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## **§ 8.01 Introduction**

For an attorney, the primary question in considering mediation is: what can a mediator do for my client, for my case? If the client and attorney are interested in reaching settlement but are having trouble doing it, can a mediator help the parties and their counsel make progress? In thinking about this, it is useful to know what techniques mediators use.

The central premise for any mediation is that neither party is firmly against settlement. Mediation can assist parties who have decided that settlement (on the right terms, of course) is generally preferable to a full trial, or parties who are ambivalent about settlement but who are willing to explore that possibility. If, however, one party absolutely needs a victory in court .. because of feelings of anger and frustration, a deep conviction of being right on the merits, or other reasons -- there is little a mediator can do.

In this chapter we first discuss some general characteristics of mediation, and then outline the primary techniques mediators use. The chapter also discusses preparation for mediation, the steps in a mediation, and some of the legal issues involved in mediation.

## **§ 8.02 What Happens In A Mediation: General Characteristics and Overview**

A mediation is an informal process that can be tailored to the needs of the case or parties. Although each mediation is therefore in some ways unique, there are several characteristics that can be seen in most mediations.

Before the mediation convenes, a mediator often requests a brief written summary of the case (e.g., facts, issues, bargaining history) from each side. The mediator will tell the parties whether this summary is to be held in confidence or shared with the other party, or this decision may be left to the parties to decide in consultation with the mediator.

Before bringing everyone together, the mediator may communicate in person or via conference call with the attorneys involved in the case. Occasionally, a mediator will confer separately with each attorney. The purpose of this pre-meeting conference is to determine who will attend the mediation, how the parties can prepare for the mediation, other preliminary matters. It is also possible that the mediator, not constrained by prohibitions against ex parte communications, may use the pre-meeting communication to explore some of the substance of the case with each party. As a practical matter this is the beginning of the mediation. In some circumstances, however, the confidentiality statute<sup>1</sup> is not triggered until the parties have signed an agreement to mediate, an event that often occurs at the first joint session.

Most mediations bring the parties together, usually though not always with their counsel. One assumption of mediation is that the parties need to deal with the conflict themselves, with the help of, but not necessarily through, counsel. This assumption notwithstanding, when circumstances require and everyone agrees, a mediation can be attended only by counsel and the mediator. Who attends is thus determined case by case, though there are patterns by practice area. For example, in family mediation, parties usually attend alone, consulting with counsel before and after mediation sessions on an as-needed basis; in civil litigation, parties usually attend with counsel. Where attorneys do not attend the mediation, the usual ground rule is that there can be no final agreement until counsel have reviewed it.

Mediation generally begins in a joint session with all the parties present. The mediator describes the process, and then explores whether there are variations in the process that the parties wish to use. The mediator usually explains that the mediation is confidential<sup>2</sup> and that the

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<sup>1</sup> See § 8.34 for a discussion of the statute.

<sup>2</sup> See § 8.33 (concerning confidentiality).

mediator's role is to facilitate an agreement, not to impose one. The mediator will then ask each side to explain his view of the case. A mediator will often want the party to speak for herself, unless he is uncomfortable doing so or he strongly prefers having his counsel make the initial statement concerning the case.

The mediator may then allow the parties (and counsel) to talk directly to each other, the goal here being clarification of issues. If parties and counsel seem to be moving productively toward settlement, the mediator may allow this process to continue without intervening.

Often the mediator will ask to speak with one party (and his counsel) alone, while the other side waits in another room. The purpose of this private caucus is to explore flexibility for settlement; the party may be willing to indicate possibilities that he does not wish to express to the other side just yet, or indeed at all unless the party can be sure it will lead to settlement. Are there special limitations on bargaining room? Are there other issues in the case which the party would like to introduce but does not know how to?

The mediator may also wish to emphasize to the party some of the realities of non-settlement which may appear to the mediator to have been minimized in the party's opening comments. More specifically, the mediator might wish to focus a party's attention on weaknesses in his court case. Some parties are resistant to hearing such messages, and it is the mediator's task to compel the party to focus on those unpleasant possibilities until they have been assimilated. Such persistence may be more effective in private caucus. The mediator may also offer possible solutions which have proven successful in prior mediations: "Would you find it acceptable to do this...?" "Suppose the other side were willing to.... Would you then be willing to..?" Sometimes this process entails working with the party to craft imaginative solutions.

Sometimes it entails whittling at the most recent offers, moving the parties toward a meeting point.

The mediator will often have private caucuses with each side, perhaps several times, conveying back and forth explicit offers (if authorized to do so), or general notions of the direction the other party is willing to move. This shuttling will continue until the mediator is satisfied that (a) an agreement has been reached, (b) an agreement cannot be reached, or (c) the parties can now come back together and work on the remaining issues together.

The duration of a mediation depends of course on the complexity of issues, the number of parties, and their flexibility. A mediation may take more than one session, with the length of each determined by the parties. The mediator may speak with each side by phone between sessions.

Through mediation the parties may reach any agreement they could have reached without mediation. The use of a mediator makes the agreement neither more nor less binding than if a mediator had not been used. If the agreement is itself a contract, it is enforceable as a contract. If the mediation is part of litigation and the parties submit the agreement to court as an agreement for judgment, that agreement (when entered by the court) is as binding as any other order of court. (Alternatively, the parties may wish to keep the substance of their agreement confidential, in which case they may enter a stipulation of dismissal pursuant to their agreement, which would not be filed with the court.)

### **§ 8.03 The Past and the Future**

Procedures like arbitration and trial are designed in part to reach a determination of the facts -- i.e., what happened in the past. In mediation, there is no oath, no cross examination, and, with few exceptions, no witnesses. The parties' memories and concerns regarding the history of the conflict are of course important, but more important is their desire to seek an agreement. Ideally, there is less time spent vindicating one side's view of the past, and more time spent on creating a better future for the parties.

### **§ 8.04 Mediator As Authority**

Mediators sometimes know a great deal about the subject matter of the dispute, sometimes not. Mediators often have extensive experience with similar cases in court, occasionally not. In either event, good mediators will be cautious about giving their own opinion about what a court would decide if the case does not settle, and a mediator will almost never indicate his own opinion about what is "fair" in a particular case. Mediators are expert in the process of settling the dispute, and about this they are ordinarily assertive throughout the mediation.

### **§ 8.05 Tailoring**

The parties, counsel, and the mediator can design many aspects of a mediation. They may choose to use or not use witnesses, experts, and physical or documentary evidence. Parties, counsel, or both may attend. If there are multiple parties, the mediator may meet with all of them at once, some of them in groups, or each one at a time; the mediator may be an active manager of the process, or may allow the parties to conduct the negotiation with occasionally

interjected clarifications or suggestions. Decisions concerning all of these variables will depend on the particular facts of the case and the preferences of the participants.

### **§ 8.06 Widening the Focus**

An arbitration or trial attends closely to the legal issues. A mediation, by contrast, frequently covers a much wider area.

Indeed the parties may wonder about the mediator's questions concerning matters seemingly irrelevant to the core issues in the case. The mediator will often be looking for other issues, perhaps not mentioned in the pleadings, that have made agreement between the parties difficult to attain. Mediators often find it easier to help parties settle a case by "expanding the pie," seeking out both underlying issues and perhaps other related topics, the resolution of which may make settlement more acceptable to all sides.

### **§ 8.07 What Happens in Mediation: A Look Inside the Mediator's Tool Box**

For the mediator approaching a case, the central question is: what is preventing these parties from reaching an agreement on their own? Most cases settle, and most cases settle without going to mediation. When the parties turn to mediation, it is likely that there is a blockage to settlement. The mediator's task is to identify the blockage and help the parties overcome it. A number of tools are available to help him achieve that goal.

### **§ 8.08 Establishing Neutrality and Building Trust**

For the mediator, the first and most essential step in the process is to establish and maintain the trust of the parties. Because the mediator has no sanctions that require the parties to take his suggestions, he is effective only to the extent that the parties have confidence in his competence and integrity. The mediator must demonstrate (assertion is rarely useful) that he is skillful at helping parties reach agreement, and that he will show partiality to neither side. To do

this the mediator must give the parties the feeling of being heard, of being understood.

Mediators speak of “active listening” and of “building empathy.” Building on this always somewhat tenuous foundation of trust, the mediator uses the following additional techniques to help the parties move toward agreement.

### **§ 8.09 Challenging Overly Optimistic Assessments by the Parties or Counsel**

A frequent difficulty in reaching a settlement occurs when a participant (party or attorney) has an overly optimistic view of the alternative to settlement. One party, for example, may truly believe, or appear to believe, that he will do extremely well in court, and therefore any settlement would have to be in the same vicinity as his anticipated judgment. As a result, the range in which he is willing to settle is small and anchored very close to his opening position.

A party may hold this view because of an emotional commitment to a certain outcome (“a jury will have to see that I am right”), or because of a misconception about the court process (“a judge is trained to know who is telling the truth, so I will win”). In such a situation, an attorney can find it difficult to correct such misconceptions because the client may interpret this as a lack of zeal or a lack of confidence in the client or his case. Thus one role for the mediator is to help the attorney help the client understand the variety of possible outcomes in court, and perhaps even the probability of each of those outcomes. It is also possible, of course, that an attorney will have mis-estimated the value of the case, either through inexperience, inadequate preparation, or a loss of professional perspective.

It is not the mediator’s task to prove to a party that his judgment is wrong. The mediator’s job is to help the party be realistic about what may happen in court.

There are two techniques mediators use in this situation. The first is to focus the attention of the party, or attorney, usually through the use of careful questioning, on the various

points in the litigation when important judicial decisions will occur. The mediator should walk the party through each of them -- motions to dismiss, discovery disputes, motions for summary judgment, and so forth. Perhaps it will be in a motion. Perhaps it will be when a particular fact is being disputed at trial. The mediator must help the party understand what the trier of fact will have to consider, what choices that trier will have before him, and what the evidence or testimony may look like. "What will you say to the court? What will the other side say? How will the judge know which side is telling the truth?" The mediator's goal with this line of questioning is to elicit information about what the party sees as the strengths and weaknesses of his case and of the opponent's case, and thus counteract a party's unwarranted optimism about the outcome at trial.

Mediators use a second technique for dealing with unwarranted optimism. After the parties have had the chance to tell the mediator the substance of their respective cases, and after the mediator has had a chance to explore with each side the background and details of the dispute, some parties will ask the mediator for his opinion about the likely outcome of the case in court, or for an opinion regarding a particular part of the case. In other cases, a mediator may feel it useful to take the initiative and suggest to the parties that they may find his judgment about the case useful. The parties are, of course, always free to reject this suggestion, as indeed they are free to ignore his opinion if it is given. However, as a person with experience in such cases, as a neutral hearing each side, or perhaps as a kind of sample juror, the mediator can offer an opinion about how the case might fare in court that may move an overly optimistic participant in the direction of a potential settlement.

All the foregoing has focused on a client's optimism about the result in court. A corollary problem is the client's inadequate attention to the costs of reaching that or any result in

court. The mediator's task, again employing the art of asking the right questions, is to walk the client through the likely costs -- to the client and to those around him -- in terms of money, time, reputation, personal relationships, and aggravation.

### **§ 8.10 Addressing Concerns about Making Concessions: Security on the “Slippery Slope”**

Frequently parties are afraid to move toward settlement or make an offer that might be viewed as a “concession.” They fear that once the offer is made, they have embarked on the “slippery slope” to virtual or complete capitulation. Such parties deal with this fear by making no concessions at all, or by making only trivial ones, and very grudgingly. Other parties assume that settlement always lies halfway between opening offers; thus they exaggerate their opening to adjust the midpoint of the bargaining range in their direction. These approaches often convey a message to the other side that there is no possibility of an agreement. The other side then becomes more entrenched. These may not be the messages the senders intend, but they are often the ones received.

A mediator in this situation has several techniques available. One approach is to try to whittle away at each offer, asking each side to take steps which are small enough to alleviate the fear of hurtling the down “slippery slope,” but large enough to convey to the other side the message that real progress is being made. The mediator's purpose is help the parties feel comfortable with the process, and to create some sense of momentum. The mediator may emphasize to each party that any move (i.e., offer or concession) sends a message, and that the sender should try to insure that the message sent is the one intended.

Nothing requires that concessions by each side be of the same size -- i.e., it is not inevitable that the settlement point will be halfway between opening offers, and often it is not. A mediator may, for example, propose conceding a particularly indefensible aspect of the claim

(e.g., “As you have never earned that level of income, tell me how you can predicate your claim to lost earnings on it?”). Or the mediator may propose that the parties each make a concession of equal percentages from their prior position.

Another technique is for the mediator to ask each of the parties to give him a target settlement at which to aim. The mediator will hold this target in confidence. “Give me an idea of what you might eventually settle for. I will ask the other side for the same, and hold both numbers in confidence. This will let me know if we have a chance of bridging the gap or not.” There is, of course, a temptation on the part of each party not to disclose to the mediator the full amount of settlement authority he has available -- i.e., to hold some in reserve. A mediator will assume this, but if that reserve is too large, it can mislead the mediator and cause him either to distort the flow of the process, or indeed to end it altogether on the possibly false assumption that settlement is impossible.

Once the mediator has specific offers from each side that fall within a reasonable settlement range, he can ask the parties for authority to disclose their respective positions to the other side. This method permits the parties to control the disclosure of their settlement authority until they are confident that their opponent is willing to reciprocate.

### **§ 8.11 Expanding The Pie**

Another technique for the mediator is to expand the number of issues on the table -- i.e., expanding the pie. Single issue negotiations are often the toughest to settle: every dollar one side gains is a dollar the other loses. But often a dispute over dollars is only one aspect of a dispute that involves other issues, perhaps corporate or personal relationships, or perhaps deeply felt emotions. In litigation, of course, the non-monetary issues are often slighted or completely ignored. But, frequently, reaching an agreement on the dollars requires addressing the other

issues. A mediator can often advance the process by getting these on the table, framing them for discussion, and helping the parties seek their resolution.

A mediator will thus spend some time “looking around,” in order to see why the parties have not been able to settle the dispute without a mediator, and to see what other issues the parties may wish (or need) to include in the negotiation. Sometimes this is done simply by asking if there are other issues a party wishes to put on the table. At other times, the mediator will explore areas of the dispute in which such issues may be hidden -- e.g., the history of the dispute or the relationship of the parties. Some disputes are difficult to settle because in the process of negotiation prior to the mediation, one party felt abused by the other: “You never even returned my phone calls.” “Ever since I filed this claim you have been calling me a liar.” If both parties are willing, it is possible to put such feelings on the table and make them Part of the process.<sup>3</sup>

### **§ 8.12 Dealing with Emotions**

Another source of difficulty in reaching a negotiated settlement stems from the emotions felt by one or more of the parties, arising from the history of the dispute. Although some disputes are simply arm’s length disagreements about money, the majority that come to mediation involve heightened emotions. (For example, divorce, employment terminations and tort cases involving serious injury almost invariably involve at least one party with a high pitch

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<sup>3</sup> For example: A woman sued her former business partner. The plaintiff had visited the ex-partner's office and, on leaving, had fallen down the steps because, she said, of faulty lighting in a stairwell that was under construction. The mediation revealed that the accident occurred immediately after the defendant had bought out the plaintiff's partnership interest. The plaintiff was very concerned that the buy-out would be interpreted in the field as a reflection on her ability and would thus influence her ability to get another job in the same field. The defendant was worried about the plaintiff's inclination to "bad-mouth" the defendant's business. The mediator learned about this set of potential issues by asking about the history of their business relationship, and what else the parties might want out of the mediation process. As a result, both parties found a business justification to collaborate on the plaintiff finding new employment, and the final settlement for the accident took that into account. The case illustrates why it is important that parties, not just attorneys or insurance companies, be present at the mediation.

of emotionality about the matter in dispute.) Sometimes the emotions are on the surface; sometimes they must be drawn out. The range of emotions that can surface in disputes is wide, but by far the most common is anger.

Intense emotions can influence a mediation in a variety of ways. They can reinforce a commitment to “principle” so that flexibility in negotiation is perceived as betrayal of the principle. They can blind a party to evidence that weakens his case. And they can bind a party to a single definition of an appropriate outcome.

Mediators employ several techniques to deal with intense emotions. The mediator may set ground rules about the face-to-face expression of hard feelings. The mediator may take on the task of communicating the feelings himself, attempting to present them accurately but in a less inflammatory manner than the party would. The mediator may ask the parties to express their feelings in writing to each other, and he may then edit them before communicating them to the other side. Some parties find a neutral authority valuable as one to whom they can describe the burden of the dispute and the “villainy” of the other party. Other parties need to be able similarly to unburden themselves but they need to speak directly to the opponent. Some parties are able to do this only in the safety of a framework provided by the presence of a mediator. The danger of one party letting off steam, of course, is that other side will want to do so also, which will re-stimulate the first party, etc. But a good mediator can structure opportunities for each party to express her frustration and anger without allowing the dispute to escalate, and without letting the venting result in the parties becoming yet more bitter and yet more entrenched.

Another technique mediators use is to help the parties see the cost of their emotions in the dispute. Many parties have so persuaded themselves of the evil being perpetrated by the other side that they lose sight of the role of their own emotions in perpetuating the conflict. A

mediator can act as a mirror showing the role that these emotions play in the process, and can focus the parties' attention on the cost of clinging to those feelings if the matter is not settled. For example, the mediator might ask one of the parties: "You are in the process of spending \$50,000 to retrieve \$25,000 -- is this what you want to do?" The costs, of course, may not be only monetary. They may have to do with damaged relationships, emotional aggravation, and time spent. Some parties find it sobering when they are asked to compare the costs of their anger with the potential benefits. Others, on seeing the cost of such anger, identify their interest as one of principle. In that situation a mediator can seek to identify the principle and explore other ways of vindicating it.

There is a third technique, harder to describe explicitly, but nonetheless effective. Mediators talk about it as helping a party "work through the anger." This is not therapy. It can be talking with the party about the angry feelings; it can be talking about other targets of the party's anger; it can be talking about what it would mean to "sacrifice" the anger in this case in order to reach a settlement. There are indeed many things it can mean, but the central idea is that the mediator addresses the emotions directly, giving them attention as a serious part of the process, rather than simply managing their expression or analyzing their cost. This technique is of course related to the venting technique described above, but its goal is to help the party gain a perspective on the anger that allows him to control it better and not let it interfere with the search for a settlement.

In sum, in cases where there is a high degree of emotionality, settlement may be impossible without processing the anger or pain the parties are feeling. As noted above, mediation is not therapy (though some mediators are psychotherapists). Nevertheless, part of the

mediator's role is to recognize the ways in which settlement or reconciliation with the opposing party is part of a healing process and to make room for that process in the mediation.

### **§ 8.13 Redefining the Problem**

Most parties enter mediation having defined their problem as one caused solely by the other side, with the solution, accordingly, resting solely with the other side. (“The defendant cheated me out of a lot of money, and until he is forced to pay up, this case can’t settle.”) And, of course, with such a definition, it never can settle. Moreover, it is likely that the other side has a definition of the problem that mirrors the first one, placing the blame solely or primarily with the plaintiff. Thus, most disputes enter mediation with at least two definitions of the problem on the table. These definitions make it almost impossible for either party to concede anything, since to do so would seem to reward misconduct by the other side. It is the mediator's task, then, to craft yet another definition of the problem, one that fits the reality the parties perceive and allows them to be flexible in seeking a resolution<sup>4</sup>. A mediator's proposed problem definition for a tort plaintiff might be: “Is there a settlement the defendant can accept that will give you the vindication you need and make the defendant less likely to commit the offending act again?” A mediator's proposed problem definition for the defendant might be: “Is there a settlement the plaintiff can accept that will compensate him for the injury he suffered but will not induce others to raise their expectations in litigation with you?”

### **§ 8.14 Responding to Other Impediments to Settlement**

Most disputes have within them some or all of the obstacles already described in this chapter: parties with unrealistic expectations of the likely outcome in court; parties who fear making concessions; parties who are dominated by their emotions; and parties who define the

problem so that no concession can be made. But these problems are only the most common. As a dispute's complexity unfolds, yet more barriers to agreement are likely to appear.<sup>5</sup> These are as varied as the sources of conflict itself; the following sub-sections describe just a few:

- Highly complex disputes
- Missing parties
- Intra-party conflict
- Communication failure
- Lack of trust

### **§ 8.15 Highly Complex Disputes**

Some disputes resist settlement because of overwhelming factual complexity. In such cases the mediator seeks to help the parties and attorneys organize the negotiation, setting an agenda of issues, reconciling the parties' description of the facts so that they are each talking about the same things, and facilitating the negotiation in such a way that the complexity of the facts does not overwhelm the process.

### **§ 8.16 Missing Parties**

In some cases negotiation is impeded by the absence of a person who has vital information or settlement authority (e.g., an important vice president, a spouse) or someone whose presence is needed for settlement. (For example, some companies have found that mediations with former employees or product liability claimants are more likely to settle if the grievant has had an opportunity to speak directly to a company official.) In such cases, a

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<sup>4</sup> The mediator may need a different problem definition for each party. There is nothing strange or manipulative in this. Even after disputes are settled, the parties often see the problem, the process, and the solution quite differently.

<sup>5</sup> For an excellent discussion of this issue, see Robert Mnookin, Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, 8 OHIO STATE J. OF DISPUTE RES. 235 (1993).

mediator will ordinarily attempt to bring the absent person to the table or otherwise involve that person in the process, either through one of the parties at the table, or in some other way.<sup>6</sup>

### **§ 8.17 Intra-Party Conflict**

In some cases a problematic relationship inhibits settlement. The problem may be between the parties, between one of the attorneys and his client, or between the client and someone not at the table; or it may be between two people (or organizations) neither of whom is at the table, with the party at the table trying to appease the inconsistent demands of each of them. Each of these relationship problems lends itself to different approaches for a mediator.

For example, a mediator may attempt to make the intra-party conflict explicit by having the party, in private caucus, describe it. The mediator may go further and offer to mediate the intra-party dispute itself. If one of the participants in this dispute is not at the table, the mediator may, with permission of the participant at the table, reach out to the absent participant and invite him to the table, or communicate with him through letter or by phone. The intra-party dispute may even, for a time at least, become the mediator's primary focus.

### **§ 8.18 Communication Failure**

The problem of communication failure in some disputes is hardly surprising. The barrage of letters and conversations in the history of most disputes the substantial number of participants (parties, attorneys, witnesses, bureaucrats, friends) who are involved in even fairly simple disputes, and the tendency of adversarial relations to inhibit listening all impair successful communication. When communication failures are impeding negotiation, the mediator is in a unique position to identify them and straighten them out.

### **§ 8.19 Lack of Trust**

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<sup>6</sup> This problem can be prevented to some extent by using a mediation agreement which obligates the parties to

In some cases settlement depends on establishing trust between the parties where each party has reason to resist such trust. This fairly common problem has spawned a number of devices that a mediator may use to promote settlement. Where the lack of trust is based on a misperception about the concerns of the other side, a mediator can help each party understand the goals or constraints as the other side sees them. Where the lack of trust is based on a fear that trusting the other side could be costly in the negotiation, the mediator can help the parties design protections against such damage, such as withholding offers until it is clear that the other party will reciprocate. Where the lack of trust is part of not fully thought-out reflex stimulated by the competitiveness of negotiation, the mediator can help the parties focus on the costs to themselves of not establishing a framework of trust in which the negotiate. The mediator's neutrality should help make his suggestion of these approaches more acceptable.

### **§ 8.20 Suggesting Settlement Solutions**

As noted above (§ 8.04), the parties may find it useful for the mediator to offer his opinion about the likely outcome of the case in court. This role can be expanded. The parties often regard the mediator as being in a unique position to suggest settlement solutions that will take account of the needs and concerns of each party. The mediator has heard not only a summary of the formal legal arguments of each side but also the wider range of issues and context in which the legal dispute arose.

Conflict has a tendency to induce tunnel vision: the solution each party envisioned on entering mediation is perceived as the only ("fair") one he can imagine. It is surprising, however, how often the process of exploration in mediation finds or invents solutions that no one had in mind before. Even in a case that seems driven by one side's effort to extract money from

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attend the mediation personally or to insure that their representative has settlement authority.

the other, the creative generation of options is possible. (For example, a structured settlement or an agreement concerning the confidentiality of the settlement terms might be inducements to settlement.) The mediator must stimulate that creativity, encourage the parties to generate options, explore what other issues are deemed by the parties to be relevant, to see what “packaging” of issues may be acceptable, and, in some cases, suggest settlement solutions drawing on his own experience.

In some cases, settlement of the case will require the use of a process in addition to mediation. A mediator, for example, may propose to the parties that they consider the use of arbitration for some portion of the case, perhaps settling some issues now in mediation, and holding onto others pending the outcome of the arbitration. Or the mediator may propose the use of a mini-trial<sup>7</sup> as a way of removing a blockage to settlement. In discussing both arbitration and mini-trial, the mediator can help the parties determine which issues are important, the identity of the hearing officer, and the scope of the proceeding (e.g., timing, duration, use of evidence and witnesses, etc.).

### **§ 8.21 Preparation for Mediation**

Assuming that the client and attorney have decided to embark on mediation in a particular case, what is the best way for them to prepare for that mediation? How should the attorney expect to participate in the mediation itself?

What one should not do is prepare for the mediation by telling the client: “Let’s just get in there and see what happens. We can always talk privately to see what we want to do next.” Mediation is informal, and there is certainly opportunity to consider new possibilities as they arise. But failure to prepare properly can also be costly: it can adversely affect (a) the duration

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<sup>7</sup> See §§ 9.11 *et seq.*

and cost of the mediation, (b) the terms of the settlement that the unprepared party might decide to accept, and (c) the way in which the client subsequently perceives the attorney.

As with preparations for a negotiation, the attorney should prepare for mediation by deciding what he wants to learn there. Though discovery may be fairly far along, there may yet be questions about particular points in the other side's case that can be explored. What the attorney learns in mediation plus what he already knows provides the basis for considering the strengths and weaknesses of the alternatives to settlement -- i.e., what are the real possibilities in court.

In preparing the case for mediation there is a temptation to present the client's case to the mediator only in its best possible light, just as one would for an arbitrator. And, of course, the client's presence at the mediation reinforces this temptation. It is not, however, a good use of time. For the mediator to be helpful he must have a good sense of the strengths and weaknesses of both cases. The mediator, of course, is obligated not to divulge the weaknesses of either party's case if they are disclosed to the mediator in confidence, unless he has explicit permission from that party to do so. However, a central part of the mediator's function is to help each side understand and assess the potential risks of litigation. Attempting to distort these realities for the mediator makes reaching settlement much harder.<sup>8</sup>

This does not mean, of course, that the attorney does not seek the best possible outcome for the client. It does mean that the attorney (and client) should prepare to communicate with the

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<sup>8</sup> Some mediators describe a party's effort to persuade the mediator that the party has a strong case or very limited settlement authority as trying to "spin the mediator." The possibility that the parties and their attorneys are not being candid with the mediator -- even in caucus sessions -- not only presents a practical difficulty for the mediator but also raises an ethical issue for the attorney. To what extent does the attorney have an obligation to speak truthfully with the mediator? To what extent is the attorney's effectiveness (and the party's credibility) impaired if the mediator believes the attorney is being less than candid?

mediator the difference between the position they have presented to the opponent, and the settlement range that they are willing to accept.

Though it is ordinarily not a good use of resources for parties to bring in their own expert witnesses, occasionally both sides can agree on one neutral expert who can describe to the mediator the nature of the factual dispute.

The following sub-sections discuss three additional aspects to preparing a case for mediation: analyzing the alternatives to settlement; discussing the party's settlement posture; and preparing the client for the mediation.

### **§ 8.22 Analyzing the Alternatives to Settlement**

The attorney and client should go to mediation with a clear sense of the risks and costs, the strengths and limits, of the court case clearly in mind.<sup>9</sup> This will ordinarily require at least some discovery. It will also require about as much analysis in preparation for the mediation as would go into a rigorous pre-trial conference -- i.e., the attorney must know what evidence he is prepared to offer, who his witnesses would be, etc., if he had to try the case. As suggested above, the mediator will explore these questions with the attorney and the client.

### **§ 8.23 Discussing the Client's Settlement Posture**

In preparing for the mediation, attorney and client need to determine the range of acceptable settlements, and be as open as possible about what ought to be on the table for this mediation. Keeping in mind that spontaneity and flexibility will be essential in the mediation, it is nonetheless useful to prepare an opening offer, an estimated bottom line, and perhaps some steps that will allow progress along the way. Because one purpose of mediation is to change the way the parties and counsel see the case, they must also be ready to view the case in a new light

as the mediation unfolds (e.g., considering methods of “expanding the pie”), and to revise their bargaining strategy as changes occur.

### **§ 8.24 Preparing the Client for Mediation**

For most attorneys the most unusual aspect of mediation is the presence and involvement of the client at the mediation. One advantage to having the client at the mediation is that the client learns first-hand about the opponent’s case. As a result, the client can make a more fully informed assessment of his own case. Preparing for the mediation together with the client is therefore essential. Such preparation should consider these matters:

(a) Determining who speaks. Mediators often prefer that parties speak for themselves. The attorney and the client need to determine in advance if this is acceptable, and the client needs to be reassured that he and his attorney can consult at any time on questions of strategy, confidentiality, etc.

(b) The attorney’s role -- advocate and conciliator. When facing their opponent, many attorneys use a tone that is sometimes adversarial and at other times flexible and conciliatory. Some clients find it difficult to understand these changes in role and tone, and often prefer the zealous advocate. The attorney therefore should prepare the client for the need for both firmness and flexibility. For some parties it will be easier to accept the use of the conciliatory tone in the private session with the mediator, with the tougher attitude maintained in the presence of the opponent.

(c) Mediating without an attorney present. Occasionally, for reasons of economy for example, the client will attend the mediation without his attorney. (This is agreed to ordinarily only when the other side is doing the same, and is the norm, rather than the exception, in divorce

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<sup>9</sup> This could be described, using the phrase coined by Roger Fisher and William Ury, as the party's "BATNA" (Best

mediation.) The client needs to be prepared for many of the same kinds of exploration and negotiation mentioned above, except that he will have to carry the responsibility alone. The attorney could arrange to be available by phone during the mediation. The attorney should instruct the client not to sign any agreement until the attorney has reviewed it. (Most mediators would insist on this anyway.)

(d) Accusations and argument. The client should be prepared for the other side's attorney to suggest to the mediator that the client is not telling the truth. If the client takes this too personally, it will make reaching settlement that much more difficult. The attorney should prepare the client to understand that the lawyer on the other side is simply doing his job. The client can also be reminded that the presentation made by the other side in mediation is a preview of the other side's argument in a trial, and it is therefore useful to hear the fullest rendition of it, irksome though that may be.

(e) Cognitive dissonance. The client should be prepared to come to the mediation with something of an open mind. It is not unusual for parties to learn matters of importance at the mediation, and this new information may be difficult to assimilate. The client may find this discomfiting or, as also happens, find that the new information makes accepting settlement easier.

(f) Openness to creative settlement options. Though many mediations proceed with each side whittling away at the extreme opening position of the other until some mid-point is reached, a surprising number of mediations generate unforeseen, creative solutions, that require re-thinking. Parties need to be prepared for this spontaneity, to participate in it, and not to feel threatened by it. For example, clients need to be assured that they will have the opportunity to

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Alternative To a Negotiated Agreement). See GETTING TO YES (1981).

think carefully through all alternatives, in private with the attorney if desired. Client and counsel also need to consider the ways in which they can alter their negotiating positions so that the client does not fear that he is embarking down slippery slope.

(g) Readiness for settlement. Clients also need to prepare for the real possibility that they will have to make a decision, whether or not to accept a settlement, at the mediation. Some clients find the act of decision particularly difficult, and need to think about this in advance. Some clients enter mediation more eager to settle than the attorney thinks wise. They may underestimate the value of the case or fear the prospect of trial. Conversely, some clients enter mediation so angry or filled with the unrealistic hope of victory in court that they are not prepared to settle. The decision to settle or not, of course, is the client's, but the attorney should prepare the client to enter the mediation cautiously and thoughtfully, prepared to be open-minded, but not ready to communicate a decision to the other side until client and counsel have conferred in a private caucus.

(h) Settlement authority. Authority to reach an agreement needs to be determined. With a non-corporate client, the attorney needs to be sure that the client is personally prepared to reach a decision at the mediation, and that any significant others in his life (e.g., spouse, partner) are ready to let the client make that decision. With a corporate client, the attorney needs to be sure that the representative at the mediation has authority up to the limit the attorney has determined necessary; if someone at the home office has yet further authority, the attorney should do his best to have that authority vested in the representative at the mediation. If that is not possible, the corporate officer with the necessary authority should be available by phone throughout the mediation. If board of directors approval is necessary, the representative and the

attorney need to be prepared at the mediation to undertake a good faith effort to persuade the board to approve any settlement the two of them find reasonable.

### **§ 8.25 Conducting The Mediation**

Although mediation shares many of the characteristics of a negotiation, there are also significant differences, due primarily to the presence of the mediator and the clients. Because the clients are present and involved in the process, the proceedings tend to be more formal than a negotiation conducted solely by attorneys. Because of the mediator's involvement, the negotiation is more likely to be structured, with defined stages in the process. The following sections discuss briefly the stages in a typical mediation.

### **§ 8.26 Opening Statements and Positions**

The opening statement, whether made by the attorney or the client, should summarize the major facts, the important legal issues, and a history of any negotiations. Some clients feel comfortable in mediation only if their attorney makes a highly adversarial opening statement. This need not be a serious problem in mediation so long as the attorney is also able to indicate to the mediator that this is an opening position. After each party has made an initial statement of some kind, the mediator will generally follow up on the issues presented with a series of questions for each party. The questions enable the mediator to sift through the issues for the crucial areas of disagreement (and agreement) and at the same time demonstrate to parties his empathy, impartiality and understanding of the case.

### **§ 8.27 Caucus With Mediator**

After meeting with the parties in a joint session, the mediator may ask to meet with attorney and client in a private caucus. He may use that time to inquire about matters that each party does not wish to share with the other side, or to be sure the party has thought through all

the implications of not settling. The caucus may also be called at the initiative of one side. A party may wish to make clear to the mediator a boundary beyond which settlement cannot go, or a relevant issue that is too delicate or confidential to bring up with the other party present.

### **§ 8.28 Making Use of the Mediator**

Because of the mediator's role in facilitating the discussions, attorneys often let the mediator set the agenda for the mediation as it progresses. However, there is nothing inappropriate about the attorneys or clients taking a leadership role in moving the process along. In doing so, there are a number of ways in which they can make use of the mediator. Several of these have already been discussed in this chapter:

- Correcting overly optimistic assessments of the case (see § 8.08)
- Suggesting settlement proposals (see § 8.19)
- Helping the client understand the other party's position or interests (see § 8.17)
- Serving as a buffer (or "broker") for offers and counter-offers (see § 8.09).

In addition to these roles, the mediator can give the attorneys and clients an assessment of the process itself -- i.e., whether mediation seems to be working or they should consider another dispute resolution process.

### **§ 8.29 Reaching Closure**

Several of the sections in this chapter have addressed obstacles to settlement and the methods used by mediators to overcome those obstacles. Attorneys, too, need to be alert to any issues that must be addressed in order for the parties to reach closure. In some cases, those issues may be non-monetary -- e.g., one party may be unable to end the dispute without an apology or acknowledgment of wrong-doing by the other party. Even where the issues involve only money, however, the last steps toward settlement are often the most difficult, since the party

that makes the offer which is accepted may feel that it was too generous.<sup>10</sup> The key to reaching closure is to manage the parties' expectations in a manner that leaves the parties feeling that, in the end, both sides made significant adjustments of their position. Though an agreement can be drafted by the mediator, more often it is done by counsel. It can be useful, however, particularly in complex cases, for the mediator to record at the mediation a list of the major points in the agreement and have the parties initial it.

Once the main agreement is reached a mediator may wish to discuss it with the parties. He may propose ways to prepare for the possibility of future misunderstanding or disputes arising from the agreement, such as the incorporation of dispute resolution clauses in the settlement agreement.<sup>11</sup>

### **§ 8.30 After The Agreement, or After The Non-Agreement**

When the mediation has ended in agreement, the mediator may yet have a further role. Should the agreement begin to unravel, the mediator may be called on for help. In some situations, the mediator is asked by the parties in a private session with them to recount his recollection of what was said or apparently meant by one or another of a party's statements. A mediator will ordinarily give this information if he can honestly do so. In other situations the mediator's help is needed to resume the mediation with respect to issues not covered by the settlement agreement.

Some mediations end with no agreement. Some mediators stay in touch with the parties up to the time of trial. In either event, a change in circumstance, including the imminence of trial, will on occasion cause the parties to invite the mediator to resume the mediation.

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<sup>10</sup> Prof. Eric Green has described this phenomenon as the "jinx of the accepted offer," noting that the effect of the jinx is that the offeror often looks for ways to add terms to the settlement in order to recover any value that may have been needlessly relinquished to the other side.

### **§ 8.31 Legal Issues Concerning Mediation**

Mediation is often said to be conducted in the “shadow of the law,” in the sense that settlements are shaped by what the parties believe a court would do with a case in the absence of a settlement. The law casts another shadow, however, with respect to mediation -- namely, the procedural aspects of the process.<sup>12</sup> The following sections discuss some of the more significant legal issues that arise in connection with mediation: the enforceability of agreements to mediate (§ 8.32); confidentiality in mediation (§§ 8.33-8.39); lawsuits against mediators (§ 8.40); and ethical issues (§ 8.41).

### **§ 8.32 Enforceability of Mediation Agreements**

Although mediation is often referred to as a “non-binding” process, an agreement reached in a mediation is as binding and enforceable as any other agreement. The enforceability of the agreement may depend, of course, on the care with which the agreement is drafted, but conceptually (and legally) such an agreement is indistinguishable from any other contractual undertaking.<sup>13</sup>

The more difficult issue is whether an agreement to mediate is enforceable, since the mediation process is, by definition, voluntary. The enforceability of an agreement to mediate has been tested in only a handful of cases. In those cases, however, the courts have enforced the agreement, even though the agreement called for participation in a “non-binding” process. The leading case is *AMF Inc. v. Brunswick Corporation*,<sup>14</sup> in which AMF and Brunswick had ended litigation with a settlement agreement. The agreement provided that, if a dispute arose between

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<sup>11</sup> See Chapter 6 for samples of such contract language.

<sup>12</sup> See Robert Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 *YALE L.J.* 950 (1979).

<sup>13</sup> See § 4.15.

them concerning the settlement, it would be submitted to a neutral third party for an advisory opinion, which “shall not be binding upon the parties, but shall be advisory only.”<sup>15</sup> The court analogized this provision to an agreement to arbitrate, which, it held, was clearly enforceable under the Federal Arbitration Act, and therefore ordered Brunswick to participate in the mediation.<sup>16</sup> Although the rationale of this decision ignores the fundamental difference between mediation and arbitration, the case has been widely cited for its holding that agreements to mediate can be enforced, and its strong endorsement of “the general public policy favor[ing] support of alternatives to litigation.”<sup>17</sup>

Of course, one might wonder whether, from the viewpoint of the enforcing party, such a victory is worth the effort to obtain it. A party so resistant to entering into a mediated negotiation might be seen as unlikely to reach an agreement. There is, however, a body of research suggesting that parties forced into mediation by order of the court reach agreement at about the same rate as those who enter mediation voluntarily.<sup>18</sup> This research studied circumstances in which the court initiated the idea of mediation, not where mediation was sought by one party over the objection of the other. However, it seems likely that the utility of mediation would not be significantly different in a setting where the compulsion to mediate derived from the parties’ agreement rather than from the court.

### **§ 8.33 Confidentiality**

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<sup>14</sup> AMF Inc. v. Brunswick Corporation, 621 F. Supp. 456 (E.D.N.Y. 1985).

<sup>15</sup> AMF Inc. v. Brunswick Corporation, 621 F. Supp. 456, 458 (E.D.N.Y. 1985).

<sup>16</sup> AMF Inc. v. Brunswick Corporation, 621 F. Supp. 456, 459-60 (E.D.N.Y. 1985) (citing 9 U.S.C. § 1 et seq.).

<sup>17</sup> AMF Inc. v. Brunswick Corporation, 621 F. Supp. 456, 462 (E.D.N.Y. 1985. See also Haertle Wolf Parker, Inc. v. Howard S. Wright Construction Co., 1989 LEXIS 14756 (D. Or. 1989) (holding that “a contract providing for alternative dispute resolution should be enforced, and one party should not be allowed to evade the contract and resort prematurely to the courts”).

Most mediators consider confidentiality an essential ingredient of mediation, both in joint sessions and caucus sessions.<sup>19</sup> In the former, the parties may wish to assure themselves that their negotiations are not disclosed to the judge, jury, or arbitrator if the mediation does not succeed. In the latter, the each party must be confident that the mediator will not disclose (and cannot be forced to disclose) to the opponent private communications with that party, which may include sensitive information about the strengths and weaknesses of the party's case or its bottom-line settlement position.<sup>20</sup>

In Massachusetts the protection of confidentiality in mediation derives primarily from the following sources:

- (1) The Massachusetts confidentiality statute, Mass. Gen. L. ch. 233, T 23C;
- (2) Federal Rule of Evidence 408;
- (3) Federal Rule of Evidence 501;
- (4) Common law rules of evidentiary privilege;
- (5) Contractual provisions (if the parties to the mediation execute a confidentiality agreement); and
- (6) Ethical codes barring disclosure by the mediator.

As discussed in the following sub-sections, these various forms of protection of confidentiality do not provide, either separately or in combination, an absolute bar to disclosure of communications or documents exchanged in connection with a mediation.

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<sup>18</sup> See Pearson and Thoennes, Divorce Mediation: Reflections on a Decade of Research, in *MEDIATION RESEARCH* 9 (K. Kressel and D. Pruitt, eds. 1989).

<sup>19</sup> For a dissenting point of view on the subject, see Eric Green, A Heretical View of the Mediation Privilege, 2 *OHIO ST. J. DISP. RESOL.* 1 (1986).

<sup>20</sup> See generally Note, Protecting Confidentiality in Mediation, 98 *HARV. L. REV.* 441 (1984). Commentators have noted, however, that the mediator's success in settling cases may depend, at least in part, on his ability to make

### § 8.34 Massachusetts Confidentiality Statute.

The Massachusetts confidentiality statute, Mass. Gen. L. ch. 233, T 23C, provides that documents exchanged in connection with a mediation and the substance of discussions in a mediation are not “subject to disclosure” in any judicial or administrative proceeding. The statute bars both access to admissibility of the documents and communications exchanged in a mediation. The first paragraph of section 23C provides that: All memoranda, and other work product prepared by a mediator and a mediator’s case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

It is important to note the language used by the statute: the communications “shall be confidential and shall not be subject to disclosure.” No court has yet ruled on whether those words prohibit only compelled disclosure (e.g., by subpoena) or also prohibit voluntary disclosure by one of the parties.

The second and final paragraph of section 23C defines the conditions under which the broad protection of section 23C applies: For purposes of this section a “mediator” shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute

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indirect disclosures to each of the parties concerning their opponent's position. See Jennifer Gerarda Brown and Ian

resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.

(Emphasis added.)

While the syntax of this provision is difficult to follow, the meaning appears to be that one qualifies as a “mediator” for purposes of the statute in one of two ways:

- (a) Either appointment by a “judicial or governmental body,”
- (b) Or use of a written agreement with the parties, and 30 hours of mediation training, and “either . . . four years of professional experience as a mediator or [accountability to] a dispute resolution organization which has been in existence for at least three years.”

Even with clarification of the syntax, the terms of the statute leaves considerable room for interpretation. For example, does “four years of professional experience as a mediator” mean full-time employment as a mediator or four years during which the individual performed some mediation services? If the latter, how much time as a mediator would suffice? Also, since there are currently no certification requirements in Massachusetts for mediators or the training of mediators, what kind of training would satisfy the 30-hour requirement? And, to whom does the statute apply -- e.g., does it bar non-parties, as well as the parties and the mediator, from disclosing the substance of discussions at the mediation?<sup>21</sup>

The legislative history of section 23C does not answer these questions, but it does indicate the purposes that the statute was designed to serve. Section 23C was drafted in part by the Massachusetts Office of Mediation Services (the predecessor of the Massachusetts Office of

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Ayres, Economic Rationales for Mediation, 80 VA. L. REV. 323 (1994).

<sup>21</sup> See David Matz, The Confidentiality Privilege in Mediation: To Whom Does it Apply?, 5 MASSACHUSETTS FAMILY LAW JOURNAL 33 (July 1987).

Dispute Resolution),<sup>22</sup> whose director, David O'Connor, made the following points in testimony supporting the bill:

If enacted, this bill would

- (1) benefit parties who use mediators by reducing the risks to them in revealing sensitive information to mediators;
- (2) benefit parties who are considering resort to mediation by encouraging mediators to enter into written agreements with them in advance which explain mediation;
- (3) benefit the practice of mediation in non-labor areas by providing it with a much-needed legislative sanction; and
- (4) benefit mediators by reducing the uncertainty and cost of preparing a defense against a subpoena to disclose information.<sup>23</sup>

To

date, there have been no reported appellate decisions construing the provisions of section 23C, but there has been one reported trial court decision, *White v. Holton*, 1 Mass. L. Rptr. No. 10,216 (November 15, 1993). In *White*, the Massachusetts Superior Court held that a mediator was not entitled to the protection of the statute because she was serving without a written agreement and did not have thirty hours of training in mediation.<sup>24</sup> An appellate decision will likely be forthcoming in *White* because the Superior Court certified the legal issues in the case to the Massachusetts Appeals Court for decision.

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<sup>22</sup> For a description of the Massachusetts Office of Dispute Resolution, see section 13.06.

<sup>23</sup> Letter from David O'Connor to Senator Michael LoPresti and Representative Thomas Brownell dated March 20, 1985, on file with the authors.

<sup>24</sup> The mediator informed the Court that she had had at least thirty hours of training in "conflict management," but the Court held that mediation is a skill that may or may not be taught as part of conflict management, and therefore she did not meet the statutory definition of "mediator." *White v. Holton*, 1 Mass. L. Rptr. No. 10,216 (November 15, 1993).

One of the critical issues for purposes of confidentiality protection is whether T 23C covers criminal proceedings. The broad language of the statute (“any judicial or administrative proceeding”) suggests that it does. In addition, there is a reference in the statute which strongly suggests legislative intent to cover criminal proceedings: the statute excludes labor dispute mediations, which are covered by another statute (G.L. c. 150, T 10A). Section 10A has a specific disclaimer of criminal matters.<sup>25</sup> The absence of any exclusion of criminal matters in T 23C, while at the same time referencing a statute that does contain such an exclusion, again strongly suggests a legislative intent to include criminal proceedings as confidential under the statute.<sup>26</sup> It is worth noting, however, that even if T 23C prevents state prosecutors from obtaining information from a mediation, federal prosecutors and other governmental authorities might not be similarly barred. The Supremacy Clause of the U.S. Constitution enables federal officials (such as the IRS and the Justice Department) to override the state confidentiality statute and subpoena testimony and documents from a mediation.<sup>27</sup>

For example, in *U.S. v. Gullo*,<sup>28</sup> the defendant participated in a mediation of a business dispute. A federal grand jury subpoenaed the records of the mediation in connection with a prosecution for extortionate means of credit collection. The parties to the mediation had signed a confidentiality agreement, and the mediation was conducted pursuant to a state confidentiality statute which (like the Massachusetts statute) provided that the communications and work

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<sup>25</sup> G.L. c. 150, §§ 10A provides confidentiality protection for a labor mediator but states: "Nothing herein contained shall apply to any criminal proceedings."

<sup>26</sup> *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

<sup>27</sup> *See, e.g., U.S. v. Gullo*, 672 F. Supp. 99 (W.D.N.Y. 1987). It is well settled that neither the statutes nor the decisional law of a forum state can control the admissibility of evidence in any phase of a civil or criminal action in federal court, where the principles of common law, as interpreted by the federal courts, govern the nature and scope of evidentiary privileges. *See U.S. v. Turner*, 497 F.2d 406 (8th Cir. 1974), *cert. denied*, 423 U.S. 848 (1974).

product of the mediation “are confidential and shall not be subject to disclosure in any judicial or administrative proceeding.” The Gullo court held that it was not bound by the New York confidentiality statute but instead was required to determine, pursuant to Federal Rule of Evidence 501, whether federal common law would recognize a “mediation privilege” under the circumstances of that case.

The state confidentiality statute is also vulnerable, in both state and federal courts, to efforts by a criminal defendant to subpoena testimony or records necessary for his defense. Criminal defendants have a constitutional right to obtain evidence that is in the hands of third parties. Again, by virtue of the Supremacy Clause, the criminal defendant’s constitutional rights would likely take precedence over the state confidentiality statute.<sup>29</sup>

Of even greater concern to most mediators and parties to mediation is the lack of explicit coverage in the statute for premediation discussions and conferences between the parties outside the presence of the mediator. The confidentiality of both of these types of discussions could fall within the scope of the evidentiary privilege for “compromise” negotiations or could be protected to some degree by confidentiality agreements.

### **§ 8.35 Confidentiality Agreements.**

The parties to a mediation often try to keep the proceedings confidential by contract. Most mediation agreements include language to the effect that the proceedings will be confidential and both the mediator and the parties agree not to disclose (or offer as evidence) the substance of those proceedings. Such agreements also usually prohibit the parties from using

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<sup>28</sup> U.S. v. Gullo, 672 F. Supp. 99 (W.D.N.Y. 1987).

<sup>29</sup> See *Davis v. Alaska*, 415 U.S. 308 (1974) (criminal defendant has a sixth amendment right to cross-examine witness about his probation status resulting from delinquency finding, despite state statutory policy of protecting the anonymity of juvenile offenders); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (similar).

non-voluntary means -- such as subpoenas, federal or state -- to obtain information about what the other parties may have said to the mediator in a private caucus.

These provisions should be embodied in a written agreement, not only because they are more easily enforced that way but also because, it is necessary (absent judicial or governmental appointment) to have a written mediation agreement in order to enjoy the protection of the Massachusetts confidentiality statute. (Most mediators have forms that they use for such agreements.)

It is important, however, to recognize the limitations of mediation agreements as a form of confidentiality protection. They do not bind third parties, and therefore a confidentiality agreement would not prevent third parties (or the government) from subpoenaing the information exchanged in a mediation.<sup>30</sup>

### **§ 8.36 Federal Rule of Evidence 408.**

In cases tried in Federal District Court, the Federal Rules of Evidence provide some protection for the confidentiality of mediations. Rule 408 bars the admissibility (but not the discoverability) of settlement discussions, including those that occur in mediation sessions. Rule 408 provides that: Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the

evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The usefulness of Rule 408 is limited not only by the exceptions in the Rule itself (i.e., the substance of settlement discussions may be admissible for purposes other than establishing liability), but also by the fact that the Rule does not bar disclosure through pretrial discovery.<sup>31</sup> Moreover, it is not clear that the Rule covers mediators and their work product.<sup>32</sup>

The limitations of Rule 408 are illustrated by *United States v. Gilbert*.<sup>33</sup> In *Gilbert*, the defendant entered into a civil consent decree with SEC to resolve certain claims. The consent decree was then offered by the government in its criminal prosecution of *Gilbert* to show that he was aware of the SEC reporting requirements involved in the decree.<sup>34</sup> The Court noted that the consent decree could not have been offered to show liability but could be offered to show the defendant's state of mind.

### **§ 8.37 Federal Rule of Evidence 501.**

In place of a set of rules recognizing specific privileges, Congress adopted the catch-all Fed. R. Evid. 501, which provides, in part:

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<sup>30</sup> See 8 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286, at 528 (J. McNaughton, rev. ed. 1961) ("[n]o pledge of privacy . . . can avail against demand for the truth in a court of justice")

<sup>31</sup> One court has found that, because of the public policy expressed in Rule 408, a party seeking discovery of the terms of a settlement agreement would have to make a "particularized showing of a likelihood that admissible evidence will be generated" by the requested discovery. *Bottaro v. Hatton Associates*, 96 F.R.D. 158, 158 (E.D.N.Y. 1982).

<sup>32</sup> For a discussion of the limitations of Rule 408 and proposals for a "mediation privilege," see Peter Demuth, Theories for Protecting Mediation, in CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 155 (American Bar Association, 1984), and Note, Protecting Confidentiality in Mediation, 98 HARV. L. REV. 441 (1984).

<sup>33</sup> *United States v. Gilbert*, 668 F.2d 94 (2d Cir. 1981), cert. denied, 102 S. Ct. 2014 (1982).

<sup>34</sup> *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981), cert. denied, 102 S. Ct. 2014 (1982).

[T]he privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

Although the need for confidentiality in mediation is widely recognized, there is at this point no widespread recognition of a “mediation privilege.” Some commentators have looked upon state confidentiality statutes as tantamount to a privilege, but the broad range of factors the courts must use in determining whether a new privilege should be recognized make Rule 501 a highly unreliable source of protection for confidentiality in mediation.

The case most directly on point is *U.S. v. Gullo*,<sup>35</sup> which was discussed in section 8.34. The *Gullo* Court weighed the four factors determinative of whether a privilege should be recognized: (1) the federal government’s need for the requested information; (2) the importance of the policy sought to be advanced by the privilege; (3) any special need for the information sought; and (4) the adverse impact on the local policy that would result from nonrecognition of the privilege. The Court went on to find that it would recognize the privilege in that case because the federal prosecutor conceded that the grand jury had sufficient information to indict Mr. Gullo even without the requested information. The clear implication of *Gullo*, however, is that where the subpoenaed information is essential to a prosecution, a federal court may refuse to recognize a mediation privilege.

### **§ 8.38 Common Law Rules of Evidence.**

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<sup>35</sup> *U.S. v. Gullo*, 672 F. Supp. 99 (W.D.N.Y. 1987)

The common law rules of evidence that govern proceedings in the state courts of Massachusetts (and other states) limit the admissibility of settlement discussions in the same manner as, but not to the full extent of, Fed. R. Evid. 408. For example, the common law rule does not bar admissibility of statements of fact made in the course of settlement discussions.<sup>36</sup> In addition, like Rule 408, the common law rule governs the admission of evidence but does not bar disclosure through pretrial discovery. The substance of discussions in a mediation might also be subpoenaed by a criminal defendant, whose constitutional right to obtain evidence in his defense may override common law and statutory evidentiary privileges.<sup>37</sup>

### **§ 8.39 The Duty to Disclose.**

A final source of protection for confidentiality derives from the mediator's ethical codes, which require confidentiality. For example, the Ethical Standards of Professional Responsibility promulgated by the Society of Professionals in Dispute Resolution (SPIDR) prohibit disclosure of confidences by neutrals. However, the Standards also recognize that confidentiality cannot always be protected:

There may be instances . . . in which confidentiality is not protected. . . . Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process.<sup>38</sup>

What are the "instances" in which confidentiality is not protected? There is no Massachusetts statute which requires mediators to voluntarily disclose evidence of the commission of a crime. There is a federal "misprision" statute, however, which prohibits the

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<sup>36</sup> See PAUL LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE § 4.6 (Mark Brodin and Michael Avery, eds. 1994).

<sup>37</sup> See, e.g., *Davis v. Alaska*, 415 U.S. 1105 (1974).

<sup>38</sup> SPIDR Ethical Standards of Professional Responsibility T3 (1984). The text of the Standards is in Appendix F-36.

concealment of a federal crime.<sup>39</sup> This statute makes it a crime, punishable by a \$500 fine and/or three years imprisonment, to conceal evidence of the commission of a felony. The failure to report such evidence is not a crime in and of itself. But any affirmative act of concealment -- such as destroying the notes from a mediation -- could be considered such an act.

There is also a child abuse reporting statute, G.L. ch. 119, § 51A, which requires certain classes of people (such as social workers, psychologists, probation officers and others -- but not lawyers) to report evidence of abuse or neglect. But even that statute obligates the reporter only when she acquires the information in her “professional capacity.” Mediators (who are not covered by the statute) are not required to report evidence of abuse solely because they also serve at other times as mental health professionals, or in some other “mandated reporter” capacity. However, many mediators believe they are mandated reporters under § 51A, and therefore they tell the parties that they will not keep confidential any information about child abuse.

There is also a potential common law duty to disclose evidence of the planned commission of a crime -- i.e., the mediator might be considered negligent for failing to warn the prospective victim of a threatened future crime. The leading case in this area is *Tarasoff v. Regents of the University of California*.<sup>40</sup> In *Tarasoff* a psychotherapist at the University of California was found negligent when he failed to warn a third party of his patient’s threats to murder a student. Some commentators have argued that the duty established in *Tarasoff* could

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<sup>39</sup> 18 U.S.C. § 4 (1988).

<sup>40</sup> See *Tarasoff v. Regents of the University of California*, 118 Cal. Rptr. 129 (1974), on rehearing, 131 Cal. Rptr. 14 (1976).

apply to mediators.<sup>41</sup> No case to date, however, has held that a mediator has a common law duty to disclose past criminal activity, or even anticipated future criminal activity.

#### **§ 8.40 Immunity**

Unlike arbitrators, who are entitled to a broad quasi-judicial immunity,<sup>42</sup> mediators are not always immune from liability. When they are appointed by a court in which a case is pending or in connection with a court-annexed program, they are generally considered immune, but the law is less settled for mediators serving without the imprimatur of a court.<sup>43</sup> Two recent cases illustrate the application of this principle.

In *Wagshal v. Foster*,<sup>44</sup> the defendant served as a case evaluator for the Multi-Door Dispute Resolution program of the Superior Court in Washington, D.C. The plaintiff alleged that the defendant (an attorney in private practice) improperly disclosed to the presiding judge the evaluator's dim view of the plaintiff's case, and that the case therefore settled for an amount that was lower than the plaintiff would otherwise have received. The Court noted that court-sponsored ADR "is of relatively recent origin" but held that the defendant was entitled to the same absolute immunity as other individuals operating under analogous delegations of authority from the courts (such as prosecutors, court-appointed psychiatrists, and conciliators):<sup>45</sup>

A review of the case law . . . reveals that court-appointed mediators and their like have not been around long enough to have generated much in the way of

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<sup>41</sup> See John Murphy, In the Wake of Tarasoff: Mediation and the Duty to Disclose, 35 Cath. U.L. Rev. 209 (1985).

<sup>42</sup> See § 10.17 (discussing arbitrators' immunity from liability).

<sup>43</sup> For a debate on the issue, see Linda R. Singer, Immunity Imperils the Public and Mediator Professionalism, NAT'L L.J. C-12 (April 11, 1994); D. Alan Rudlin and Kelly L. Faglioni, Mediator Immunity Promotes ADR Access, Keeps Cost Low, NAT'L L.J. C-12 (April 11, 1994).

<sup>44</sup> *Wagshal v. Foster*, 8 Indv. Empl. Rts. Cas. (BNA) 632, 1993 WL 86499 (D.D.C. 1993). See also *Mills v. Killebrew*, 765 F.2d 69 (6th Cir. 1985) (holding that panelists in court-mandated mediation program are "absolutely immune").

precedent with respect to the extent they enjoy the immunity of the court whom they serve when they venture into a private controversy . . . Other more traditional agents of the judicial process have, however, historically been held to possess such immunity when they act in their official capacities, and this Court concludes that court-appointed arbitrators, mediators, case evaluators, and others who are directly involved in ADR programs with express authority from the court may properly invoke the same protection, for similar reasons.<sup>46</sup>

The court went on to note that for purposes of that case, “the functions of mediators and evaluators are indistinguishable.”<sup>47</sup>

A Massachusetts Superior Court judge came to the opposite conclusion with respect to non-court-annexed mediation in the case of *White v. Holton*<sup>48</sup> In *White* the defendant was a consultant hired by the Diaconate of the First Congregational Church of Melrose to mediate a dispute between the Church and the plaintiff, who had served as minister of the Church for two years. The defendant interviewed more than one hundred members of the congregation and then issued a report sharply critical of the minister, who filed suit. The Court held that the consultant was not entitled to immunity from liability for her work as a mediator, noting that “this court is

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<sup>45</sup> *Wagshal v. Foster*, 8 *Indiv. Empl. Rts. Cas.* (BNA) 632, 1993 WL 86499 \*3 (D.D.C. 1993).

<sup>46</sup> *Wagshal v. Foster*, 8 *Indiv. Empl. Rts. Cas.* (BNA) 632, 1993 WL 86499 \*2 (D.D.C. 1993), citing *inter alia*, *Howard v. Drapkin*, 222 *Cal. App. 3d* 843, 860 (1990) (“[A]bsolute immunity is properly extended to neutral third persons who are engaged in mediation, conciliation, evaluation or similar dispute resolution efforts”).

<sup>47</sup> *Wagshal v. Foster*, 8 *Indiv. Empl. Rts. Cas.* (BNA) 632, 1993 WL 86499 \*3 (D.D.C. 1993). See also *Mills v. Killebrew*, 765 *F.2d* 69 (6th Cir. 1985) (holding that panelists in court-mandated mediation program are “absolutely immunity”).

<sup>48</sup> *White v. Holton*, 1 *Mass. L. Rptr.* No. 10, 213 (November 15, 1993) (discussed in previous section).

aware of no case[] where quasi-judicial immunity has been extended to a private party not working at the behest of the court.”<sup>49</sup>

The White Court contrasted the consultant’s private arrangement with the court appointment at issue in *Lalonde v. Eissner*.<sup>50</sup> In *Lalonde*, a case involving a parental visitation dispute, the Probate Court ordered the probation department to arrange for the psychiatric evaluation of the family and the child at issue to assist the Court in the mediation of the dispute.<sup>51</sup> Pursuant to the order, the department referred the matter to the defendant psychiatrist and the defendant submitted a written report to the probation department. The mother sued the defendant on a theory of negligence; she alleged that the psychiatrist negligently performed the evaluation which resulted in the continuation of the father’s visitation privileges and therefore caused harm to the minor child.<sup>52</sup> The Court held that a court-appointed psychiatrist who renders expert services to a court is entitled to absolute immunity in the performance of those services because of the function he performed and its essential connection to the judicial process.<sup>53</sup>

In California, a 1990 decision from the state Court of Appeals held that mediators are entitled to immunity even when they are not court-appointed.<sup>54</sup> The court reasoned that “the job of third parties such as mediators, conciliators, and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee.”<sup>55</sup>

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<sup>49</sup> *White v. Holton*, 1 Mass. L. Rptr. No. 10, 213, 216-17 (November 15, 1993).

<sup>50</sup> *Lalonde v. Eissner*, 405 Mass. 207 (1989).

<sup>51</sup> *Lalonde v. Eissner*, 405 Mass. 207, 209 (1989).

<sup>52</sup> *Lalonde v. Eissner*, 405 Mass. 207, 209 (1989).

<sup>53</sup> The court cited the following cases in support: *Moses v. Parwatikar*, 813 F.2d 891 (8th Cir.), cert. denied, 108 S. Ct. 108 (1987); *Williams v. Rappeport*, 699 F. Supp. 501 (D. Md. 1988); *Miner v. Baker*, 638 F. Supp. 239 (E.D. Mo. 1986.)

<sup>54</sup> *Howard v. Drapkin*, 271 Cal. Rptr. 893 (Cal. Ct. App. 1990).

<sup>55</sup> *Howard v. Drapkin*, 271 Cal. Rptr. 893, 902 (Cal. Ct. App. 1990).

Of course, mediators do not need to rely on quasi-judicial immunity to protect themselves from liability, since they can include a waiver of liability in a written agreement with the parties. Such clauses are common in mediation and arbitration submission agreements. The protection afforded by such clauses is largely untested, however, and neutrals who rely on them should make sure that the parties who execute such agreements do so knowingly.

Although Massachusetts has no statute that provides mediators with immunity from civil liability, a number of other states have adopted such laws.<sup>56</sup> Mediators can protect themselves, however, by obtaining liability insurance. For attorneys and other professionals, malpractice insurance often covers work done as a mediator as long as it is part of the individual's "professional activities."<sup>57</sup>

#### **§ 8.41 Ethical Issues**

A mediator faces a number of potential ethical questions. The first occurs when he believes that one of the parties is not capable of representing his own interests. Mediators often discuss this as an example of power imbalance.<sup>58</sup> This concern stems from the assumption that the mediator's job is to assist parties to negotiate, and if one of them is incapable of doing so, an agreement may be reached which does not represent the interests of that party. For the mediator, the problem is that in many (perhaps most) disputes, there is at least the appearance of power imbalance, and one side will often declare his status as a victim. The mediator must determine when the imbalance is so serious as to render a party unable to represent his own interests in the

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<sup>56</sup> See MARGARET SHAW ET AL., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS § 14.0 (Center for Dispute Settlement, n.d.) (listing statutes).

<sup>57</sup> Since there are variations in insurance policy language and coverage, one should confirm with the insurance carrier that such activities are in fact covered.

<sup>58</sup> Albie Davis and Richard Salem, Dealing with Power Imbalance in Mediation of Interpersonal Disputes, 6 MEDIATION QUARTERLY 17 (1984).

negotiation. When a mediator does come to this conclusion, he will either withdraw from the case, or -- in the presence of both parties -- advise the disadvantaged party to seek assistance.

A second ethical dilemma arises when the mediator learns, through the mediation, that a party has committed or plans to commit a crime. The mediator is sworn to confidentiality, but is now in possession of information which can prevent a crime or can help solve one.

Confidentiality statutes in some states specifically exempt knowledge of crime from the protection afforded mediators. The Massachusetts confidentiality statute does not, although many mediators interpret the Massachusetts Child Abuse statute<sup>59</sup> to require reporting by a mediator of any information about child abuse. In addition, as a matter of practice many mediators tell parties during the introduction to the mediation that should a party acknowledge past or planned criminal activity, the mediator will feel obligated to report that fact to the appropriate authorities. As a result, mediators are rarely put in the position of having to report any such admissions.

Mediators' professional organizations have promulgated several codes of conduct. Ethical Standards of Professional Responsibility, adopted by the Society of Professionals in Dispute Resolution (SPIDR)<sup>60</sup> and the American Bar Association (ABA) Standards of Practice for Lawyer Mediators in Family Disputes establish rules for mediator behavior, but at present contain no review or enforcement mechanism for situations of alleged infraction. The same is true of Academy of Family Mediators' (AFM) Standards of Practice for Family and Divorce Mediation<sup>61</sup> and the Standards of Massachusetts Council on Family Mediation (MCMF),<sup>62</sup>

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<sup>59</sup> MASS. GEN. L. ch. 119, § 51A (1992).

<sup>60</sup> See Appendix F-36 for a copy of this Code.

<sup>61</sup> See Appendix F-39.

<sup>62</sup> See Appendix F-40.

although both of those organizations require compliance as a condition of membership. Both of those organizations have also included in their standards a “conflict of interest” provision which either discourages (AFM) or bars (MCFM) attorney-mediators from ever serving as counsel for one of the parties -- a very significant disqualification, especially in the law firm setting where all of an attorney-mediator’s colleagues would in all likelihood be similarly disqualified.

For Attorneys, playing the role of mediator can present ethical questions about advocacy versus neutrality. Rulings on this question have varied around the country.<sup>63</sup> In Massachusetts, rulings on this question have been issued by the Boston Bar Association (BBA) in 1978,<sup>64</sup> and by the Massachusetts Bar Association (MBA) in 1985.<sup>65</sup> In the BBA opinion, the attorney intended to mediate for a couple planning a divorce and also agreed to draw up a separation agreement. The opinion found no ethical obstacle to the attorney acting as mediator so long as, inter alia, he did not serve as the attorney for either of the parties in the mediation or in any subsequent proceedings relating to the matter.<sup>66</sup>

The MBA opinion responds to a similar inquiry from an attorney engaged in divorce mediation. The opinion emphasizes the need for clarity about the lawyer’s role, especially where the lawyer serves as a co-mediator with a non-lawyer. According to the MBA, when the lawyer acts solely as mediator, she is not providing legal services. However, if she drafts a separation agreement for the parties to the mediation, she is serving as an attorney for both of them and therefore must make sure that she has each party’s informed consent and that it is “obvious”<sup>67</sup>

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<sup>63</sup> See Leonard Riskin, Toward New Standards for the Neutral Lawyer in Mediation, 26 ARIZONA L. REV. 329 (1984).

<sup>64</sup> Boston Bar Association, Ethical Opinion 78-1 (1978).

<sup>65</sup> Massachusetts Bar Association, Ethics Opinion 85-3 (1985).

<sup>66</sup> See Appendix F-43 for a copy of the opinion.

<sup>67</sup> See DR 5-105(C).

that she can “adequately represent both parties.”<sup>68</sup> The reason for caution is clear: “in drafting a contract, the attorney is generally faced with choices in language, choices concerning the allocation of risk of non-performance, etc., which will generally advantage one party’s interest against the other.”<sup>69</sup> The opinion also discusses the need for separate billing by the lawyer-mediator when she works with a co-mediator because of DR 3-102’s prohibition against sharing “legal fees” with a non-lawyer.

An issue akin to whether lawyer-mediators are practicing law arises when non-lawyers engage in mediation involving legal issues. In *Werle v. Rhode Island Bar Association*,<sup>70</sup> a psychologist was informed by the president of the state bar association that his divorce mediation practice involved him in the unauthorized practice of law. The psychologist sued the bar association. Without reaching the question of whether the psychologist violated the law, the Court held that the bar association could not be sued for making its determination. However, the case stands as a warning to non-lawyers who practice mediation.<sup>71</sup>

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<sup>68</sup> A copy of the MBA opinion can be found in Appendix F-42.

<sup>69</sup> See MBA Opinion 85-3.

<sup>70</sup> *Werle v. Rhode Island Bar Association*, 755 F.2d 195 (1st Cir. 1985).

<sup>71</sup> For a general discussion of ethical dilemmas encountered by mediators, see Robert A. Baruch Bush, The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications, 1994 J. DISPUTE RESOLUTION 1 (1994)