

Professional Liability of Mediators in Maryland, USA: Ethics and Practice

By *Unyime Morgan*

Enlisted as Mediator with Maryland Program for Mediator Excellence (MPME), Maryland, USA

Orcid: 0009-0009-7824-8413

Abstract

The professional liability of mediators can be examined from diverse perspectives: the need for regulatory provisions, leniency because mediators in most jurisdictions have maintained a high standard of professionalism and thus a low record of professional liability, and the fear that a stricter liability regime could stifle the flexibility of the mediation process and encroach on the professional and procedural diversity mediation currently enjoys. This article aims to define the mediator's professional liability and examine such liability in Maryland, USA. Additionally, tips to keep the mediator out of professional liability, such as promoting parties' self-determination, keeping one's practice within designated legal boundaries and professional standards, maintaining professional liability insurance if necessary, co-mediating with experts, attending training and fulfilling continuing education requirements, making disclosures, and drafting professionally, will be examined.

Keywords: Professional Liability of Mediators, Mediator's Liability, Ethics, Maryland, Mediation

Case Study

Jamie, a tall and diligent mediator, vibrated with fright as the court summons dropped from her shaky hands to the softly carpeted office floor. The import of a messy court case, the possibility of a public smear on her mediation career, and the loss of clients dawned on her like a dreadful nightmare as she recollected the events that converted her mediated settlement to litigation. The parties, Jim and John, had built an international financial technology corporation together for almost three decades. Their blooming business was on the verge of crumbling due to a discordant succession arrangement. Jamie was engaged by the parties to facilitate a peaceful split of the business empire between the embittered partners. How can a settlement she facilitated spark such contention? The mediator shuddered at the subtle notion of conflict of interest that had culminated in the litigation.

At the early stage of her career as a dispute resolution specialist, Jamie had assisted with the resolution of a flurry of disputes birthed by a privacy breach in one of Jim's IT start-ups. From a client-mediator relationship, her relationship with Jim blossomed with the death of her father. Jim is currently a father figure and a remote family friend. Jamie had only disclosed her involvement in the resolution of Jim's corporate disputes over ten years ago. The parties did not object to her serving as a neutral. At the inception of the mediation, she did not contemplate any circumstance that could topple her neutrality. Her mediation style over the years has been predominantly facilitative, but she recalled instances when Jim and John prompted her to provide options based on her past experiences in mediating similar cases.

Pondering over her relationship with Jim, and the circumstances of the mediation, she was tormented by two opposing perspectives the court could liberally examine and adopt. On one hand, she had conscientiously strived to preserve her neutrality during the mediation. On the other hand, the persisting uneasiness seems to be an inward acknowledgment that she was too emotionally attached to Jim to be "neutral." John shared the second perspective and initiated a court case to air his grievance. He had become very unsettled when he learned that Jim had been Jamie's family friend for years. Suddenly, the satisfactory settlement deal he came off the mediation table with no longer seemed fair. Perhaps, Jamie was just a ploy to fetch Jim the best portion of the establishment he had toiled for in the past twenty-eight years.

Regulatory Framework of Mediators' Professional Liability in Maryland

What regulations can a mediator in Maryland, USA, turn to for guidance on professional liability? The American Bar Association Section of Dispute Resolution,ⁱ the Association for Conflict Resolutionⁱⁱ and the American Arbitration Association adopted the Model Standards of Conduct for Mediators in 2005ⁱⁱⁱ "Model Standards" are sources of national mediation ethics, integral to ensuring accountability in the mediation profession.^{iv} Internationally, the United States is a signatory to the 2018 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation).^v Where parties are subject to the Singapore Convention on Mediation, the Convention's standard of conduct on mediators' liability applies. Other standards of ethics are made by states, courts, and provider organizations.^{vi}

In Maryland, the Maryland Standards of Conduct for Mediators regulate the practice of mediators enlisted by the Maryland Program for Mediator Excellence (MPME).^{vii} Title 9^{viii} and 17^{ix} of the Maryland Court Rules, provide procedural and ethical guidelines for mediations carried out within Maryland, USA. The former regulates family mediation, while the latter governs the conduct of civil mediation generally. The Maryland Code and case law precedents also guide the standard of liability in diverse spheres of law.^x These regulations are reference points for the determination of the mediator's liability. Mediators may also attract liability rooted in other professions and associated professional codes of conduct. An example is the unauthorized practice of law rooted in the legal profession. In addition to legislative regulations and guidelines, mediators should endeavor to abide by community practice guidelines in mediation institutions they are affiliated with to avoid liability.^{xi} Additionally, where the contract engaging a mediator provides guidelines on the mediator's rights, duties, and liability, such a contractual agreement should be complied with.^{xii}

Mediation Styles and their Interaction with Professional Liability

Mediators emerge from a pool of experts from all walks of life.^{xiii} Mediation is also characterized by a great variety of practice styles.^{xiv} The predominant mediation models in Maryland are the facilitative, transformative, and inclusive models. Attention will also be given

to liability that can arise from evaluative mediation. Inclusive mediation, which originated in Maryland, USA, in the 1990s welcomes all ideas without filtering or changing them and works with all types of expression without designing or enforcing communication guidelines.^{xv} Facilitative mediation encourages disputants to reach their voluntary solution by exploring each other's deeper interests without mediators disclosing their views on the conflict, while transformative mediation aims at changing party interaction, perception, and approach to conflict^{xvi} and their relationship by empowering disputants to resolve their conflict and recognize each other's needs and interests.^{xvii} On the other hand, evaluative mediation admits mediators' recommendations, suggestions, and expressions of opinions.^{xviii}

Each mediation model reflects different values and has applications in various contexts.^{xix} For instance, evaluative mediation seems to be commonly employed in the resolution of commercial and international disputes, while facilitative and transformative mediation models are commonly used in domestic contexts like family, workplace, and neighborhood disputes^{xx}. These mediation styles all share common traits that make mediation distinct from other dispute resolution processes like arbitration.^{xxi} Parties retain decision-making power, all outcomes require parties' consensus and discussions are confidential.^{xxii} It is noteworthy that no style of mediation authorized by the parties should be considered inferior to another, provided, that the mediation style is not prohibited by the applicable law.^{xxiii} Evaluative mediation requires close attention when considering mediators' liability because parties' actions or inactions may be influenced by the mediator's expert opinion. Depending on the applicable law, Jamie in the case above may be liable for suggesting options, even at the parties' request. For instance, Rule 17-103 of the Maryland Court Rules does not permit mediators to recommend the terms of an agreement to parties. It is difficult to rule out the possibility of incurring liability from inaccurate or injurious professional advice given during evaluative mediation. It seems that facilitative, inclusive, and transformative mediation may not be significantly threatened by such liability traits because mediators adopting these mediation styles do not offer professional advice, suggestions, or recommendations. Nonetheless, it seems that an incompetent mediator adopting any mediation style may not be far from a liability because competence is a prerequisite for independent mediation.

Where a mediator is appointed based on professional skills and experiences, there is a presumption that the mediator is knowledgeable in that sphere of expertise. If the mediator's

conduct falls short of the presumed expertise, there is a high probability that the mediator could incur liability. It seems that representing oneself as a mediator with a particular professional expertise creates a duty to know certain facts and act in a certain manner. Therefore, it would be easy to infer that failure to know or act as expected might have arisen out of negligence if a duty of care is established based on the mediator's expertise. For instance, a mediator appointed based on medical expertise is expected to be well-versed in medical procedures, standards, and best practices in a given medical dispute scenario. In the same vein, if parties appoint an attorney-mediator to benefit from the neutral's legal knowledge, the appointed attorney-mediator would be expected to be conversant with legal principles relevant to the dispute.

To determine liability, are there special regulatory guidelines for diverse mediation styles? Principles and guidance on the mediator's liability can be drawn from national, state and international laws highlighted above. For instance, self-determination, which is mandated by Standard 1 of the Maryland Standards of Conduct for Mediators, is an important yardstick in determining fairness and the severity of a mediator's breach. To ensure fairness in the mediation process, the self-determination of the parties is required. The principle of self-determination significantly guides the interpretation of the term "serious breach."^{xxiv} Mediators should also guard against breach of avowed professional neutrality. Irrespective of the mediation style adopted, a mediator should avoid taking on ancillary professional functions outside the traditional mediation role, such as serving simultaneously as a language interpreter or therapist, to maintain neutrality.^{xxv}

Solo-Practitioners, Volunteers, Profit-Making and Non-profit Mediation Organizations: Dealing with Mediators' Liability

Are there peculiarities in the mediation personnel structure that increase exposure to mediation liability? It seems that solo mediators are at greater risk of losing neutrality and conflict of interest breaches than mediation organizations. Unlike solo mediators, organizations possess a wide diversity of interests, experience, competencies, and experts disputants may choose from. Kristen Blankley recommends that solo mediators refer cases that fall out of their areas of interest or competence to more competent mediators to avoid compromise.^{xxvi} In the case study above, professionals in Jamie's shoes may better maintain neutrality by referring such cases to

other competent mediators. Another option for solo practitioners is to partner with diverse experts to co-mediate where the need for such expertise arises. Private and institutional mediators should deliberately structure their practice to avert liability. Presumably, the more mediators that a mediation organization has enrolled, the more likely it is that one of the mediators will be competent and willing to take up unique cases.^{xxvii} What professional mediators' liability issues should non-profit groups using volunteer mediators be aware of? Volunteer mediators and the respective non-profit groups under which they volunteer should be mindful of at least two sets of regulations. National, state, and institutional regulations on mediation are reference points for the determination of their liability.

Secondly, Chapter 139 of the 42 U.S. Code and the Maryland Code, Courts and Judicial Proceedings § 5-407, guide the liability of volunteers. It is noteworthy that these statutes do not address the liability of the charity organization in which volunteers work. In other words, a charity organization may not benefit from the limitation of liability a qualified volunteer enjoys. This indicates the need for corporate insurance against professional liability. Both regulations seem to agree that a volunteer mediator will not be exempted from liability if they have proven to be grossly negligent and reckless.^{xxviii} Wilful and wanton misconduct or intentional tortious conduct by a mediator will also deprive a volunteer mediator of the limited liability shield provided by Chapter 139 of the 42 U.S. Code and the Maryland Code.^{xxix} There is no exemption from liability where a mediator acts outside their prescribed capacity.^{xxx} Even when mediators and their affiliated institutions offer voluntary services to the public, it is safer to meet the required qualifications for such services and maintain a high standard of competence and diligence.

The Probability of Mediators' Liability

Instances that can trigger civil liability include inappropriate recommendation of mediation as a dispute resolution method, compromising the integrity of the settlement agreement, defamation, negligence; and breach of fiduciary duties where the mediator's action and terms of engagement justify the imposition of fiduciary obligations,^{xxxi} failure to disclose a conflict of interest, breach of contractual promise, breach of confidentiality, false advertising, inflicting emotional distress on a disputant, and mediating incompetently.^{xxxii} Criminal liability arises

from a wrong against the state. Examples of cases that can trigger criminal liability include fraud^{xxxiii} and assault on a party, for which immunity is not usually available.^{xxxiv} A mediator facing criminal liability for professional misconduct may be subject to fines, imprisonment, and other criminal penalties if found guilty by a court of law. The outcome of civil and criminal court proceedings is open to the public unless the court makes an exception for confidentiality. In other words, an unfavorable court decision may generate negative publicity for the mediator. Like any other professional, even a mere allegation of professional liability could be career-threatening. Mediators should navigate prudently and carefully to avert such liabilities.

How should mediators deal with the likelihood of liability from illegal conduct in the course of mediation? Mediation settlement agreements are subject to court reviews and existing legal regulations. Mediators should strive to research what would be legal or illegal from the perspective of the cases they have committed to mediate. Illegality may arise from the mediator's direct conduct, adopting mediation outcomes that fall outside the scope of legality, and mediating an illegal cause. An instance of reaching an illegal outcome could occur when parties in a monetary settlement agree to avert tax payment to the knowledge of the mediator. In light of Standard VI.B of the Maryland Standards of Conduct for Mediators, which expressly requires that mediators follow all applicable statutes, rules, and codes of conduct, mediators should be knowledgeable of legal regulations, limitations, and illegal conduct related to their spheres of practice.

Civil and criminal liability can ensue from a mediator's conduct on many grounds but there have been very few established cases. For instance, only 100 mediators out of 9,000^{xxxv} regulated by Florida have received any type of sanction, remedial recommendation, or intervention for unethical conduct.^{xxxvi} Here are the reasons for the rare professional liabilities: The existence of statutory and contractual immunities exempts mediators from liability, the flexible and confidential nature of mediation reduces the mediator's risk, parties' self-determination makes it difficult to establish a causal link between the mediator's conduct and any loss or damage.^{xxxvii} In addition, malpractice, professional negligence, tort-based actions, and breach of contract standards are not easily met because mediation is a voluntary process.^{xxxviii} In other words, parties can discontinue mediation at any stage, thereby offsetting the attendant liability. Furthermore, the requirements of neutrality and impartiality in mediation

make it difficult to establish a breach of fiduciary duties, even when a breach of fiduciary duty is a likely inference from a mediator's conduct.

Finally, it seems that a widespread ignorance of mediation standards among the populace, coupled with a high degree of compliance with professional ethics, has made mediators' liability an infrequently deliberated subject. It is noteworthy that where the breach of duty on the part of the mediator has been established, proving damages may be difficult because mediation is a consensual and confidential process where the decision-making is the parties' prerogative.^{xxxix} Particularly, parties would have difficulty proving damages from non-settlement, unfavorable settlement, settlement terms that injure third parties, and injuries that are not reflected in the mediation outcome because mediation is voluntary.^{xl} If a party establishes liability and proves damages, likely remedies include altering or rescinding the settlement agreement,^{xli} compensation for loss or damages arising from the mediator's conduct, professional sanctions like suspension, and withdrawal of accreditation are possible disciplinary actions that may spring from professional misconduct.^{xlii}

Tips to Ward Off Professional Liability

Mediators should actively be on their guard against professional liability. Just as certain activities may attract liability, cautionary measures can be engaged to ward off professional liability. The latter are discussed below.

Promote Parties' Self-Determination:

The cardinal notion of self-determination is that parties are at the center of decision-making, process design, and the outcome of the settlement. It seems that mediations that promote parties' self-determination have a higher rate of acceptance and thus rarely attract judicial review. Self-determination shields the mediator from liability, as parties bear the responsibility for their opinions and the ensuing consequences. It is noteworthy that where the applicable law permits, adopting an evaluative approach at the instance of the parties does not undermine self-determination since the parties have authorized the design of the mediation process and would ultimately determine whether or not to adopt the outcome of the evaluation. However, mediators adopting an evaluative mediation style should be mindful of the likelihood of professional liability and refrain from evaluations and directives where accuracy and neutrality

cannot be guaranteed. While parties are at liberty to choose the design of the mediation process and style, mediators should determine whether or not their skills and experience match the parties' chosen mediation model. Ultimately, obligations flowing from parties' self-determination and agreed covenants, such as confidentiality, should be respected.

Knowledge of Legal Boundaries:

Mediation and legal practice share the common objective of resolving disputes. The interconnection between mediation and the legal system is reflected in the friction between the theoretical framework of mediation, the legal culture, and legal processes.^{xliii} The note on the construction of the 2005 US Model Standards of Conduct for Mediators acknowledges that various aspects of mediation may be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed, and other agreements of the parties. Standard VI.B of the Maryland Standards of Conduct for Mediators expressly requires that mediators follow all applicable statutes, Maryland Rules, the Maryland Standards of Conduct for Mediators, and the requirements of any program under which the mediator is mediating. Mediators should have legal knowledge of how the facts of the dispute interact with applicable laws, rules, and contractual provisions. However, there is a risk of liability arising from unauthorized practice of law (UPL) if such legal knowledge translates to legal practice.

What is UPL? Rule 19-305.5 of the Maryland Court Rules regulates the unauthorized practice of law in Maryland, USA. UPL has been defined simply as the unlicensed practice of law.^{xliiv} A simple definition would not suffice to determine whether a mediator's conduct is UPL, as each case has to be individually examined by the court to determine intent and liability.^{xliv} The unlicensed practice of law goes beyond the dissemination of legal information. It encompasses giving legal advice, drafting legal documents, and providing legal services generally. What is the difference between legal information and legal advice? Legal information states what the law is so it does not create an attorney-client relationship, while legal advice shows how the law applies to/impacts a given situation.^{xlvi} The practice of law includes activities conducted outside the courtroom and embraces the giving of legal advice and the preparation of legal instruments, covering an extensive field.^{xlvii} The work of the office lawyer is performed with the possibility of litigation in mind and should be performed by persons possessed of adequate learning, skill, and sound moral character, acting at all times under the heavy trust obligation to clients which rests upon all attorneys.^{xlviii} Where UPL occurs, injury to the public is

presumed, not on account of incompetence or injury to clients, but from the fact that law is practiced without satisfying the uniform, standard, and requirements for admission to the bar imposed for the benefit and protection of the public.^{xlix}

According to Professor John Cooley, non-lawyer mediators provide certain legal services, like the drafting of mediated settlement agreements.¹ Even though drafting the terms of a contract is an inherently legal service, it is expected that mediation sessions would culminate in a settlement agreement drafted by mediators or their legal representatives, as parties desire. Mediators should remind parties of their right to seek legal representation where such intervention seems necessary. It seems that mediation law or at least a guideline can provide insight into UPL and thus fill the regulatory vacuum that confines the definition, indictment, and penalization of UPL to a legal perspective.^{li} Undoubtedly, mediation would benefit from greater clarity about the distinction between legal information and legal advice, the ambit of UPL, penalties, and exceptions to UPL as they apply to mediators, and diverse mediation styles. This will ensure that mediators can perform their propitious work without fear, uncertainty, or error.^{lii}

The need for caution in the unauthorized practice of law can be extended to other professions such as medicine, nursing, real estate, etc. Where the knowledge of any profession is required, mediators should consider referring such disputes for professional advice to preserve neutrality, unless the mediator has been engaged by parties to evaluate based on professional competence or experience. Mediators should also be conversant with the likelihood of liability arising from the practice of each profession they identify with. For instance, an attorney-mediator deemed to be practicing law, by giving legal advice may be subject to liability based on all the standards of practice, code of ethics, duties to clients, and legal and fiduciary duties of attorneys.^{liii} Additionally, conflict of interest may arise where parties are not equally represented.^{liv} Mediators should get acquainted with and wisely navigate regulations and professional codes of conduct that could impact their practice.

Knowledge of Mediator's Professional Standards:

In the United States, mediators have maintained a very high professional standard despite the flexibility of the mediation process and the admission of practitioners from numerous walks of life. It seems that professional liability is more likely to arise from ignorance than bad faith. In

Maryland, professional standards are enshrined in the Maryland Standards of Conduct for Mediators and Titles 9 and 17 of the Maryland Court Rules and augmented by continuing education training. In line with designated professional standards, mediators should cross-check their competence to handle each case, assess whether there is a threat to the integrity of the mediation process, ascertain impartiality, and the absence of conflict of interest, respect confidential information during and after mediation,^{lv} and ensure parties' self-determination can be respected before engaging in a mediation.^{lvi} It is beneficial to encourage clients to leave feedback and reviews so mediators can assess their performance and address shortfalls that may translate to professional liability.

Mediators' Liability Insurance:

In mediation practices where mediators are likely to generate options and advice, the need for professional liability insurance should not be ruled out. Mediators should ascertain whether professional liability insurance is mandatory for their enrollment in court or institutional rosters. In the rare event that professional liability arises, such liability would be covered by the insurance. On the other hand, mandating professional liability insurance for mediators would increase the cost of getting started as a mediator and the annual cost of offering mediation services. This should not be lightly considered since many mediators are volunteers. Considering the low risk of professional liability that characterizes mediation, it seems that mediators should be allowed to decide whether or not to insure their practice. The justification for mandating mediators' liability insurance is an overriding public policy requirement that those who cause damage to others through a breach of their legal obligation to take reasonable care should be answerable and compensate those to whom they have caused damage.^{lvii} Mediators' liability insurance can address compensation where liability arises.^{lviii} The Maryland Standards of Conduct for Mediators and Title 17 of the Maryland Court Rules do not mandate liability insurance.

Co-Mediation with Subject-Matter Experts:

Liability can arise from acting ignorantly in a subject matter that requires expertise. Co-mediation with subject-matter experts can create efficiency and avert liability. For instance, Rule 9-205(c) of the Maryland Court Rules requires family mediators to obtain family mediation training to practice family mediation in Maryland, USA. Delving into family

mediation without specialized family mediation training may trigger professional liability because the mediator contravenes applicable law and may be incompetent for family mediation. Co-mediation is mediation which is facilitated by two or more neutrals who jointly assist parties in addressing issues and reaching a resolution.^{lix} Some dispute resolution service providers utilize larger teams of neutrals, depending on the complexity and expert requirement of the dispute.^{lix}The footnote to Standard IV. A of the Maryland Standards of Conduct for Mediators does not permit an incompetent mediator to mediate independently, but such a mediator may be competent to do so as a co-mediator or with appropriate mentoring. In other words, where expertise is required, the mediator should have such expertise or co-mediate with an expert who can fulfill that requirement. Thus, the non-expert would not only stay away from possible professional liability but also learn from the expert's experience. Furthermore, where mediators co-mediate, an individual mediator's conduct may have less impact on the settlement terms reached by the parties and so be less likely to sustain liability.^{lxi}

Training and Continuing Education:

Training and continuing education play a significant role in the prevention of liability. Considering that mediation codes of conduct and court rules do not address every scenario or legal issue the mediator would encounter in practice, continuing education is a gap-filler to keep mediators abreast of current trends, vices, and regulations. In the absence of training, continuing education, and codes of conduct on UPL, some professionals only understand UPL after they have received a summons for UPL and are probably awaiting a decision from the disciplinary committee. Mediation communities play a significant role in the formulation of professional ethics, ethical discussion, and guidelines for practice^{lxii} and the training of its members. Sharing professional experiences, co-mediation and the observation of mediation conducted by experienced mediators should be encouraged for inexperienced mediators.^{lxiii} A broad and robust professional community aids individual practitioners' development in their practice and prevents entrenching personal biases and liability.^{lxiv} Mediation training provides enlightenment on different perspectives, regarding the law as just one measure of justice.^{lxv} Training and implementation of associated feedback from the local mediation community refine mediation cultures until they crystallize into norms and regulations.

Legislative Regulation:

Mediation legislation can serve diverse purposes, such as regulating mediation practice by establishing standards of competency like minimum qualifications for enrollment, ascertaining the rights, obligations, and protection of parties to mediation, mediators, and, to a limited extent, third parties.^{lxvi} Regulations can also be used to define ethics, achieve uniformity^{lxvii} and prevent the monopoly of dominant professional perspectives in the practice of mediation.^{lxviii} In uncertain practice areas like the UPL, it seems that provisions on mediator misconduct will enable courts to develop a coherent case law without inevitably resorting to other professional standards, public policy, or the imaginary standard of a reasonable man.^{lxix} On the other hand, it is noteworthy that formalizing the mediation process may make mediation more costly and less accessible.^{lxx} For instance, a regulation mandating professional insurance for mediators may increase the cost of mediation practice. There is also a likelihood that entry into the mediation profession may be restricted for many mediators who are only volunteers. Ultimately, one has to consider the objective of a regulatory intervention. In other words, what vice is the proposed regulation designed to wall out, or what benefit would be introduced?

The dynamics of regulating mediation practices should be carefully deliberated on, planned, and executed. The diversities in the approaches to mediation, the background of experts, and the host of actors (including lawmakers, policymakers, judicial officials like judges and legal practitioners, auxiliary experts like psychologists, parties, dispute resolution institutions, and professional organizations) should be taken into consideration.^{lxxi} Regulations should be tailored to recognize that there could be more than one ethically correct answer and thus accommodate options where there are several ethically permissible courses of action that are compatible with reason, confidentiality, neutrality, and parties' self-determination.^{lxxii} It has been argued that the relatively low level of risk or potential harm to participants is evidence that regulating mediation is practically unnecessary.^{lxxiii} Nevertheless, the Singapore Convention on Mediation suggests a desire for international regulation to boost certainty, international acceptance, and enforcement of mediation.^{lxxiv} Mediation communities are well versed in their members' triumphs and challenges; they should engage in dialogue towards the determination of shared goals and values and best practices in curtailing liability, regulating irregularities, and attaining uniformity in practice.^{lxxv}

The Role of Agreements to Mediate and Settlement Agreements:

To avert liability, close attention should be paid to the administration and execution of the parties' agreement to mediate. An executed agreement to mediate is an acknowledgment of the parties' right to self-determination and a mediator's avowed promise of impartiality, confidentiality, neutrality, and professionalism. Mediators should be attentive to questions and exceptions raised when parties determine whether or not to agree to mediate their dispute. When parties have expressly subjected their dispute to mediation, it is not uncommon that they express concerns about the process, likely outcome, uncertainty about the other party's good faith, cooperation, and enforceability. Without compromising on self-determination, neutrality, and parties' entitlement to independent legal advice, these seeds of discontentment should be promptly addressed and rooted out to ensure they do not pose liability threats during and after the mediation has been concluded.

The Agreement to mediate initiates the parties' consent to participate in the mediation session. Where the mediation is successful and parties come to an agreement, it is anticipated that the terms of such an agreement will be reduced into writing. The Maryland Standards of Conduct for Mediators does not provide express guidance on whether the settlement agreement should be drafted by a legal practitioner or a mediator. Upon request, Rule 17-103 of the Maryland Court Rules expressly permits mediators to record points of agreement expressed and adopted by the parties. It is reasonable to state that parties may choose to be accompanied by their lawyer and have the settlement agreement reviewed by a lawyer, especially where they may feel disadvantaged without legal representation. Hence, the mediator is deemed to be capable of manning the entire mediation process: from agreement to mediate to drafting a settlement agreement.^{lxxvi} The terms of the settlement agreement and the process leading to their adoption are important considerations in determining professional liability. Where the mediator drafts the settlement agreement, the mediator should ensure the parties' self-determination has not been eroded by bias, coercion, or fraud. Mediators should respect the parties' decision to have their settlement agreement drafted by a legal practitioner where applicable.

Disclosures:

A common precedent and harbinger of liability is conflict of interest. Standard III.A.1 of the Maryland Standards of Conduct for Mediators defines conflict of interest as any personal,

professional, or financial relationship or circumstance that might reasonably raise a question about the mediator's impartiality. Such a conflict of interest may arise from a relationship or circumstance that existed before the mediation, at the time of the mediation, or is reasonably foreseeable after the mediation. Conflict of interest assesses the integrity of the mediator from a reasonable person's perspective. Standard III.A.1. places the burden on the mediator to identify conflict scenarios or relationships, assess their impact on the parties and the potential outcome of the mediation, and disclose such a conflict. According to Standard III.A.1, disclosure of conflict and the parties' consent to proceed with mediation may not cure every conflict of interest. There seems to be an additional requirement that the mediator should ascertain that the disclosed conflict would not undermine the integrity of the mediation process. In light of the relationship between Jamie and Jim, some conflicts of interest seem to be so entrenched that they could leave the mediator, parties, and reasonable people uneasy even when the mediator has acted fairly throughout the mediation process. Mediators should also be careful to ensure there has been a full disclosure of conflict scenarios. Ultimately, the mediator should answer the question of whether or not the identified conflict of interest can be cured by disclosure.^{lxxvii}

Conclusion

Many emotions are associated with deliberations on the mediator's professional liability: the fear of disciplinary actions, civil liabilities, and criminal sanctions, uncertainty about the scope of such liability and concern about eliminating error, and finally, confidence in the dispensation of one's mediation service because liability-generating factors have been identified and prevented. This work is designed to produce the last outcome. Civil and criminal liability may arise from the practice of mediation. There are still gray areas that require regulatory clarification. Nonetheless, intentional, informed, and prudent actions can be taken to ward off such professional liabilities.

References

Articles and Online Resources

- American Bar Association, Association for Conflict Resolution and the American Arbitration
- Association, “Model Standards of Contract for Mediators” September 2005
- https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf Accessed 28 February 2024
- American Bar Association, “Section of Dispute Resolution”
https://www.americanbar.org/groups/dispute_resolution.sologout/ Accessed 28 February 2024
- Art Hinshaw, An Unquestionable Mediation Conflict of Interest: The MGM Mandalay Bay Shooting Settlement 2-3
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3928128 Accessed 29 February 2024
- Ashish Kumar, “Fundamental Regulatory Issues in the Mediation Practice”
<https://ssrn.com/abstract=3171891> 9 Accessed 28 February 2024
- Association for Conflict Resolution, <https://acenet.org/> Accessed 28 February 2024
- Ben Köhler, “Blaming the Middleman? Refusal of Relief for Mediator Misconduct Under the
- Singapore Convention” *Journal of Private International Law*, 2023 Vol. 19, No. 1, 42–66, 66
- Caroline Harmon-Darrow, Lorig Charkoudian, et al "Defining Inclusive Mediation: Theory, Practice and Research" <https://mdmediation.org/wp-content/uploads/2021/03/Defining-Inclusive-Mediation-2020.pdf> Accessed 28 February 2024
- Chien-Yu Lung, “Violation of Mediators’ Duties As A Ground Of Non-Enforcement Under The Singapore Convention” 13(2) *Contemp. Asia ARB. J.* 435 [2020] 436 - 477, 463
- David Hoffman and Natasha Affolder, “A Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law” 6

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1307857 Accessed 28 February 2024

- Dorcas Anderson, “The Importance Of Ethics In The Practice Of Mediation” *Asian Journal On Mediation* [2021] 27 - 45, 31
- Elayne Greenberg, “The Ethical Compass Truth and Consequences: What Should a Mediator Ethically Disclose About Her Mediation Style? How Might a Mediator's Style Compromise a Mediator's Neutrality?” *NYSBA New York Dispute Resolution Lawyer* I Spring 2009 I Vol. 2 I No. 1, 9
- Elayne Greenberg, “When Worldviews Collide—Strategic Advocacy v. a Mediator’s Ethical Obligations” *NYSBA New York Dispute Resolution Lawyer*, Fall 2017 [Vol. 10, No. 2 9] 7 - 10, 9
- Ellen Waldman and Donna Erez-Navot, “Accepting a Case or Refusing to Mediate: Ethical Considerations”⁹⁶
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3892407 Accessed 28 February 2024
- Gary Meggitt and Hussain Somji, “The Regulation of Mediators in England and Wales, The United States and Australia — Lessons for Hong Kong” (2016) *HKLJ* 445 - 476, 464
- Heather Hazelwood, “Legal Information Versus Legal Advice: What’s the Difference?” 17 March 2022 <https://ampersand-law.com/blog/legal-information-versus-legal-advice-whats-the-difference> Accessed 28 February 2024
- Jennifer Schulz, “Mediator Liability in Canada: An Examination of the Emergence of American and Canadian Jurisprudence” 2000 - 2001 *Ottawa Law Review* [Vol. 32:2, 269 - 297] 180
- Jennifer Winestone, “What is Transformative Mediation and How Is It Connected to the New Ways for Families Method?” 25 April 2017
<https://highconflictinstitute.com/mediation/what-is-transformative-mediation-and-how-is-it-connected-to-the-new-ways-for-families-method/> Accessed 10 April 2024
- John Cooley, *Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR*, *Disp. Resol. J.*, Aug.- Oct. 2000 72

- John Naylor, “What Exactly Is The Unauthorized Practice of Law?”
<https://clarkcountybar.org/fivethings-you-may-or-may-not-know-about-the-attorney-discipline-process/> Accessed 28 February 2024
- Jonathan Crowe, “Ethics and the Mediation Community” (2015) 26 ADRJ 20-25, 20
- Jonathan Crowe, “Two Models of Mediation Ethics” Sydney Law Review 2017 [Vol 39:147 - 165] 164 - 165
- Judy Gutman and Jodie Grant, “Ethical Conundrums Facing Mediators: Comparing Processes, Identifying Challenges and Opportunities” 111
- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2996299 Accessed 28 February 2024
- Katie Shonk, “Types Of Mediation: Choose the Type Best Suited to Your Conflict” 27 February 2024
- <https://www.pon.harvard.edu/daily/mediation/types-meditation-choose-type-best-suited-conflict/> Accessed 28 February 2024
- Kristen Blankley, “Is a Mediator Like a Bus? How Legal Ethics May Inform The Question Of Case Discrimination By Mediators” Gonzaga Law Review Vol. 52:2 327-372, 367
- Lydia Nussbaum, “Mediation As Regulation: Expanding State Governance Over Private Disputes” Utah Law Review [NO. 2] 2016 1 - 55, 6
- M Moffitt, Ten Ways to Get Sued: A Guide for Mediators, 8 Harv. Nego. L. Rev. 81 (2003) in Ashish Kumar, “Fundamental Regulatory Issues in the Mediation Practice” <https://ssrn.com/abstract=3171891> 6 - 7 Accessed 28 February 2024
- Mary Culbert, “Proposal: A New Unified Canon of Mediator Ethics” Legal Studies Paper No. 2022-14 (January 2023) 9 <https://ssrn.com/abstract=4228199> Accessed 27 February 2024
- Maryland Courts, “Maryland Code and Rules Sources”
<https://www.mdcourts.gov/lawlib/research/gateway-to-md-law/code-rules-laws-sources> Accessed 28 February 2024
- Maryland Court Rules, “Title 9 - Family Law Actions”
<https://casetext.com/rule/maryland-courtrules/title-9-family-law-actions> Accessed 28 February 2024

- Maryland Court Rules, “Title 17 - Alternative Dispute Resolution”
<https://casetext.com/rule/maryland- court-rules/title-17-alternative-dispute-resolution>
Accessed 28 February 2024
- Maryland Judiciary, “The Maryland Standards of Conduct for Mediators” 1 January 2020
<https://www.courts.state.md.us/sites/default/files/import/macro/pdfs/mdstandardsofconductformediators.pdf> Accessed 28 February 2024
- Michael Moffitt, " Suing Mediators" Boston University Law Review (2003)
[Vol.83:147 - 207] 197
- MWI, Co-Mediation: “The Perils and Pleasures of Teamwork”¹
<https://www.mwi.org/wp-content/uploads/2021/09/MWI-Co-Mediation-Overview.pdf> Accessed 29 February 2024
- Nadja Alexander, “Making Mediation Law” January 2016 Singapore Management University <https://www.researchgate.net/publication/313895443> 28 Accessed 23 February 2023
- Omer Shapira, “What do Mediators Need to Know to Mediate Ethically?” Mediation Ethics: A Practitioner's Guide 3-31 (American Bar Association Publishing, 2021)
<https://ssrn.com/abstract=4491501> 28 Accessed 28 February 2024
- OpenAI. “ChatGPT” CHATGPT Android app, version 2.0. OpenAI, 2024
<https://chat.openai.com> accessed 27 April 2024
- Paula Young, “A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies” South Texas Law Review January 2008, 1047 - 1293, 1201 17
- Paula 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) 774 - 775
- Rachael Field, “Proposing A System Of Contextual Ethics For Mediation For A Range Of
- Mediation Models And In Both Ad Hoc And Institutional Environments” 2017 10(2) Contemp. Asia Arb. J. 293 - 319, 294

- Robyn Carroll, “Mediator Immunity in Australia” Sydney Law Review [VOL 23: 2001, 185 - 221] 189
- Robyn Carroll, “Trends in Mediation Legislation: 'All for One and One for All' or 'One at All'?” March 2002, Western Australian Law Review [VOL30] 173
- Singapore Convention on Mediation, “The Model Law Text”
<https://www.singaporeconvention.org/model-law/text> accessed 5 February 2024
- Social Dispute Mediation Resolution Center, "Social D R C Dispute Mediation Resolution
Guide - Mediators Liability” https://www.socaldrc.com/mediators_liability.htm
Accessed 26 February 2024
- Y Zhao and AKC Koo, Revisiting The Issue Of Mediator Immunity: The Way Forward For
Prospective Mediation Legislation In Hong Kong” Hong Kong Law Journal, 2011,
Vol. 41 No. 3, 677- 695, 687

Case Law

- Ark. Bar Ass'n v. Block, 323 S.W.2d 912, 914 (Ark. 1959)
- Commonwealth v. Jones & Robins, Inc., 41 S.E.2d 720, 726-27 (Va. 1947)
- Conn. Bank & Trust Co., 140 A.2d [870]
- Grievance Comm. of the Bar of Fairfield County v. Dacey, 222 A.2d 339, 342 (Conn. 1966) [350]
- In re the Petition for Disciplinary Action against Dean Nyquist 493 N W 2d 538 (Minn. 1992)
- State Bar Ass'n v. Conn. Bank & Trust Co., 153 A.2d 453, 457 n.3 (Conn. 1959)
- Tapoohi v Lewenberg (No 2) [2003] VSC 410 (Supreme Court of Victoria, Commercial and Equity Division) (21 Oct 2003) 89

Legislations

- 42 U.S. Code, Chapter 139 - Volunteer Protection
- Maryland Code 2020, Courts and Judicial Proceedings § 5-407
- Maryland Standards of Conduct for Mediators 2020

- UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (Singapore Convention on Mediation)
- US Model Standards of Conduct for Mediators 2005
- US Volunteer Protection Act 1997
- Title 9 of the Maryland Court Rules
- Title 17 of the Maryland Court Rules

Endnotes

ⁱAmerican Bar Association, "Section of Dispute Resolution," https://www.americanbar.org/groups/dispute_resolution.ssologout/ Accessed 28 February 2024

ⁱⁱ Association for Conflict Resolution, <https://acrnet.org/> Accessed 28 February 2024

ⁱⁱⁱ American Bar Association, Association for Conflict Resolution and the American Arbitration Association, "Model Standards of Contract for Mediators" September 2005 https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf Accessed 28 February 2024

^{iv} Dorcas Anderson, "The Importance Of Ethics In The Practice Of Mediation" Asian Journal On Mediation [2021] 27–45, 31

^v Singapore Convention on Mediation, "The Model Law Text" <https://www.singaporeconvention.org/model-law/text> accessed 5 February 2024

^{vi} Dorcas Anderson, "The Importance Of Ethics In The Practice Of Mediation" Asian Journal On Mediation [2021] 27–45, 31

^{vii} Maryland Judiciary, "The Maryland Standards of Conduct for Mediators" 1 January 2020 <https://www.courts.state.md.us/sites/default/files/import/macro/pdfs/mdstandardsofconductformediators.pdf> Accessed 28 February 2024

^{viii} Maryland Court Rules, "Title 9 - Family Law Actions" <https://casetext.com/rule/maryland-court-rules/title-9-family-law-actions> Accessed 28 February 2024

^{ix} Maryland Court Rules, "Title 17: Alternative Dispute Resolution" <https://casetext.com/rule/maryland-court-rules/title-17-alternative-dispute-resolution> Accessed 28 February 2024

^xMaryland Courts, "Maryland Code and Rules Sources" <https://www.mdcourts.gov/lawlib/research/gateway-to-md-law/code-rules-laws-sources> Accessed 28 February 2024

^{xi} Nadja Alexander, "Making Mediation Law" January 2016, Singapore Management University

<https://www.researchgate.net/publication/313895443> 28 Accessed 23 February 2023

^{xii} *ibid*

^{xiii} Ashish Kumar, “Fundamental Regulatory Issues in the Mediation Practice” <https://ssrn.com/abstract=3171891> 9 Accessed 28 February 2024

^{xiv} Nadja Alexander, “Making Mediation Law” January 2016 Singapore Management University

<https://www.researchgate.net/publication/313895443> 10 Accessed 23 February 2023

^{xv} Caroline Harmon-Darrow, Lorig Charkoudian, Tracee Ford, Michele Ennis and Erricka Bridgeford, “Defining Inclusive Mediation: Theory, Practice and Research” <https://mdmediation.org/wp-content/uploads/2021/03/Defining-Inclusive-Mediation-2020.pdf> Accessed 28 February 2024

^{xvi} Jennifer Winestone, “What is Transformative Mediation and How Is It Connected to the New Ways for Families Method?” 25 April 2017 <https://highconflictinstitute.com/mediation/what-is-transformative-mediation-and-how-is-it-connected-to-the-new-ways-for-families-method/> Accessed 10 April 2024

^{xvii} Katie Shonk, “Types Of Mediation: Choose the Type Best Suited to Your Conflict” 27 February 2024 <https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/> Accessed 28 February 2024

^{xviii} *ibid*

^{xix} Rachael Field, “Proposing A System Of Contextual Ethics For Mediation For A Range Of

Mediation Models And In Both Ad Hoc And Institutional Environments” 2017 10(2) CONTEMP. ASIA ARB. J. 293–319, 294: To enable parties to exercise their right to informed consent and self-determination, mediators should not hesitate to disclose their mediation style to potential clients. Elayne Greenberg, “The Ethical Compass Truth and Consequences: What Should a Mediator Ethically Disclose About Her Mediation Style? How Might a Mediator's Style Compromise a Mediator's Neutrality?” NYSBA New York Dispute Resolution Lawyer I Spring 2009 I Vol. 2 I No. 1, 9

^{xx} *ibid*

^{xxi} Lydia Nussbaum, “Mediation As Regulation: Expanding State Governance Over Private Disputes” Utah Law Review [NO. 2] 2016 1–55, 6

^{xxii} *ibid*

^{xxiii} Mary Culbert, “Proposal: A New Unified Canon of Mediator Ethics” Legal Studies Paper No. 2022-14 (January 2023) 9 <https://ssrn.com/abstract=4228199> Accessed 27 February 2024

^{xxiv} Chien-Yu Lung, “Violation Of Mediators' Duties As A Ground Of Non-Enforcement Under The Singapore Convention” 13(2) Contemp. Asia ARB. J. 435 [2020] 436–477, 463

^{xxv} Ellen Waldman and Donna Erez-Navot, “Accepting a Case or Refusing to Mediate: Ethical Considerations” 96 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3892407 Accessed 28 February 2024

^{xxvi} Kristen Blankley, “Is a Mediator Like a Bus? How Legal Ethics May Inform The Question Of Case Discrimination By Mediators” Gonzaga Law Review, Vol. 52:2, 327–372, 367

^{xxvii} *ibid*

^{xxviii} Maryland Code, Courts and Judicial Proceedings § 5-407(b)(2)(c) and Chapter 139 of 42 U.S.Code § 14503 (a)(3)

^{xxix} *ibid*

^{xxx} Chapter 139 of 42 U.S.Code § 14503 (a)(1)(2); See State Bar Ass'n v. Conn. Bank & Trust Co., 153 A.2d 453, 457 n.3 (Conn. 1959)

^{xxxi} Social Dispute Mediation Resolution Center, “Social D R C Dispute Mediation Resolution Guide - Mediators Liability” https://www.socaldrc.com/mediators_liability.htm Accessed 26 February 2024

^{xxxii} See M Moffitt, Ten Ways to Get Sued: A Guide for Mediators, 8 Harv. Nego. L. Rev. 81 (2003) in Ashish Kumar, “Fundamental Regulatory Issues in the Mediation Practice” <https://ssrn.com/abstract=3171891> 6 - 7 Accessed 28 February 2024

^{xxxiii} M Moffitt, Ten Ways to Get Sued: A Guide for Mediators, 8 Harv. Nego. L. Rev. 81 (2003) in Ashish Kumar, “Fundamental Regulatory Issues in the Mediation Practice” <https://ssrn.com/abstract=3171891> 6 - 7 Accessed 28 February 2024

^{xxxiv} Robyn Carroll, “Mediator Immunity in Australia” Sydney Law Review [VOL 23: 2001, 185–221], 189

^{xxxv} It is noteworthy that this article was written in 2006 so this does not reflect the current statistics.

^{xxxvi} Paula 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) 774–775 in Paula Young, "A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies" South Texas Law Review, January 2008, 1047–1293, 1201

^{xxxvii} *ibid* 192–193

^{xxxviii} Michael Moffitt, "Suing Mediators" Boston University Law Review (2003) [Vol.83: 147 - 207] 197

^{xxxix} Ashish Kumar, “Fundamental Regulatory Issues in the Mediation Practice” <https://ssrn.com/abstract=3171891> 7 accessed 28 February 2024

^{xl} *ibid*; Michael Moffitt, "Suing Mediators" Boston University Law Review (2003) [Vol. 83:147 - 207] 197

^{xli} Robyn Carroll, “Mediator Immunity in Australia” Sydney Law Review [VOL 23: 2001] 185 - 221] 191

^{xlii} *ibid* 192

^{xliii} Judy Gutman and Jodie Grant, “Ethical Conundrums Facing Mediators: Comparing Processes, Identifying Challenges and Opportunities” 111 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2996299 Accessed 28 February 2024

^{xliv} John Naylor, “What Exactly Is The Unauthorized Practice of Law?” <https://clarkcountybar.org/five-things-you-may-or-may-not-know-about-the-attorney-discipline-process/> Accessed 28 February 2024

^{xliv} See Ark. Bar Ass'n v. Block, 323 S.W.2d 912, 914 (Ark. 1959)

^{xlvi} Heather Hazelwood, “Legal Information Versus Legal Advice: What’s the Difference?”

17 March 2022 <https://ampersand-law.com/blog/legal-information-versus-legal-advice-whats-the-difference> Accessed 28 February 2024

^{xlvii} See Paula Young, "A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies" South Texas Law Review January 2008, 1047 - 1293

^{xlviii} Conn. Bank & Trust Co., 140 A.2d [870]; See Paula Young, "A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies" South Texas Law Review January 2008, 1047 - 1293, 1074

^{xlix} Grievance Comm. of the Bar of Fairfield County v. Dacey, 222 A.2d 339, 342 (Conn. 1966) [350]; See Paula Young, "A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies" South Texas Law Review January 2008, 1047 - 1293, 1080

¹ John Cooley, Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR, Disp. Resol. J., Aug.- Oct. 2000, at 72, 77; See Paula Young, "A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies" South Texas Law Review January 2008, 1047 - 1293, 1051

^{li} *ibid* 1052

^{lii} David Hoffman and Natasha Affolder, “A Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law” 6 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1307857 Accessed 28 February 2024

^{liii} Jennifer Schulz, “Mediator Liability in Canada: An Examination of the Emergence of American and Canadian Jurisprudence” 2000 - 2001 Ottawa Law Review [Vol. 32:2, 269 - 297] 180

^{liv} In re the Petition for Disciplinary Action against Dean Nyquist 493 N W 2d 538 (Minn. 1992); See Jennifer Schulz, “Mediator Liability in Canada: An Examination of the Emergence of American and Canadian Jurisprudence” 2000 - 2001 Ottawa Law Review [Vol. 32:2, 269 - 297]

^{lv} Insight from AI-generated information. See OpenAI. “ChatGPT” CHATGPT Android app, version 2.0. OpenAI, 2024 <https://chat.openai.com> accessed 27 April 2024

^{lvi} Ellen Waldman and Donna Erez-Navot, “Accepting a Case or Refusing to Mediate: Ethical Considerations” 83 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3892407 Accessed 28 February 2024

^{lvii} *Tapoohi v Lewenberg (No 2)* [2003] VSC 410 (Supreme Court of Victoria, Commercial and Equity Division) (21 Oct 2003) 89

^{lviii} Y Zhao and AKC Koo, Revisiting The Issue Of Mediator Immunity: The Way Forward For Prospective Mediation Legislation In Hong Kong” Hong Kong Law Journal, 2011, Vol. 41 No. 3, 677-695, 687

^{lix} MWI, Co-Mediation: "The Perils and Pleasures of Teamwork" 1 <https://www.mwi.org/wp-content/uploads/2021/09/MWI-Co-Mediation-Overview.pdf> Accessed 29 February 2024

^{lx} *ibid*

^{lxi} Robyn Carroll, “Mediator Immunity in Australia” Sydney Law Review [VOL 23: 2001, 185 - 221] 192 - 193

^{lxii} Jonathan Crowe, “Ethics and the Mediation Community” (2015) 26 ADRJ 20-25, 20

^{lxiii} *ibid* 24-25

^{lxiv} *ibid*

^{lxv} Elayne Greenberg, "When Worldviews Collide—Strategic Advocacy v. a Mediator's Ethical Obligations" NYSBA New York Dispute Resolution Lawyer, Fall 2017 [Vol. 10, No. 2 9] 7–10, 9

^{lxvi} Robyn Carroll, “Trends in Mediation Legislation: 'All for One and One for All' or 'One at All'?” March 2002, Western Australian Law Review [VOL30] 173

^{lxvii} *ibid* 180

^{lxviii} Ashish Kumar, “Fundamental Regulatory Issues in the Mediation Practice” <https://ssrn.com/abstract=3171891> 11 accessed 28 February 2024

^{lxix} See Ben Köhler, “Blaming the Middleman? Refusal of Relief for Mediator Misconduct Under the Singapore Convention” Journal of Private International Law, 2023 Vol. 19, No. 1, 42–66, 66

^{lxx} Lydia Nussbaum, "Mediation As Regulation: Expanding State Governance Over Private Disputes" Utah Law Review [NO. 2] 2016 1–55, 50

^{lxxi} Nadja Alexander, “Making Mediation Law” January 2016 Singapore Management University

<https://www.researchgate.net/publication/313895443> 3, 26 Accessed 23 February 2023

^{lxxii} Omer Shapira, “What do Mediators Need to Know to Mediate Ethically?” Mediation Ethics: A Practitioner's Guide 3-31 (American Bar Association Publishing, 2021) <https://ssrn.com/abstract=4491501> 28 Accessed 28 February 2024

^{lxxiii} Gary Meggitt and Hussain Somji, “The Regulation of Mediators in

England and Wales, The United States and Australia — Lessons

for Hong Kong” (2016) HKLJ 445–476, 464

^{lxxiv} *ibid* 465

^{lxxv} Jonathan Crowe, “Two Models of Mediation Ethics” Sydney Law Review 2017 [Vol 39:147 - 165] 164 - 165

^{lxxvi} The mediator's role seems akin to a real estate agent who prepares a contract of sale for clients. See *Commonwealth v. Jones & Robins, Inc.*, 41 S.E.2d 720, 726-27 (Va. 1947) (allowing licensed real estate agents to prepare contracts for the sale of real estate).

^{lxxvii} Art Hinshaw, *An Unquestionable Mediation Conflict of Interest: The MGM Mandalay Bay Shooting Settlement 2-3* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3928128 Accessed 29 February 2024