfare, and best interest of the child in all phases of the process, including interviews with parents, extended family members, counsel for the child, and other interested parties or collateral contacts”); Model Standards of Practice for Family and Divorce Mediation Standards I.B., VIII.A.-F (2000) (stating that “[t]he primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others” and requiring family mediators to assist participants in promoting the best interest of the children).

This short exchange, and several others that come later in the transcript, suggest to the author how lawyers have a difficult time assuming that parties may apply normative values other than legal norms. In this case, the parties chose to apply the normative value of the best interest of the child. While the law has adopted this value as a legal value as well, it can be defined without any reference to applicable law. See Barbara Bennett Woodhouse, Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard, 33 Fam. L.Q. 815, 815-19 (1999) (describing development of the “best interest” of the child standard). In fact, applicable law probably defines the barest of requirements that the court will deem consistent with the best interests of the child. For instance, while child support guidelines set a minimum amount due to protect the interest of a child, parties in mediation could agree to a substantially higher number because they believe they cannot protect the best interests of their children with a lower child support payment. The draft MOU of the Wright's expressly incorporated this value:

The parenting arrangement is designed in the “best interest” of Kavic and Michael. “Best interest” includes, but is not limited to, the following principles: promoting social, cognitive, emotional and physical well-being; enabling optimal development as productive members of society; minimizing exposure to danger, violence, abuse, neglect and family conflict; and ensuring continuing relationships with both parents and their significant family members [including grandparents, aunts, and uncles], so far as that is consistent with the other aforementioned principles.

Respondent's Hearing Brief, supra note 23, at exhibit 3.

As noted above, most mandatory mediator ethics codes limit the ability of a mediator to give legal advice, but allow mediators to give legal and other types of professional information in certain contexts. Among other requirements, the mediator must be competent by training or experience to give the information. See supra note 341. Only Maine, New Jersey, and South Dakota place no limits on giving legal advice in their mandatory ethics codes for mediators. See supra note 701. Georgia, Kansas, Maine, Minnesota, New Jersey, Oklahoma, South Carolina, South Dakota, and Utah do not specify whether and how mediators may provide information they are qualified to give. See supra note 701.


The mandatory ethics codes for mediators typically support the role of consulting attorneys as resources for mediating parties. See supra notes 27, 341, 701. Only California, Maine, and South Dakota do not require mediators to advise parties about the role of consulting attorneys in the mediation process. See supra note 701.

As noted above, the Virginia SOEs require the mediator to disclaim, by reciting the “four legals,” any ability to provide legal advice or otherwise represent the parties in a legal capacity. See Standards of Ethics and Prof'l Responsibility for Certified Mediators § D.2.b. (Judicial Council of Va. 2005); see also supra note 32. In addition, the 2005 Model Standards require mediators to “be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experience, services and fees.”
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Model Standards of Conduct for Mediators Standard VII.A (2005). Another standard provides that a mediator “should have available for the parties’ information [that is] relevant to the mediator's training, education, experience and approach to conducting a mediation.” Id. Standard IV.A.3. Florida and Virginia have similar provisions in their mediator ethics codes about truthful advertising. Fla. Rules for Certified and Court-Appointed Mediators R. 10.610 (2000); Standards of Ethics and Prof'l Responsibility for Certified Mediators § N (Judicial Council of Va. 2005). The Divorce Model Standards similarly suggest that the mediator provide parties with information about his or her training, education, and expertise. Model Standards of Practice for Family and Divorce Mediation Standard II.B (2000). Another standard requires truthful advertising and solicitation that accurately represents the mediator's qualifications. Id. Standard XII.B.

See supra notes 824-79 and accompanying text (discussing ethics rules and statutes governing the drafting role of the mediator).

As noted above, the mediator's impartiality is a core value of mediation. Izumi & La Rue, supra note 145, at 86.

As noted above, most mandatory mediator ethics codes require the mediator to advise the parties to obtain independent legal or other professional advice. See supra notes 27, 341, 701 and accompanying text. Only California, Maine, and South Dakota do not impose this requirement. See supra note 701.

While ethics codes encourage mediators to refer parties to experts for professional advice, they also contemplate that the mediator may provide information that he or she is qualified by training or experience to provide. See supra note 341 and accompanying text.


See Abramson, supra note 360, at 74 (describing the stages of the mediation process). The Virginia SOEs note that “the stages of mediation should include at a minimum, an opportunity for all the parties to be heard, the identification of issues to be resolved in mediation, the generation of alternatives for resolution, and, if the parties so desire, the development of a Memorandum of Understanding or Agreement.” Standards of Ethics and Prof'l Responsibility for Certified Mediators § D.1.d. cmt. (Judicial Council of Va. 2005). Thus, option generation and evaluation are key components of the mediation process. Some ethics codes constrain the mediator's ability to suggest options out of concern for party self-determination and mediator impartiality. See supra notes 346-75 and accompanying text (discussing the ethical constraints on option generation or evaluation by mediators).

Parties typically arrive at mediation with fixed positions, whether legal or otherwise. As noted above, the identification of a party's underlying interests is a key stage of the mediation process. See supra notes 284, 360, 491, 606-07.

Several guidelines, ethics opinions, and grievance decisions make a distinction between memoranda of understanding that record the progress or outcome of the mediation and legally operative forms, pleadings, or agreements. The Florida MEAC has issued several advisory opinions discussing whether a mediator may draft certain types of documents. See supra note 168; see also Comm. on Ethics, Ga. Comm'n on Dispute Resolution, Advisory Op. 6, at 7 (June 14, 2005), available at http://www.godr.org/ethics_info.html (advising that a mediator cannot prepare a court order for the parties, even at the request of a judge or judicial officer). Under Georgia law, if a lawyer-mediator prepared a court order it would constitute impermissible legal advice under the mandatory ethics codes for mediators. See Comm. on Ethics, Ga. Comm'n on Dispute Resolution, Advisory Op. 7, at 2-3 (Jan. 3, 2007) (advising that mediation is not the practice of law, that court-connected mediators are expected to help parties prepare settlement agreements or memoranda of understanding, that “Georgia's state-created [child support] worksheets, schedules, Excel spreadsheet[s], and on-line calculator are [] tools” that mediators, whether lawyer or non-lawyer, may use to help parties calculate child support, and that mediators may not make judgments for the parties about the inputs for the calculations and deviations, but may help the parties negotiate these issues). The Georgia UPL Guidelines specifically allow mediators, including nonlawyer-mediators, to help the parties complete child custody forms. See id. at 3-4.

See supra notes 824-79 and accompanying text (detailing the role of mediators in drafting documents and forms under the UPL guidelines of Virginia, North Carolina, Georgia, and Colorado, and under the CCDM Mediation Standards).
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The author's mediation class offers students an exercise designed to help them draft memoranda of understanding with greater clarity and specificity.

As noted above, most mandatory mediator ethics codes require the mediator to refer the parties to legal professionals when appropriate. See supra notes 27, 341. Only California, Maine, and South Dakota do not impose this ethical obligation. See supra note 701.

Dr. Fremed’s practice of obtaining a waiver for the purposes of communicating with legal counsel shows an appropriate consideration of the attorney-client privilege. In addition, mediator ethics codes promote the third core value of mediation, confidentiality, by ensuring that the mediator does not talk with persons who do not participate in the mediation without the prior consent of the parties to the mediation. See, e.g., Model Standards of Conduct for Mediators Standard V (2005); Fla. Rules for Certified and Court-Appointed Mediators R. 10.360 (2000); Standards of Ethics and Prof'l Responsibility for Certified Mediators §1 (Judicial Council of Va. 2005). In addition, states may have statutes governing confidentiality in mediation. See, e.g., Va. Code Ann. §§ 8.01-576.10, -581.22 (West 2007). One of the Virginia statutes provides:

All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a mediation shall not result in a waiver of the attorney work product privilege.

Notwithstanding the provisions of this section, in any case where the dispute involves support of the minor children of the parties, financial information, including information contained in the child support guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to each party and the court for the purpose of computing a basic child support amount pursuant to § 20-108.2.

Id. § 8.01-581.22. See generally Ellen E. Deason, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?, 85 Marq. L. Rev. 79 (2001) (urging the adoption of the Uniform Mediation Act to create more predictability in determining the scope of confidentiality in mediation and identifying the risks of the current state-by-state rules and statutes); Richard C. Reuben, The Sound of Dust Settling: A Response to Criticisms of the UMA, 2003 J. Disp. Resol. 99 (providing a previously unpublished history of the UMA drafting process and responding to criticisms of the model law); Joseph B. Stulberg, The UMA: Some Roads Not Taken, 2003 J. Disp. Resol. 221 (examining the drafting process of the UMA and urging states to consider more substantial protections than provided in the model law); Unif. Mediation Act prefatory note (amended 2003), available at http://www.law.upenn.edu/bll/archives/ylc/mediat/2003finaldraft.pdf (discussing the goals of the UMA and the problems it creates, may solve, and ignores).

See supra note 168 (discussing the drafting of court forms or legal instruments as opposed to drafting settlement agreements or memoranda of understanding).

St. Louis mediator Rebecca Magruder prefers to call this stage of the mediation the “storytelling” phase. She believes calling it a fact-finding process reduces the significance of the emotional, psychological, and other interests of the parties that they might share during this part of the mediation. Magruder has earned both a masters degree in social work and a J.D. She is one of the few mediators whom the author knows who bridges the cultural gap between lawyers and mediators with her dual professional background. Interview with Rebecca Magruder, Private Mediator, in Grundy, Va. (Feb. 13, 2007).
Lawyers may talk about issues, but mediators talk about underlying interests and needs. See supra notes 284, 360, 491, 606-07; see also Model Standards of Practice for Family and Divorce Mediation Standard I.B (2000) (“The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others.”).

Many divorce mediators meet with the parties over several sessions, with each session focused on a particular topic such as child support, the parenting plan, or distribution of marital assets. Parties will often have “homework” they will do between sessions to ensure that they have the information they need to make informed decisions. Part of that homework may involve consulting with independent legal counsel. See, e.g., Jay Folberg & Ann Milne, Divorce Mediation: Theory and Practice 80-81 (1988); see also Respondent's Hearing Brief, supra note 23, exhibit 1 (showing Dr. Fremed’s marketing brochure advising prospective parties that the mediation process averages about four to five two-hour sessions).

A mediation ends when one or both parties decide to terminate the process, when the mediator decides to terminate the process, or when the parties reach a settlement agreement. See, e.g., Model Standards of Practice for Family and Divorce Mediation Standard I.D (2000) (stating that the participants “may withdraw from family mediation at any time and are not required to reach an agreement in mediation”); Fla. Rules for Certified and Court-Appointed Mediators R. 10.420(b) (2000); see also infra note 984 (discussing termination to protect a balanced mediation process).

See supra notes 27, 341 (discussing the parties’ right to consult with legal counsel).

Ethics codes consistently define mediation as a voluntary process. See, e.g., Model Standards of Conduct for Mediators pmbl. & Standard I.A (2005); Fla. Rules for Certified and Court-Appointed Mediators R. 10.230 to .310, 10.420(b)(1) (2000); Standards of Ethics and Prof'l Responsibility for Certified Mediators § D cmt., E.1-.2 (Judicial Council of Va. 2005). Accordingly, a party may terminate mediation at any time. In addition, the mediator may terminate or postpone mediation in certain circumstances. See infra note 984.

Most ethics codes allow a mediator to suggest and evaluate options subject to certain constraints. See supra notes 346-75 and accompanying text.

See supra notes 34-47 (offering a summary of the drafting history of the Separation Agreement). See generally Disciplinary Proceeding Transcript, supra note 34 passim (discussing the parties' memorandum of understanding).

Chief Disciplinary Counsel may have asked this question because some courts, in analyzing the UPL question, consider whether the non-lawyer has made money on the services he or she has provided. See, e.g., Wis. Stat. Ann. § 757.30 (West 2001 & Supp. 2007) (prohibiting a person, for compensation, from giving professional advice or rendering legal service); State Bar v. Guardian Abstract & Title Co., 575 P.2d 943, 949 (N.M. 1978) (“[M]aking [] separate additional charges to fill in the blanks [on a form] would be considered the ‘practice of law,' for the reason that it would place emphasis on conveyancing and legal drafting as a business rather than on the business of the title company.”); see also Cole et al., supra note 448, § 10:5 (discussing the unauthorized practice of law).

Dr. Fremed’s marketing brochure does not give the price for this service. See Respondent's Hearing Brief, supra note 23, exhibit 1.

The 2005 Model Standards provide that if a mediator charges fees, “the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.” Model Standards of Conduct for Mediators Standard VIII.A.1 (2005). The Divorce Model Standards suggest that the mediator make full disclosure of his or her fees at the outset of the mediation and in the agreement to mediate. Model Standards of Practice for Family and Divorce Mediation Standard V.A.-B (2000). The Florida rules provide more guidance. Fees must be “reasonable and consistent with the nature of the case.” Fla. Rules for Certified and Court-Appointed Mediators R. 10.380(a) (2000). In setting fees, mediators should be guided by the following principles:

1. Any charges for mediation services based on time shall not exceed actual time spent or allocated.
2. Charges for costs shall be for those actually incurred.
3. All fees and costs shall be appropriately divided between the parties.
4. When time or expenses involve two or more mediations on the same day or trip, the time and expense charges shall be prorated appropriately.
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Id. R. 10.380(b). The Virginia SOEs simply state that “[a] mediator shall fully disclose compensation, fees, and, charges to the parties.” Standards of Ethics and Prof'l Responsibility for Certified Mediators §M.1 (Judicial Council of Va. 2005). Mediators may not accept contingent fees, referral fees, or gifts because of their potential affect on the mediator's impartiality. Model Standards of Conduct for Mediators Standard VIII.B.1 (2005); Fla. Rules for Certified and Court-Appointed Mediators R. 10.330(c), R. 10.380(e)-(f) (2000); Standards of Ethics and Prof'l Responsibility for Certified Mediators §G.1.-.3 (Judicial Council of Va. 2005); see also Young, Rejoice!, supra note 348, at 214-15 (discussing how fees can affect a mediator's impartiality).

Some mediators charge an hourly rate while others charge by the half-day or session. Additionally, some mediators bill expenses separately and some impose cancellation fees.

Kate W. Haakonsen was Resa Fremed's attorney.

Every mediators' ethical code protects party self-determination. See supra notes 145, 341, 348, 566, 570, 657.

Later testimony shows that Dr. Fremed faxed the MOU, including the parenting plan, to Attorney Flanagan. See Disciplinary Proceeding Transcript, supra note 34, at *35, *51, *58, *68.

Barbara Flanagan represented James Wright, Mrs. Brady Wright's ex-husband, in the divorce for a short period of time. Id. at *51, *57-59, *65.

In the Yale study, fifty-six percent of the defendants in cases handled by lawyers did not retain counsel. Yale Divorce Research, supra note 98, at 149. More recent data suggests the number of pro se parties has increased. See supra note 643. Legal ethics in some ways constrain lawyers for one spouse from communicating with the unrepresented party. Model Rules of Prof'l Conduct R. 4.3 (2007). These ethical limitations can make it more difficult for a lawyer to negotiate a settlement in a divorce than for a mediator to do so. While mediators must maintain neutrality towards both mediating parties, a primary function of their role is to improve communication between the parties by discussing their interests and needs, most often in joint sessions. See supra notes 284, 360, 491, 606-07.

The ethics rules for mediators handle the risk of an imbalance of power when pro se parties appear in mediation in several ways. The 2005 Model Standards offer this advice: “If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.” Model Standards of Conduct for Mediators Standard VI.A.10 (2005). More generally, the standard states: “If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.” Id. Standard VI.C. The standard also advises mediators to take appropriate steps if domestic abuse or violence threatens a party's self-determination. Id. Standard VI.B.

The Divorce Model Standards also express concern about a party's ability effectively to participate in the mediation. One standard requires the mediator to assess the party's “capacity to mediate.” Model Standards of Practice for Family and Divorce Mediation Standard III, III.C (2000). The mediator must also decline to mediate if he or she believes one or more of the participants is “unable or unwilling to participate.” Id. Standard III.C. The mediator must also shape the mediation process to account for any possible domestic abuse, and those mediations that may result in “safety, control or intimidation issues” are not suitable for mediation. Id. Standard X.C. The mediator must suspend or terminate the mediation if he or she reasonably believes that a participant cannot effectively participate. Id. Standard XI.

The Florida rules require the mediator to postpone or cancel the mediation “[i]f, for any reason, a party is unable to freely exercise self-determination.” Fla. Rules for Certified and Court-Appointed Mediators R. 10.310(d) (2000). The Committee Note to this rule further explains that “postponement or cancellation of a mediation is necessary if the mediator reasonably believes the threat of domestic violence, existence of substance abuse, physical threat or undue psychological dominance are present and existing factors which would impair any party's ability to freely and willingly enter into an informed agreement.” Id. R. 10.310 notes. Another rule specifies when a mediator should adjourn or terminate the mediation, including: (1) “upon agreement of the parties”; (2) if continuance “would result in unreasonable emotional or monetary costs to the parties”; (3) “if the mediator believes the case is unsuitable for mediation or any party is unable or unwilling to participate meaningfully in the process”; (4) when the mediation “entail[s] fraud, duress, the
absence of bargaining ability, or unconscionability”; and, (5) “if the physical safety of any person is endangered by the continuation of mediation.” Id. R. 10.420(b)(1)-(5).

The Virginia SOEs require the mediator to assess whether:
1. mediation is an appropriate process for the parties;
2. each party is able to participate effectively within the context of the mediation process; and
3. each party is willing to enter and participate in the process in good faith.

If in the judgment of the mediator the conditions specified in (1) through (3) are not met, the mediator shall not agree to mediate or, if the concerns arise after the process has begun, shall consider suspending or terminating the process.

Standards of Ethics and Prof'l Responsibility for Certified Mediators §C (Judicial Council of Va. 2005). The comment to this section recommends screening interviews. “Where appropriate, these interviews should include specific questions regarding violence..., child abuse/neglect, drug and/or alcohol use, and balance of power.” Id. § C cmt. Another standard provides:

If the mediator has concerns about the possible consequences of a proposed agreement or that any party does not fully understand the terms of the agreement or its ramifications, the mediator has the obligation to raise these concerns with the parties. Under circumstances in which the mediator believes that manifest injustice would result if the agreement was signed as drafted, the mediator shall withdraw from the mediation prior to the agreement being signed.

Id. Standard J. Yet another standard provides:

If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from nondisclosure or fraud by a participant, the mediator shall inform the parties. The mediator shall discontinue the mediation in such circumstances, but shall not violate the obligation of confidentiality.

Id. Standard L.2.

985 Under the UPL guidelines issued by Virginia and Georgia, a mediator could provide a party with a child support guideline form approved or sponsored by a court. The mediator could also help a party complete the form. See supra notes 800-06, 838-39, 859-62, 867-68 and accompanying text. See generally Virginia UPL Guidelines, supra note 458, ch. 3, §§ 3, 4 (discussing form preparation); Comm. on Ethics, Ga. Comm'n on Dispute Resolution, Advisory Op. 7 (Jan. 3, 2007) (discussing document preparation).

986 This hearing shows how an accountant could possibly fill out the child support guideline form, presumably as an incidental service to his primary role as an accountant, without running afoul of the rules on UPL. See supra note 460 and accompanying text. However, the Reviewing Committee may have considered this same act by a mediator as UPL. In its proposed decision in Dr. Fremed's case, the Reviewing Committee failed to consider or apply the “incidental services” exception, despite its earlier application in the Strong and Decker cases. See supra note 337 and accompanying text.

987 Pursuant to the terms of the MOU, Mrs. Brady Wright agreed to use her maiden name, Brady, after the divorce.

988 The author's research has not identified Mr. Jackson's relation to the court system. If Mr. Jackson was a court employee, he also faced UPL constraints on the help he could provide the Wrights. See supra notes 466, 808 and accompanying text.

989 One issue most UPL regulators have not considered is whether they can discipline a mediator for providing information that a party could otherwise get from an online service or source. But see supra notes 842-44, 867 and accompanying text (discussing the UPL guidelines of Virginia and Georgia regarding the use of forms made available by courts). The Reviewing Committee's proposed decisions in the Strong and Decker cases considered the availability of the Do It Yourself Divorce Guide, provided on the court's website, on the parties' choice of mediator. It did not consider, however, the separate issue of whether a mediator may provide the same information found in the kit without running afoul of the UPL constraints. See also supra notes 151, 173-75, 448 and accompanying text.

990 See supra notes 341 and accompanying text (discussing the rules governing a mediator's ability to give information they are competent to give based on their training or experience). Here, Dr. Fremed has provided information about what divorcing couples typically do about post-majority educational support based on her experience working with them in mediation. Based on her experience level, she was likely competent to give this information. If so, before giving this information she would have had to consider whether the information would undermine party self-determination or her impartiality. See supra note 341.
E-mail from Kate W. Haakonsen, Partner, Brown, Paindiris & Scott, LLP, to author (Feb. 15, 2008, 13:32:00 EST) (on file with author). The introduction to the record of these e-mails raises due process issues. See supra notes 330-33 and accompanying text.

Thus, the final version of the Separation Agreement that Judge Vilardi-Leheny saw at the hearing to grant the divorce consisted of the parenting plan drafted by Dr. Fremed, which Attorney Barbara Flanagan had reviewed, approved, and attached to her draft Separation Agreement. The final version of the Separation Agreement also included Mrs. Brady Wright's edits to a copy of the draft Separation Agreement prepared by her ex-husband's former attorney, Barbara Flanagan. Those edits reflected her own thinking about the remaining issues, her research on the internet, her work with the Do It Yourself Divorce Guide, her conversations with the Bethel attorney, her conversations with her brother-in-law (also an attorney), and the parties' discussions with court personnel to whom the judge referred them, including Robert Jackson. In general, Mrs. Brady Wright's testimony shows a great deal of self-determination on her part, which no one but Dr. Fremed respected, not even the Reviewing Committee or Judge Vilardi-Leheny.

Mrs. Brady Wright could not be brought before the Reviewing Committee on charges of UPL, even though she drafted the final version of the Separation Agreement, because states recognize a constitutionally-based exception for self-representation. See Nolan-Haley, supra note 10, at 263.

This testimony clearly reveals that Mrs. Brady Wright never confused the role that Dr. Fremed played in Mrs. Brady Wright's attempt to get an uncontested divorce from her husband. She understood the distinct roles of a therapist-mediator and of consulting lawyers. See Disciplinary Proceeding Transcript, supra note 34, at *90-92, *102-03.

Even lawyer-mediators typically cannot give legal advice because ethics codes governing lawyers would raise conflict of interest concerns from possible joint representation of the parties. See Cole et al., supra note 448, § 10:2. But, they can give legal information in certain circumstances. See supra note 341.

The ethics codes recognize that the choice of a mediator, including a nonlawyer-mediator, reflects party self-determination over the process. See supra note 657; see also supra notes 655-90 and accompanying text (discussing diversity in the mediation field and the attributes nonlawyer-mediators bring to mediation sessions).

Thus, Dr. Fremed's disclaimer reflects the disclosures of one of the “four legals” Virginia requires its mediators to make to parties. See supra note 32. Virginia, however, only requires the mediator to make the disclosure once. The SOEs apparently assume that parties need only read or hear the “four legals” once. Id. Mrs. Brady Wright's testimony clearly indicates that she understood, based on the number of times Dr. Fremed reminded her, that Dr. Fremed was not an attorney, that she would not provide legal advice, that the parties could and should consult with legal counsel if they had any questions about the law, and that any mediated agreement should be reviewed by an attorney. See Disciplinary Proceeding Transcript, supra note 34, at *14-15, *19, *22, *34, *90, *102-03, *113.

This statement may reveal Dr. Fremed's recognition that giving advice, information, or opinions could change the balance of power in the negotiation, could affect party self-determination, and could give the appearance of partiality towards the party getting the advice, information, or opinion. See supra note 341.

As noted above, the mediation process almost always includes stages of interest and issue identification and exploration. See supra note 360. Empirical research shows high levels of party satisfaction with mediation. Grace E. D'Alo, Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?, 8 Harv. Negot. L. Rev. 201, 221-22 (2003) (finding high levels of satisfaction in a Pennsylvania special education mediation program, where eighty-two percent of clients were very satisfied or satisfied with the actions of the mediator and the process); Charlene E. Depner & Sonya Tafoya, supra note 643, at 24 (reporting that, in California, nearly ninety percent of parties using family mediation found it a “good way to work on custody and visitation issues” and would recommend mediation to a friend); E. Franklin Dukes, What We Know About Environmental Conflict Resolution: An Analysis Based on Research, 22 Conflict Resol. Q. 191, 199 (2004) (reporting that sixty-one percent of disputants in fifty-four waste management mediations were satisfied with the mediation process and the outcome); Joan B. Kelly, Family Mediation Research: Is There Empirical Support for the Field?, 22 Conflict Resol. Q. 3, 17 (2004) (stating that satisfaction studies show that sixty-five to eighty-two percent of parties to family mediation viewed their mediators as “warm, sympathetic, and sensitive to feelings,” as well as “helpful in standing up for their rights in disagreements with spouses; staying focused on the important issues; and having clear and sufficient information for decision making”); Roselle L. Wissler, The Effectiveness of Court-Connected Dispute Resolution
in Civil Cases, 22 Conflict Resol. Q. 55, 65-66 (2004) (reporting that a majority of parties participating in court-connected civil mediations felt that “the mediation process was fair” and “gave them sufficient opportunity to present their case”, that “[a] majority of litigants felt they had control over the process or had input in determining the outcome”, that “most [parties] thought the mediator was neutral..., did not pressure them to settle ...., understood their views and the issues in dispute...., and treated them with respect”; that a majority of parties felt the mediation resulted in a fair agreement; and that most attorney-advocates shared similar feelings, but some minority of parties and attorneys did not have these feelings about the experience).

This testimony shows that Dr. Fremed adhered to the even more stringent requirements imposed by Virginia by iterating many times for the parties the last of the “four legals.” See supra note 32.

Accordingly, the facts of this matter would not satisfy the “client reliance” test for UPL. See supra note 452 and accompanying text.

This testimony clearly shows that Mrs. Brady Wright had access to counsel and used it when she thought it appropriate. Accordingly, she exercised party self-determination in her choice to use, or not use, counsel as she thought appropriate.

See supra notes 300-04 and accompanying text (giving the quoted text of this e-mail exchange). Mrs. Brady Wright was consulting with “Bethel” counsel about this option at the time of this e-mail exchange.

See supra notes 27, 341 and accompanying text (discussing the role of consulting attorneys in mediation).

Again, this testimony clearly reveals that Mrs. Brady Wright never confused the role that Dr. Fremed played in Mrs. Brady Wright's attempt to get an uncontested divorce from her husband.

This testimony indicates that while Dr. Fremed suggested some drawbacks to the option generated by Mrs. Brady Wright, Mrs. Brady Wright sought and received independent legal advice about the option. Mediator ethics codes permit a mediator to help parties develop options for resolving the dispute and also permit a mediator to help parties evaluate those options, subject to certain precautions designed to protect party self-determination and mediator impartiality. See supra notes 340-90. The Reviewing Committee focused on whether this communication constituted legal advice. To qualify as the practice of law, the communication would have to satisfy the “affecting legal rights,” “customary function,” or “relating law to specific facts” tests that broadly define the practice of law. See supra notes 449-50 and accompanying text (describing these tests). The narrower tests for the practice of law, the “client reliance” and “attorney-client relationship” tests, would not make the communication unlawful. See supra notes 451-52 and accompanying text (describing these tests). The earlier testimony clearly indicates that Mrs. Brady Wright did not rely on Dr. Fremed to give her legal advice. See Disciplinary Proceeding Transcript, supra note 34, at *92. Moreover, Dr. Fremed had disclaimed any role as an attorney and so could not have intentionally or unintentionally created an attorney-client relationship. Id. at *90.

The testimony confirms that the legal information or advice on which Mrs. Brady Wright relied came from her attorney, not from Dr. Fremed. Id. at *92-93, *99-101.

Is this e-mail communication an example of information giving, interest identification, option generation, or option evaluation? Any of these characterizations would permit the communication Dr. Fremed had with Mrs. Brady Wright as a function of the “authorized practice of mediation.” See supra notes 340-92 and accompanying text.

This testimony suggests Dr. Fremed helped Mrs. Brady Wright evaluate an option generated by Mrs. Brady Wright.

In this e-mail, Dr. Fremed again disclaims any role as an attorney. Implicit in this disclaimer is the expectation that Mrs. Brady Wright should seek legal advice. Dr. Fremed consistently communicated the need to seek independent legal advice and Mrs. Brady Wright's testimony confirms her understanding of the need to consult legal counsel. See Disciplinary Proceeding Transcript, supra note 34, at *14-16, *19, *20, *22, *25, *34, *44, *90-92, *100-02, *112-13. Moreover, Mrs. Brady Wright sought legal advice about this specific option. Id. at *92-93, *99-101.

The typical test for whether a communication constitutes legal advice looks for whether the person making the communication has applied principles of law to the specific facts of a situation. See supra notes 451, 775-823 and accompanying text; see also Virginia UPL Guidelines, supra note 458, ch. 2, § 2. Arguably, this communication does not satisfy that test. See supra notes 340-92 and accompanying text.
1012 Mrs. Brady Wright answered:
I agree with you 100%; that's why I had added that clause into the Quit Claim Deed--it was something to the effect of “Upon the signing of this document, James K. Wright will release all rights, title and pursuit of financial interest of (property address). I can check with an attorney that I know in Bethel but I'm pretty sure he won't be able to get any more money on the sale of the house/if it gets sold in the future. Many thanks for your responses though--it's always helpful to have another opinion!

E-mail from Diane Brady Wright, Certified Meeting Professional, Global Event Management, to Dr. Resa Fremed, New England Counseling & Mediation (Oct. 26, 2004, 20:32:01 PDT), introduced as Disciplinary Counsel's Hearing exhibit 1, supra note 300, at 38.

Mrs. Brady Wright's testimony again clearly indicates she understood the distinct role of the mediator as opposed to the lawyers.

1015 This testimony confirms that Mrs. Brady Wright understood Dr. Fremed's role as one of issue spotting or option evaluation. She did not rely on Dr. Fremed to provide legal advice about the quitclaim option. Instead, she discussed the option with the “Bethel” attorney. See Disciplinary Proceeding Transcript, supra note 34, at *92-93, *99-101.

1016 As noted above, a mediator may give information he or she is qualified to give by training or experience. See supra note 341. As Dr. Fremed testified, she had prior experience with the post-majority educational support issue. See Disciplinary Proceeding Transcript, supra note 34, at *20-25. She also knew something about the governing law. See id.

1017 This testimony indicates that Mrs. Brady Wright sought advice from Dr. Fremed about the process of reaching agreement, not about the substance of any agreement. Training or experience clearly qualified Dr. Fremed to give that kind of process advice. See supra notes 16-22.

1019 This question fails to make clear which definition of the practice of law the Reviewing Committee member suggests applies to the e-mail.

1020 Dr. Fremed makes the distinction between legal advice and identification of additional options. Suggesting additional options typically falls within the “authorized practice of mediation,” so long as it does not unduly affect party self-determination or the mediator's impartiality. See supra notes 346-90.

1021 This statement reveals the fundamental misunderstanding the Chief Disciplinary Counsel had about mediation. First, it does not have to operate in the “shadow of the law.” It can invoke other normative values, such as the best interests of the children or religion. See Disciplinary Proceeding Transcript, supra note 34, at *10-12, *21-22, *24, *81-82, *91, *105. In addition, the mediator does not necessarily have to make the parties aware of their legal choices. The mediator may, however, have an ethical obligation to advise parties to seek legal advice. Dr. Fremed satisfied that ethical obligation. See Disciplinary Proceeding Transcript, supra note 34, at *14-15, *19, *22, *34, *102-03, *113; see also supra notes 25-28 and accompanying text (excerpting her marketing brochure and agreement to mediate).

1022 This statement suggests that the Chief Disciplinary Counsel would apply the “relating law to specific facts” test for the practice of law.

1023 This statement may reflect the concerns of the Chief Judge who could not understand how non-lawyers could conduct divorce mediation. See supra note 230 and accompanying text. It shows the inability to assume that parties could reach agreement on issues relating to their separation based on shared interests uncovered through improved communication and a structured problem-solving process. It also suggests that the law supplies the only relevant normative value. See supra note 948 and accompanying text.
The author of this article finds it odd, and a bit embarrassing, that the Chief Disciplinary Counsel failed to take a position about whether Dr. Fremed had engaged in the unauthorized practice of law. Why put someone through this emotionally and financially draining process if the Chief Disciplinary Counsel could not assume a definitive position on the charges against her? He had a prosecutorial duty to decide whether to dismiss the case if clear and convincing evidence did not support the charges. Dr. Fremed spent $6,000 on her defense, none of which was covered by insurance. See supra notes 4-7, 76, 237, 246 and accompanying text.

At the end of the day, the focus had shifted from who drafted the document submitted by the parties to Judge Vilardi-Leheny to whether the late-admitted e-mails showed that Dr. Fremed had given legal advice.

This statement indicates that Attorney Haakonsen believed the relevant test for the practice of law was the “relating law to specific facts” test. However, the Connecticut case law suggests that the broader “customary function” test would also apply. See supra notes 79-128, 450 and accompanying text.

This closing statement begins by addressing the lawyer-generated dominant paradigm that focuses on the practice of law.

Attorney Haakonsen refers here to the “parallel” paradigm of the “authorized practice of mediation,” but she has not provided much context for it with the members of the Reviewing Committee. Respondent's Hearing Brief faintly mentions the statutory definition of mediation. It also briefly distinguishes the roles of attorney and mediator and discusses confidentiality in mediation as further evidence of the different roles of attorneys and mediators. Respondent's Hearing Brief, supra note 23, at 8-10. It does not mention any aspirational or mandatory mediation ethics codes.

See supra notes 129-83 and accompanying text (discussing the SGC decisions in Carney, Strong, and Decker).

This closing statement ends by addressing the “law practice” paradigm.