# The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation

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## I. INTRODUCTION: THE COMPLEX LEGAL LANDSCAPE OF MEDIATOR LIABILITY

### A. *The Liability Landscape in Context*

The topic of mediator liability[1] is both difficult and controversial.[2] The role of the mediator is complex and varies depending on the precise context in which the mediator is operating.[3] A plaintiff seeking to sue

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1. In a previous article, I attempted to demonstrate that mediators needed to consider the possibility of liability. *See* Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731 (1984). That article was a conservative attempt to show that functionable liability theories existed, especially in the family mediation context. *Id.* at 736-39. I attempted to show that the law of fiduciary duties would subject mediators to liability in certain cases, even if no other theory of liability could be adapted. Of course, one problem with a theory of fiduciary duty is that it will not often enable plaintiffs to pursue the kind of consequential damages that are possible when the theory is professional malpractice or negligence. In the present Article, I provide a more comprehensive view of the various liability theories for the purpose of providing a background against which intelligent decisions concerning the propriety of model legislations may be made.

2. Some mediators are disturbed enough about the liability problem to ask their clients to sign a general exculpatory agreement. *See CPR Model Procedure for Mediation of Business Disputes,* ALTERNATIVES TO THE HIGH COST OF LITIGATION, April 1986, at 15, 16. The Center for Public Resources' proposal for its Model Business Mediation Rules includes § III, (11) which states: "The mediator shall not be liable for any act or omission in connection with his role as mediator." *Id. See also,* J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 339 (1984) [hereinafter MEDIATION]. Decisions Resources [formerly the Center for Dispute Resolution] in Denver also requires clients to sign an exculpatory clause. Conversation with Mary Margaret Golten, Administrative Partner of Decisions Resources (July 12, 1986). The effectiveness of exculpatory clauses, especially general exculpatory clauses that purport to insulate mediators from all liability, is extremely dubious. The viability of exculpatory clauses in mediation agreements may be a subject for another day, but it is safe to say that the law frowns upon them, construes them narrowly, and often finds them unenforceable. *See* W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, 482-84 (5th ed. 1984) [hereinafter PROSSER]. *See also* Tunkl v. Regents of the University of California, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (exculpatory agreement signed by patient in hospital is ineffective and against public policy). The agreements will not be enforced where there is an indication of unequal bargaining power, where the implications of the waiver are not made known to the plaintiff, or where the precise conduct being excused is not specifically mentioned. PROSSER, *supra* note 2, at 482-84. Although the precise facts may prove me wrong, I predict that clauses exculpating mediators will not be favored by the courts.

3. Historically, mediators have played their most visible roles in the resolution of labor disputes. More recently, mediation is being employed in family disputes, business, and a

a mediator[4] may rely on several theories,[5] in various combinations,

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variety of "grass roots" small claims disputes. *See* Steele, *Two Approaches for Contemporary Dispute Behavior and Consumer Problems,* 11 LAW & SOC'Y REV. 667 (1977). The practice is also spreading to criminal prosecutions. *See* Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System — An Overview and Legal Analysis,* 29 AM. U. L. REV. 17 (1979). Even disputes with public agencies are now considered viable mediation cites. *See, e.g.,* Susskind, *Environmental Mediation and the Accountability Problem,* 6 VT. L. REV. 1 (1981). In addition to the disparate substantive contexts in which mediators operate, there is also variation in the institutional contexts in which mediators operate. Some mediators are in private practice, some are adjuncts to court diversion programs, and others may be volunteers in neighborhood justice centers. As a result, the outlook and training of mediators may vary widely.
*See,* Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators,* 99 HARV. L. REV. 1876, 1878-81 (1986) [hereinafter Note, *Sultans*].

4. *See infra* p. 6.

5. Several writers and commentators have suggested approaches to the regulation of mediator practice. Some commentators have characterized the problem as one of "accountability" and have suggested various certifications of regulatory schemes. *See,* Susskind, *Environmental Mediation and the Accountability Problem,* 6 VT. L. REV. 1 (1981), *but see,* Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind,* 6 VT. L. REV. 85 (1981). Other writers have been more concerned with the probable response of courts to liability suits against mediators. *See* Chaykin, *supra* note 1. *See also* MEDIATION, *supra* note 2, at 244-89. One recent commentator has criticized previous approaches and has attempted to discover a limited tort model based on the mediator's duty to safeguard "the contractarian process." Note, *Sultans, supra* note 3, at 1886. The author argues that previous accountability models, like the fiduciary duty model and the "substantive responsibility model" are flawed because they fail to account for the diverse settings in which mediators may operate. *Id.* at 1882-83, 1886. Actually, although both models have limitations, lack of flexibility to institutional variation is not one of them.

First, Susskind never attempted to present a model of general applicability; he was specifically interested in the special problems of environmental mediation. *See* Susskind, *supra* note 3, at 6. Susskind argued that in environmental disputes, mediators had to take care to assure the interests of unrepresented third parties, and make other efforts to assure that public interests are met. He then suggested that environmental mediators should have certain credentials, *id.* at 42, have links to relevant regulatory agencies, *id.* at 43, and assure that the public is well informed, *id.* at 44. Although Susskind's views are subject to criticism on the basis that he misperceives the role of the environmental mediator, *see* Stulberg, *supra* note 4, it is not fair to criticise his model for lack of flexibility to institutional variation. Criticism of the fiduciary model for lack of flexibility is similarly perplexing. Note, *Sultans, supra* note 3, at 1883-84. The commentator argues that (1) the fiduciary approach is not flexible enough to accommodate the needs of court or neighborhood mediators, and (2) the fiduciary model will result in draconian liability where a more limited "restitutional" theory would do. *Id.* at 1877, 1888. The author seriously underestimates the flexibility of fiduciary duties, and the pressure under the law of fiduciaries toward the kind of equitable, "restitutional" accommodations the author craves. "Courts necessarily employ flexible standards in determining whether a fiduciary relationship exists." Chaykin, *supra* note 1, at 748. In fact, in my article on fiduciary duties, I provided at least one example of a situation where modification on the mediated agreement, without any mediator liability, would be the preferred result. *Id.* at 758-59. The more accurate and trenchant criticism of the fiduciary model is not that it goes too far and is inflexible, but rather that it will allow too many mediators to escape liability because some courts are reluctant to find fiduciary duties. *Id.* at 748 n.84.

The *Sultans* article argues for some kind of tort liability model based on impartiality, non-coerciveness, and thoroughness. These concepts bear a disturbing similarity to duties discerned by previous writers such as "the duties to be evenhanded and unbiased, trustworthy and diligent." Chaykin, *supra* note 1, at 749. Moreover, the *Sultans* com-

depending upon the mediator's alleged transgressions. The most common theory of professional liability, malpractice, does not seem to fit the mediational context without extensive customization. Most notably, the role of the mediator renders traditional tort analyses difficult[6] because it is difficult to discern exactly which standard of care should apply to the mediator or how a mediator can cause harm. Furthermore, even if the causation problem can be managed, there is still difficulty in proving damages against a mediator — an essential element of tort liability.[7]

Given the difficulty of analyzing the liability issues, analysis of the legal status of mediators is speculative and depressing. Those of us who work in the field of alternative dispute resolution find discussions of mediator liability threatening and counterproductive.[8] There are very few reported cases that even remotely deal with mediator liability,[9] even though various forms of mediation have been used for a long time.[10] The threshold question is why discuss mediator liability at all, much less think about model legislation to regulate mediator liability.

The use of mediation is on the rise.[11] The recent alternative dispute resolution movement did not invent mediation, but the vigorous interest in mediation has led to the application of mediation techniques in a

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mentator focuses only on the proximate cause issue, arguing that courts should consider the impact on neighborhood mediators in its analysis of proximate cause. Note, *Sultans, supra* note 3, at 1892-93. Strangely, in his analysis of this impact, the author never considered the availability of liability insurance. The author also never considered the more direct solution of immunity for mediators operating in a judicial capacity. *See infra* p.9.

Most importantly, however, the *Sultans* note presents an hysterical reaction to the possibility of mediator liability. Because of problems related to proof and causation, which were skirted in the *Sultans* note, the possibilities of *any* mediator being held liable are extremely slim. *See infra* p. 18. Neighborhood justice centers and court adjunct mediators may have even more protection as a result of their greater claims to immunity. *See infra* p. 79. To the extent these institutional actors are at risk, and considering that the cost of insurance could arguably drive them out of business, states can grant the necessary tort immunity should society deem them important enough to forego the opportunity to sue them for their wrongs (all questionable assumptions embraced in the *Sultans* article).

6. *See infra* p. 27-33.

7. *See infra* note 93.

8. After all, one of the main ideas of mediation is to avoid external, coercive decisionmaking. Many mediators have expressed their discomfort with litigation. *See, e.g.*, O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT 85-92 (1978), MEDIATION *supra* note 2.

9. In fact, the only case that bears a semblance to a lawsuit against a mediator for professional negligence is Lange v. Marshall, 622 S.W.2d 237 (Mo. App. 1981). *See infra* p. 25.

10. *See* C. MOORE, THE MEDIATION PROCESS 19-21 (1986) for a concise treatment of the history of mediation.

11. At least it appears that there is an increasing interest in mediation and other forms of alternative dispute resolution. Many new scholarly journals and newsletters devote themselves to mediation and dispute resolution. Alternative dispute resolution centers have been launched at several universities, and many new practitioners appear to be entering the field. *See* A.B.A. DIRECTORY OF DISPUTE RESOLUTION AGENCIES (1984).

great number of disputes in a growing array of dispute contexts.[12] Given this trend, and given the emotional,[13] hostile nature of some of the dispute contexts in which mediators are now operating,[14] it may only be a matter of time before more cases are reported in which mediators are being sued.[15] The complex contours of the mediator's legal status make it reasonable to chart some of the likeliest hazards along the way. As these hazards become better understood, courts and legislators may be better able to plan for them. Even if the environment does not favor model legislation, lawyers, judges, and mediators who face liability cases will need some understanding of the basic issues with which they will be confronted. In this way, mediators can take measures to reduce their risks, and if litigation does occur, courts will be in a position to make sensible decisions.

Finally, the propriety of model legislation, especially as it pertains to mediator immunity, is like any other political issue. Legal analysis itself does not provide the answer. The need for model legislation depends very much on the values that the decisionmaker brings to the subject. It is my view that mediation can flourish without special immunities. The common law leaves mediators exposed to liability in a very narrow range of circumstances.

### B. *Structure and Format*

Throughout the discussion of the various theories of mediator liability, it is important to remember that the main purpose of civil liability is to assure compensation to those injured by others.[16] The existence of civil liability can often have a salutory impact on an industry, assuring that certain levels of quality are maintained in the industry or that

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12. For a discussion of this phenomenon, *see* Chaykin, *supra* note 1, at 731 n.4.

13. Family mediation is the most obvious example. In this field, parties who may have little experience in negotiation attempt to settle financial, emotional, and family issues that lie at the core of personal identity. Under these circumstances, it would not be surprising to find the parties channel some of their hostility toward the family mediator.

14. *See* Saposnek, *Mediating Child Custody Disputes,* 23-24 (1983) [hereinafter, Saposnek]. "Each spouse's self-concept, lifestyle, moral values, competence as a parent, worth as a human being, and feelings of being lovable are threatened." *Id.*

15. This probability is enhanced by the fact that there appears to be some very poor mediation practices in the field. For instance, in one account, family mediators working as adjuncts to the Washington, D.C. municipal court system, handled a case of domestic violence without ever mentioning the issue of spousal abuse in the ultimate agreement. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women,* 7 HARV. WOMEN'S L.J. 57, at 57-65 (1984). It appears that only one of the two co-mediators met with each party in private caucuses. *Id.* at 59. This is generally considered poor mediation practice which can create distrust and place each co-mediator in an advocacy role for "her party." Lecture by B. Mayer and M.M. Golten, Effective Mediation Workshop in Boulder, Colo., (July 12, 1986).

16. *See, e.g.,* Note, *Sultans, supra* note 3, at 1894 (recognizing the need to curtail "unbridled mediator discretion" with judicious application of tort liability).

adherence to certain minimal professional standards of quality is maintained.[17] Viewed from this perspective, the threat of civil liability is not necessarily an undesirable goal. Civil liability may lead to improvements in the quality of mediators who remain in the profession, the quality of services performed, and the development of standards to regulate the field.

On the other hand, in certain contexts, liability can have a negative impact on an industry. Depending on the availability of insurance,[18] and the ability of actors in the industry to guard against liability, the fear of civil liability can have a demoralizing impact. One thesis of this paper is that to a large extent, the common law has done a good job in defining the line between "good and bad" liability. The problem is that the common law standards for immunity and liability do not translate easily to the mediator area until there is some understanding of the underlying purposes of the common law rules and their possible application depending on the particular mediational context. Some of the liability issues, on the other hand, are not too difficult. For this reason, I have divided the analysis into the following four groups:

1. Liabilities that a mediator may be exposed to that are similar to the liabilities that any business actor might face.
2. Liability pertaining directly to the practice of mediation in which causation and damages are not a difficult barrier to a finding of liability.[19]
3. Liabilities pertaining directly to the practice of mediation in which the problems of causation and damages make a finding of liability more difficult.
4. Liabilities that a mediator may face by causing harm to third parties who are not participants in the mediation.

At least nine theories of liability can apply to mediators. These are: (1) false advertising, (2) breach of contract, (3) tortious interference with contract or business relations, (4) fraud, (5) invasion of privacy, (6) defamation, (7) outrageous conduct, (8) breach of fiduciary duty, (9) malpractice or professional negligence.[20] Of all these theories, only

17. *See* PROSSER, *supra* note 2, at 25-26. "The 'prophylactic' factor of preventing future harm has been quite important in the field of torts .... When the decisions of the courts become known, and defendants realize they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm." *Id.* at 25.

18. The availability of mediator insurance is somewhat uncertain, but it does appear that insurance companies are willing to write this kind of professional insurance coverage. Many mediators are covered by other professional liability insurance, such as legal malpractice insurance. The author has discovered that there are some insurance companies willing to insure mediators.

19. We might refer to these as "independently tortious" acts or "independent wrongs." *See* Chaykin, *supra* note 1, at 936 n.27. "For example, a mediator who purposely causes emotional distress to a client may be liable under a theory of intentional infliction of emotional distress." *Id.*

20. Most of the theories of liability on this list come from MEDIATION, *supra* note 2

breach of fiduciary duty, professional malpractice, and, to a lesser extent, breach of contract and fraud, require extensive discussion. This is so because the law in the other fields of liability is well developed, and can be easily translated to the mediation context without much difficulty. This is not as true for the theories of professional malpractice, which are the most flexible and useful of all the theories available. I will therefore devote the greatest attention to the liability issues in Group 3 which deal with professional malpractice, and Group 4 which deal with special issues that arise as a result of injuries to third parties. I will also address the overlap between some theories of mediator liability in section VI. Finally, no analysis of mediator liability is complete without at least entertaining arguments for granting mediators some kind of immunity from civil suits.[21]

### C. *The Immunity Issue*

The last section of this Article will be devoted to the immunity issue. It will begin with a brief discussion of immunities in general and then explore why immunities are basically disfavored. If model legislation is going to be promulgated, the establishment of statutory immunity would circumvent some of the problems of professional liability of mediators. An immunity statute protecting mediators would have to deal with two difficult questions: (1) What is the scope of the immunity?, and (2) Who is covered by the immunity? However, for reasons stated below, the thesis of this Article finds insufficient evidence exists to merit the creation of mediator immunity at this time.

The argument in favor of immunity proceeds on two fronts. Immunities are generally granted when, by history or statute, the law recognizes the social importance of an activity to such an extent that a decision is made to allow those participating in that activity to continue without the threat of a civil suit. As a result, judges have long enjoyed a broad immunity for their acts which has enabled them to make decisions without fear of reprisal from disappointed litigants.[22] This immunity is absolute, excusing judges from liability for all judicial acts, even if based upon malice. Although crucial in determining the scope of immunity, interpretation of the term "judicial act" has been broad.[23] Some courts define "judicial act" in a circular manner, encompassing almost

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at 281. I have added tortious interference with contract to the list. This list is not complete, but it covers most of the important issues that will be addressed in this Article.

21. *See supra* note 4.

22. A more complete discussion of the immunity question will be provided. *See infra* p. 69-85.

23. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978) in which the United States Supreme Court upheld judicial immunity for a state judge who had issued an order allowing for the sterilization of a mildly retarded individual. *See also,* Block, *Stump v. Sparkman and the History of Judicial Immunity,* 1980 DUKE L.J. 879.

any activity of the judge.[24]

To some extent, courts have interpreted the immunity granted to an arbitrator more narrowly.[25] Arbitrators are only immune from liability for those acts that pertain to their decisionmaking function.[26] Since mediators do not render decisions in the same manner as arbitrators, a strong argument exists to extend immunity to mediators under the same rationale.[27] An alternative argument is that mediators in court-ordered referral programs should enjoy the same immunity as judges who engage in settlement discussions. This approach presents two problems. First, it would seem incongruous to grant court-appointed mediators immunity while other mediators who perform the same kind of service are left unprotected.[28] Second, the scope of a judge's immunity in settlement discussions is unclear.

In certain contexts, judicial immunity should not apply to settlement discussions.[29] For example, tort immunity should not be granted to mediators because it is unnecessary to support mediation. The costs of granting an immunity will be borne by individual victims of mediators' incompetence. In addition, the legal premise for juducial immunity is much broader than necessary to achieve its purpose. Since mediators will only face liability in a narrow range of situations, model legislation creating an immunity is unwarranted. In fact, it might be worthwhile to promulgate model legislation opposing mediator liability.

The next section discusses some of the liability problems mediators may face. The inclusion of these liability theories enables mediators to view their exposure to liability in a broader context.[30]

## II. POTENTIAL BUSINESS TORTS

### A. *Liabilities that Arise from the Business of Mediation*

Not all mediators operate in a business setting, and therefore, not all mediators will be concerned with the problem of business liability.

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24. *See* Stump v. Sparkman, 435 U.S. 349 (1978).

25. *See* Baar v. Tigerman, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (1983).

26. *Id.*

27. There is a complicating factor here because some mediators engage in hybrid forms of mediation/arbitration. *See infra* text accompanying note 154.

28. On the other hand, it is not unusual to find that those who engage in a sanctioned mode of public activity may enjoy privileges and benefits not shared by others who perform a similar role in the private sector. For instance, decisionmakers in certain governmental positions enjoy immunities that their private sector counterparts can only wish for. Even if this line of reasoning is going to be followed, it will not require model legislation. Courts will be able to extend the protection over their adjuncts. For further differentiation of mediators in various institutional roles, *see* Note, *Sultans, supra* note 3.

29. This point will be discussed more fully. *See infra* text accompanying note 135.

30. In other words, mediator liability means much more than professional malpractice.

Some mediators work as adjuncts to court programs, or are hired as governmental agents. It is the mediators in private practice who are subject to some of the same constraints as purveyors of any other service. Mediators can be liable for false advertising, breaking contracts, or deceiving or creating false perceptions about their service. For the most part, the fact that the transgression might have been committed by a mediator is of little significance—the law will be the same as if the case was filed against a plumber, for example. Still, there are unique qualities of mediation practice that render some of these issues worthy of brief discussion. In particular, it is important to examine liability that can stem from false advertising or breach of contract. Other torts that can occur in the business context, such as deception or fraud, are more thoroughly discussed in Section III.

### B. *False Advertising*

No action for false advertising exists at common law.[31] The Federal Trade Commission Act[32] and various state acts that outlaw unfair and deceptive practices have filled the void in the common law to make any practice that has the tendency to deceive actionable. Some states provide private rights of action against the offender,[33] while others allow the attorney general to bring an action.[34] Although these laws vary by jurisdiction, they generally prohibit any activity that can be considered unfair or deceptive, including the dissemination of false advertising. It is forseeable that a mediator may violate these provisions without any intention to do so.

#### 1. *Misleading Statements About the Services Provided*

Mediators should be careful about oral and written statements they make regarding the type of service they provide and its results. For instance, when advertising "divorce mediation," mediators should be careful to explain whether or not they are providing comprehensive mediation and legal services which will lead to a change of marital status. Use of the term "divorce mediation" could lead some consumers

31. B & W Management, Inc. v. Tasea Investment Co., 451 A.2d 879 (D.C. Cir. 1982). (False advertising was included as an element of unfair competition at common law).

32. Federal Trade Commission Act, 15 U.S.C. § 41 (1982).

33. *See, e.g.*, N.H. REV. STAT. ANN. § 358-A:10 (1985) and OR. REV. STAT. § 646.638 (1983) which allow for private rights of action for unfair and deceptive practices. *See also,* McCormick Piano v. Geiger, 412 N.E.2d 842 (Ind. App. 1980); Kagan v. Gibralter S&L Assoc., 35 Cal. 3d 582, 676 P.2d 1060, 200 Cal. Rptr. 38 (1984).

34. *See, e.g.*, FLA. STAT. § 501.201 (1983) and ALA. CODE § 8-19-1 (1975) which allow Attorney General to bring a cause of action for unfair and deceptive practices. *See also,* Scott v. Association for Childbirth at Home Int'l, 88 Ill. 2d 279, 430 N.E.2d 1012 (1981).

D. *Certain Breaches of Fiduciary Duty*[40]

In managing a mediation business, there will be times when a mediator will be entrusted with funds, and may take on the status of a fiduciary in relation to those funds.[41] For instance, it is quite common for mediators to require parties to place money on account with the mediation service, similar to a retainer paid an attorney, to cover the first several hours of mediation.[42] A mediator might also request that the parties place disputed funds or property in escrow with the mediator until the dispute is resolved. In such situations, where the mediator has been entrusted with funds, he acts as a fiduciary with regard to those funds.[43] The mediator must not convert those funds to his own use, hypothecate or invest them, or commingle them with other funds.[44] If clients make advance payments to a mediator for professional services to be rendered, funds should only be transferred to the mediator's private account as those services are provided.[45] This aspect of the mediator's fiduciary duty is not controversial.

Although some mediators may want to avoid a role in which they act as an escrow agent or trustee, the fact is that mediators who do perform these roles can expect to be held responsible if they violate the trust.[46]

## III. "ROUTINE" MEDIATION TORTS

Mediators may further be subject to a group of torts that appear to be related to the practice of mediation but present few difficult legal issues. The best examples of this are if a mediator is sued for defamation, invasion of privacy, or even battery. Damages for such torts are in no way related to the mediation itself; the assessment of damages is independent of the mediation.[47] As a result, the legal analysis of liability

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40. *See,* Chaykin, *supra* note 1; *See infra* text accompanying notes 89-95.

41. Mediators may hold clients' funds for a variety of reasons. For example, mediators following Coogler's recommendation for conducting family mediations will require the client deposit funds to cover the first few mediations. *See* Coogler, *supra* note 8, at 120.

42. *Id.*

43. *See* Chaykin, *supra* note 1, at n.95.

44. *Id.*

45. *Id.*

46. *See* Chaykin, *supra* note 1, at nn.42-52 and 93-95.

47. *See* Chaykin, *supra* note 1, at n.27 and accompanying text. One could also include fraud in this list. It should be remembered that in order to establish a case of fraud, the plaintiff must prove that defendant (1) made a false representation (2) knowing that it was false (3) with an intent that plaintiff would rely on the statement, (4) that plaintiff justifiably relied on the statement and (5) was damaged as a result. *See* PROSSER, *supra* note 2, at 728. Given the difficulty of proving fraud, it does not deserve great attention in this Article, especially since there is nothing about the law of fraud that is peculiar to mediators.

is similar to the analysis applied in any other defamation or invasion of privacy suit.

There are, however, a few wrinkles that merit discussion of these particular torts under a separate heading. Whereas the liabilities discussed above stem mainly from the management and operation of a mediation business, liabilities discussed in this section may arise during the mediation itself, and therefore, a strong argument may exist that mediators should be shielded from some of these liabilities by mediator immunity.[48] In addition, given the fact that many of these torts will derive from utterances made by a mediator engaged in mediation, many issues of mediator confidentiality and privilege also arise.[49] Consider the following:

> Mediator is conducting a marital mediation between H and W. H is a well-known movie star and W is an international model. As a result, the divorce has attracted a great deal of popular attention. The mediation is successful in that an agreement is reached. However, H has made it clear that he finds the agreement "onerous, and only acceptable as a matter of expediency." W calls M and says that, given H's attitude, she fears that H will not comply with the shared custody provisions in the agreement. H tries to reassure her, but there are signs that the agreement will fail. A reporter calls M to confirm reports that the agreement is in trouble. M is reluctant to respond, but finally confirms the report. He is quoted as saying, "the whole problem is unnecessary. W is in a panic because H never keeps his word on anything, but this agreement has been structured so that even a backpeddling egomaniac like H will have to keep in line." H sues M for defamation claiming that M has called him a habitual liar, and that this statement is untrue, defamatory, and has caused him damage.

Clearly, M did not handle this problem with great skill. Examining the law of defamation as it now stands, there is a good chance that M will have a protracted law suit on his hands. H will argue that M made a statement that was (1) false and (2) defamatory,[50] because it subjected him to scorn and ridicule in the community.[51] M may have various defenses, including arguments that the statement was true,[52] that H was

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48. For a discussion of mediator immunity *see* infra p. 69-85.

49. A discussion of mediator confidentiality is beyond the scope of this paper. For a discussion of mediator confidentiality *see* Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984); Comment, *In the Wake of Tarasoff: Mediation and the Duty to Disclose*, 35 CATH. U. L. REV. 209 (1985) [hereinafter Comment, *Wake of Tarasoff*]; and Green, *A Heretical View*, *infra* note 127 and accompanying text.

50. More particularly, the elements of a cause of action for defamation are (1) publication of defamatory words that are (2) false and uttered with (3) malice (express or implied). *See, e.g.*, Juneau v. Avoyelles Parish Police Jury, 482 So. 2d 1022 (La. Ct. App. 1986); Bill Partin Jewelry, Inc. v. Smith, 467 So. 2d 188 (La. Ct. App. 1985).

51. Tartaglia v. Townsend, 19 Mass. App. Ct. 693, 477 N.E.2d 178 (1985) (defamatory words expose plaintiff to contempt, hatred, scorn, or ridicule). *Accord* PROSSER, *supra* note 2, at 780-85.

52. *See, e.g.*, Brown University v. Kirsh, 757 F.2d 124 (7th Cir. 1985).

to the conclusion that they will get a divorce as a result of hiring the service. It may be a rude awakening if the consumer then realizes that there will be additional charges for the legal fees involved in obtaining a separation agreement. Because mediation services are new to many people, it is important to be explicit about what that particular mediation service provides.

### 2. *Statements of Qualifications*

Mediators must also avoid inflating their qualifications in advertising. Mediators should give an honest account of their years of experience, education, and special training. Although it is difficult to see the damage of inflated credentials, false advertising claims do not require damages. Enforcement actions may be brought as long as the activity is deceptive.[35] In some situations, the wrongdoer has been required to correct the advertisement.[36] Although this action is embarrassing, it is not as effective as direct liability.

## C. *Breach of Contract*

Not all mediations are conducted under mediation service contracts, but most mediators use written contracts.[37] As with most agreements, a contract to mediate can be written or oral; the terms can be expressed or implied. The obvious point is that contracts to mediate, which are intended to protect the mediator and educate the participants, may also provide a theory of liability against the mediator. Mediators must be sure that such agreements clearly delineate their responsibilities, accurately describe the scope of the dispute, and provide for methods of terminating the mediation, if a mediated settlement is not reached. Unless this contingency is covered, a mediator is in danger of becoming a prisoner to the mediation.

It is important to remember that contract law provides the mediator with protection.[38] A well-drafted contract should reflect the parties' expectations of the mediator's performance. It is only when these expectations are defeated, due to lack of performance by the mediator,

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35. *See, e.g.*, OHIO REV. CODE ANN. § 4165.03 (Page Supp. 1985) (proof of monetary damage or loss not required for injunctive relief against deceptive trade practice).

36. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), (F.T.C. has the authority to require corrective advertising).

37. *See*, MEDIATION, *supra* note 2, at 339.

38. Many mediators have attempted to include exculpatory clauses in their employment agreements. The exculpatory clause included in Folbergs & Taylor's book is typical. "Because of the extensive participant review and revision, we agree to hold the mediator harmless against errors, omissions, or future negative consequences stemming from the provisions of the mediation process or the preparation of the Mediated Plan." MEDIATION, *supra* note 2, at 339.

that contract liability becomes a realistic possibility.

Generally, the contract liability that will apply to mediators is the same as that which applies to nearly any other service provider. However, mere breach of a contractual provision may have no legal significance unless the plaintiff can show that the breach resulted in damages compensable under contract law. For instance, one could envision the following case:

> M agrees to help settle a dispute between buyer (B) and seller (S) concerning the terms for the purchase of an apartment building. B and S have signed a purchase and sale agreement, but disagree over the interpretation of several points in the agreement. B also contends that S made additional promises outside the agreement, which B now repudiates. Time is of the essence in this mediation because the purchase and sale agreement will expire in 20 days. B and S arrive at the mediator's office for the first session, when they learn that M will not be able to make it that day. B and S are unable to schedule additional sessions. They later learn that M was offered a very lucrative mediation assignment which he accepted in spite of his conflicting obligations to B and S. Meanwhile, the purchase and sale agreement expires, and S finds a new buyer. B sues M for breach of contract.

In analyzing this problem, one critical issue is whether M's breach can be deemed a cause of damage to B. The amount of damages is relatively certain, but the causal nexus between the damage and the breach is arguably tenuous. M will argue that B's loss was caused by S's refusal to sell, not M's failure to mediate. M may also argue that the mediation might have failed, in which case, his breach made no difference. Many of these problems dovetail with issues that arise in the causation analysis of professional malpractice.[39] For now, it is sufficient to recognize that contract law is a potential source of liability in the business of mediation.

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39. The relevant tort and contract concepts share important similarities. Using the Buyer and Seller hypothetical which was discussed above, it is quite obvious that under the law of contracts, the plaintiff would be entitled to compensatory damages. In this case, compensatory damages would include any monies paid to the mediator, and any other out-of-pocket expenses laid out in preparation for the mediation. Here, the law of damages attempts to "place the aggrieved party in the same economic position he would have had if the contract had been performed." CALAMARI & PERILLO, CONTRACTS 521 (1977). Consequential damages more closely resemble tort damages. They include damages that (1) "may fairly and reasonably be considered ... arising naturally ... and (2) such as may reasonably be supposed to have been in the contemplation of both parties ... " *Id.* at 523-24 (quoting the court in Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (1854)). The analysis can get more technical in that the first variety of damages is referred to as general consequential damages, while the second type is considered to be special consequential damages. *Id.* at 524-25. Of course, a prime concern in consequential damages cases is the foreseeability of the harm. *Id.* at 522, (sub-chapter D (Foreseeability)). This is also a general consideration employed in tort law to determine whether a given harm was the proximate cause of a defendant's actions. *See infra* text accompanying note 1.

a public figure, and that M did not make the statement with knowledge of falsity or reckless disregard of its truth.[53]

H may also sue M for invasion of privacy by claiming that the divorce mediation was a private matter and that M intruded upon that privacy by making those statements. M may also have some defenses to this theory of liability. The problem with M's defenses is that many of them can only be effective when resolved by a finder of fact in protracted litigation. In other words, the mediator will have a long, painful fight on his hands, even if he eventually prevails. On the other hand, the attractiveness of the immunity is that if the mediator asserts that his actions are protected by mediator immunity and his statements to the reporter were privileged he can avoid a law suit.

## IV. LIABILITY ISSUES WITH SPECIAL PROBLEMS

Professional malpractice is the most obvious and important type of liability that can be directed against mediators.[54] Lawyers generally perceive malpractice actions as negligence suits against professionals who have fallen below an accepted minimal level of care for practitioners in that field.[55] If the practitioner's failure to adhere to that standard can be shown to have caused provable damages to a plaintiff, then an action for professional negligence may be successful.[56]

Unfortunately, some severe problems arise when the law of professional malpractice is applied to mediators. First, because it can be argued that mediation is more of an art than a science,[57] it is difficult to prove that a given action by a mediator has fallen below minimal professional standards.[58] There is little agreement as to what minimally competent mediation practice entails.[59] This issue is further complicated by the fact that mediators operate in many different contexts which often vary widely in degree of formality and sophistication of participants.[60] Fur-

53. *See,* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). A full-scale discussion of the law of defamation is beyond the scope of this paper.

54. *See,* MEDIATION, *supra* note 2, at 281. The authors suggest that the two most likely theories of liability are "breach of contract and professional malpractice." *Id.* They recognize that many contractual problems can be avoided through the use of an Employment Agreement and Mediation Guidelines. *Id.* at 282-83. They then note that: "Mediator liability based on allegations of professional negligence, or malpractice, is the liability claim most likely to be encountered by a mediator." *Id.* at 283.

55. *See* PROSSER, *supra* note 2, at 185-93.

56. *See generally,* Note, *Torts — Medical Malpractice — Rejection of the "But for" Test,* 45 N.C.L. REV. 799 (1967).

57. "First, mediators themselves disagree about whether mediation is an art or a science. Many mediators believe that their practice is closer to an art form and have been reluctant to encourage, or have actively resisted systematic study of what they do." Moore, *supra* note 10, at X (Preface).

58. *See* Chaykin, *supra* note 1, at n.25.

59. *Id.*

60. More specifically, mediators now operate in family, labor, and business settings,

thermore, even if the standard of care can be ascertained, and that standard of care is clearly breached, it will be difficult to demonstrate to a court that a mediator has caused provable, non-speculative damages because of the structure of most mediations.[61] Many of these problems are well illustrated by the case of *Lange v. Marshall*.[62]

In *Lange*, a husband and wife seeking divorce sought an attorney named Marshall to represent them.[63] The attorney, who was friendly with both parties, said that he would be unwilling to represent one spouse against the other, but that he would represent them jointly if they could agree on the terms of the dissolution.[64] Shortly thereafter, the wife entered the psychiatric ward of a hospital for treatment of depression arising from her marital problems.[65] Her husband and the

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as well as in governmental regulatory arenas. Within each one of these areas, there are many kinds of issues that might require mediation. Mediation techniques might vary depending on the kind of issue being mediated. In addition, there are many different notions as to the best way to approach mediation problems. There is little agreement as to what a mediator should do in various contexts. Model codes of ethics, to the extent they exist, tend to provide aspirations and general guidelines, with little specific information as to what a mediator should do in a given situation. *See*, Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments*, 17 FAM. L. Q. 461 (1984); Moore, *supra* note 10, at 299-309. In addition, standards of practice may vary in different institutional contexts. *See* Note, *Sultans, supra* note 3.

61. In order to fulfill the elements of a negligence claim, the plaintiff must prove not only that the defendant has breached his duty of care, but that there was harm caused by the defendant's breach. The concept of causation in torts is generally viewed as having two components; (1) causation in fact and (2) proximate cause. The cause-in-fact component focuses on whether A caused damage to B in some logical sense. The obvious problem is that, metaphysically, all events can trace their cause back into history. In order for the cause in fact test to have some meaning, courts have developed some limiting concepts. Some courts still ask whether the damage would have occurred "but for" defendant's negligence. As we will see, there are several problems with the "but for" test. Particularly, it is not very helpful when there is more than one identifiable or possible cause of plaintiff's damage. Many courts have opted for a test that asks whether defendant's negligence is a "significant factor" as a cause of plaintiff's damages. Although the "significant factor" test may not solve all our problems, it may be the best we can do right now. The "proximate cause" component is closely related to concepts of defendant's duty and society's judgment as to whether logically causal activity committed by defendant should be actionable. The concept is related to the duty of defendant, becuase we are asking whether defendant should be responsible for these particular consequences, given the nature of his role and activities. The focus will often be on whether the harm to the plaintiff was "foreseeable" or "natural" or "a direct cause of defendant's act." *But see* Note, *Sultans, supra* note 3, at 1892 for a controversial, and somewhat perplexing, proximate cause analysis. The author notes that the factors he employs, most notably the monetary impact on the mediation program, "are not the factors commonly reviewed in proximate cause analysis." *Id.* The author continues the analysis apparently unconcerned with the fact that the cases do not recognize such considerations as relevant to the proximate cause analysis. All of this amounts to a judgment as to whether or not the defendant should be responsible for the kind of damage plaintiff incurred, given defendant's acts.

62. 622 S.W.2d 237 (Mo. App. 1981).

63. *Id.*

64. *Id.*

65. *Id.*

lawyer visited the hospital where the dissolution agreement was finally negotiated.[66] The husband and wife filed a joint petition for dissolution, which the circuit judge took "under submission," indicating that he would issue a final order in 30 days.[67]

During this time, the wife had second thoughts, obtained her own attorney, and took the matter "off submission."[68] After protracted negotiations and extensive discovery, the parties reached a new agreement which was somewhat more favorable to the wife than the previous submission.[69] Thereafter, the wife sued Marshall claiming that he failed to "(1) inquire as to the financial state of Ralph Lange and advise plaintiff; (2) negotiate for a better settlement for plaintiff; (3) advise plaintiff that she would get a better settlement if she litigated the matter; and (4) fully and fairly disclose to plaintiff her rights as to marital property, custody, and maintenance."[70] As damages, plaintiff claimed the loss of ten months maintenance payments and compensation for apartment rent, taxes, legal fees, and fees paid to accountants and private investigators who helped prepare for the litigation.[71] The jury found for the plaintiff, awarded her $74,000, and defendant appealed.[72]

The appellate court was confronted with competing characterizations of the case. The plaintiff argued that defendant was liable for professional malpractice as an attorney.[73] Marshall defended on the grounds that he was acting as a mediator, and that the normal standards regulating attorney malpractice were not relevant to this situation.[74] In other words, defendant argued that he was not negligent as an attorney because he was not acting as an attorney.

### A. *The Standard of Care*

If the appellate court had confronted Marshall's defense,[75] that he was acting as a mediator and not as an attorney, it would have been required to decide whether to apply the traditional standard of negligence for attorneys or a special standard for mediators. Assuming that the court decided that Marshall had been acting as a mediator, and that the rules for attorney malpractice were not decisive,[76] it should have

66. *Id.* at 238.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 239.
72. *Id.* at 237.
73. *Id.* at 238.
74. *Id.*
75. The *Lange* court never addressed this issue because it found no proof of damages. *See infra* text accompanying note 86.
76. The standards of practice for attorney/mediators have been a subject of ongoing

remanded the case on the issue of whether Marshall was negligent as a mediator. This question of whether Marshall had violated the standard of care is generally an issue of fact for the jury.[77] In order to conclude that Marshall's conduct fell below accepted standards, the jury needed some evidence from which it could have determined what a reasonably competent mediator would have done in Marshall's position.[78] As I

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debate. *See* Silberman, *Professional Responsibility Problems of Divorce Mediation,* 16 FAM. L. Q. 107 (1982); Crouch, *Divorce Mediation and Legal Ethics,* 16 FAM. L. Q. 219 (1982); Folberg & Taylor, *Mediation* 351-52 (1984); Riskin, *Toward New Standards for the Neutral Lawyer in Mediation,* 26 ARIZ. L. REV. 392 (1984). More precisely, commentators have been worried about three major questions: (1) Can an attorney act as a mediator without running afoul of his professional obligations as an attorney? (2) Can an attorney give legal advice when he is acting as a mediator? (3) If the answers to the first two questions are "yes," then by what standards of malpractice liability should an attorney/mediator be judged? These issues are most sensitively handled in Riskin's "New Standards" article, in which he argues that since lawyers have unique skills and talents as mediators they must have the freedom to give legal advice when they act as mediators. Riskin, *supra* at 336. After attempting to work around the ethical problems by arguing that a lawyer, acting as a mediator, is not representing either party and is therefore not subject to the existing rules of professional responsibility, *id.* at 345-353, he suggests new standards based on the duty to "foster a fair agreement and ... to 'maximize' interests." *Id.* at 353. Finally, Riskin suggests that under these new "standards" an attorney/mediator would rarely be found liable for violations of the fairness standard, and even if the standard was violated, it would be difficult to prove causation and damages. *Id.* at 360.

> On the other hand, Riskin notes that: It is easier to envision how a neutral lawyer might be held liable for failing to adequately foster material interests. A neutral lawyer who failed to tell the couple about the tax advantages of alimony over child support, ... probably would have breached his duty to exercise reasonable care to help the participants maximize their assets .... *Id.*

Riskin then explains that even here it would be difficult, but not impossible, to marshall adequate proof of causation and damages to hold the neutral lawyer liable. *Id.* at 360-61. I believe that Riskin's analysis is generally correct, although I disagree with the thrust of it, and find some of his proposed standards too vague, and probably unnecessary, to perform an adequate negligence analysis. If neutral attorneys can give legal opinions during a mediation (and that is a big "if" given the client loyalty requirements of the Code of Professional Responsibility), I am quite certain that the lawyer will be subject to ordinary rules of negligence if that opinion turns out to be incorrect. In fact, cases in which a mediator begins to use expert knowledge during mediation that go beyond his expert procedural knowledge as a mediator, present the best possibility for a malpractice action. When a neutral gives legal advice, he takes himself out of the relatively standard-free area of procedural judgment, and enters the standard-laden arena of the lawyer, the doctor, or the architect. When operating in that environment, the neutral will be subject to the traditional standards of that profession. A neutral attorney who argues that "the advice was bad because I had divided loyalties" will not be in a strong position. In that instance, the neutral attorney should either advise the parties to get their own attorneys' opinions or disclose his problem to the parties.

77. Aetna Ins. Co. v. Hellmuth, Obata and Kassabaum, Inc., 392 F.2d 472 (8th Cir. 1968) (whether the required standard of care was exercised by architect is a question for a jury).

78. *Id.* at 478 (verdict upheld where there was *some* evidence of the applicable standard of care, but it is not extensive).

mentioned above, this task represents significant problems for plaintiff.

First, the exact contours of the relationship between mediator and client are highly individualized and variable, depending upon the dispute involved and the services that the mediator has agreed to provide. For instance, plaintiff alleged that Marshall failed to inquire into Ralph Lange's financial state. In some family mediation contexts, mediators specifically agree to take on the task of assuring the exchange of relevant information.[79] In other contexts, a mediator might only act as a facilitator to help the parties find their way through a dispute based on the information that they share at that time. Similarly, it is not unusual for a mediator to bring expertise to an area and to advise the parties of the relevant facts or considerations. It is just as usual for mediators to insist that the parties provide their own experts, and that any opinions expressed as by the mediator are purely advisory. In other words, in some mediation contexts, a mediator may be deemed to have a duty to provide reasonably accurate and reliable advice or information, while in another context, he may be viewed merely as a coordinator of meetings and an enforcer of decorum.[80]

It becomes difficult, therefore, to define a consistent standard against which a mediator's professional behavior can be measured. This problem is much more severe than the one faced by plaintiffs in medical malpractice cases where different medical specialties are charged with varying levels of skill and knowledge.[81] Each specialty has a relatively defined body of knowledge with generally accepted medical standards for handling specific medical problems. This degree of uniformity and consistency does not yet exist among mediators,[82] even when they work in the same general area of mediation practice.[83] Indeed, because so much of the mediative art is a matter of judgment, this consistency may never develop.[84]

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79. *See* Coogler, *supra* note 8, at 122. "Each party shall fully disclose . . . all information . . . if the mediator finds that the disclosure is appropriate to the mediation process and may aid the parties in reaching settlement." *Id.*

80. As I noted earlier, *see supra* note 76, when a mediator does give expert advice, it is most probable that the neutral will be held to the normal standards of negligence for that profession. *See, e.g.,* Levine v. Wiss & Co., 97 N.J. 242, 478 A.2d 397 (1984), in which the court held that accountants which had been appointed as "impartial experts," *id.* at 398, to render a valuation of a business asset so that the marital estate could be equitably distributed, enjoyed no special immunities and could be found liable to plaintiffs under the ordinary standards of accountancy. *Id.* at 400.

81. *C.f.,* Chaykin, *supra* note 1, at 736 n.28.

82. This problem is exacerbated by the fact that mediators are often trained in a wide variety of disciplines and often approach mediation with allegiance to other professions. For instance, when an attorney acts as a mediator, should he be subject to the Code of Professional Responsibility for Attorneys, some modified standards for attorney/mediators, or the same standards that "any mediator" would face? *See* Riskin, *supra* note 76.

83. *Id.* at 735, nn.23-24.

84. Happily, some leading mediators are successfully demystifying the process, clearing

Furthermore, even though some organizations are developing general guidelines for mediation,[85] most decisions a mediator makes are an exercise of informed judgement. For example, there is broad debate among mediators concerning the extent to which a mediator's goal should be settlement as opposed to internal fairness. Absent contractual, ethical or statutory guidelines, a mediator who fails to promote a full exchange of information may consider himself justified by the fact that he promoted agreement. If that is the goal, the mediator's passivity with regard to information exchange may not be considered negligent.

B. *Causation and Damages*

It is probable that, in the right context, a plaintiff may still be able to demonstrate that a mediator has fallen below the applicable standard of care. The contract between the mediator and the parties, the applicable code of professional behavior, and even relevant case books or articles may help determine the appropriate standard of care. Cases in which the mediator fails to fulfill an obligation that is relatively concrete provide the best cases for liability. For instance, if in *Lange* it could be found that Marshall had an obligation to help with the exchange of information, but did nothing, then a strong case for mediator liability would exist. Another example is where a mediator gives "expert advice" on the tax implications of a certain agreement, and he is wrong.

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the way for ascertainment of minimal professional standards. *See* Moore, *supra* note 10, at 52.

> By claiming that they respond differently to each conflict or by arguing that mediation is an art form rather than a series of scientific interventions, some mediators shroud their practice in secrecy and leave their disputants ignorant of the mediation process ....
>
> Clouding the mediation process has been sharply criticized ... and I advocate a candid education of the parties about the general mediation procedures that might be used in their dispute. *Id.*

Although standards for procedural expertise are still developing, standards for substantive opinion giving are rather well developed. Where an attorney neutral gives legal advice, or an architect neutral gives an architectural opinion, or where a therapist neutral provides psychiatric evaluations or therapy, that neutral will most probably be subject to the substantive standards of that expertise. This is probably part of the reason why most proposed mediator codes forbid neutrals trained in other disciplines from practicing their substantive expertise during mediation. *See id.* at 303 *(Code of Professional Conduct)* ["Mediators are not lawyers. At no time shall a mediator offer legal advice to parties in a dispute .... This same code of conduct applies to mediators who are themselves trained in the law."]. *But see* Riskin, *supra* note 76, and ALLISON AND TAYLOR MEDIATION 352 (1984). Obviously, the argument as to whether or not a lawyer/mediator *should* give legal advice is still open to question. My point is that if the neutral lawyer does so, he *will* face a greater threat of liability for any errors in professional judgment.

85. *Id.* at 736, n.29. *See also, CPR Offers Model Rules of Business Mediation, supra* note 2.

Liability is most improbable where mediators use their professional judgment to structure the dispute resolution process. It would be hard to demonstrate that a mediator breached the standard of care by prematurely declaring an impasse on a particular issue, or settling the negotiation in a way in which one of the parties disagreed. However, even if the standard of care issue can sometimes be satisfied, the problems of causation and damages remain.

In actuality, the court in *Lange v. Marshall* did not have to decide whether the defendant was acting as a mediator or as an attorney.[86] Instead, the court found that the plaintiff had failed to prove any damage resulted from the defendant's actions.[87] Essentially, the *Lange* court found that any conclusion that the husband would have agreed to a more favorable settlement with the wife but for the mediator's actions was totally speculative.[88] The court relied on cases which hold that damages in a negligence action must be proven, and cannot be conjectural.[89] Because of the lack of proven damages, the court was able to reverse the judgement of the lower court and vacate the jury's verdict.[90]

The decision by the court in *Lange* illustrates some of the most difficult problems associated with the analysis of mediator liability. First, because of the very nature of the mediative setting, the ultimate decision to enter into an agreement and resolve the dispute ostensibly remains with the parties, not the mediator. Consequently, there is a strong argument that, from a tort perspective, the mediator has no responsibility at all. Proponents of this view would suggest that since the mediator functions merely as a facilitator, he is not responsible for damages resulting from either party's decision to enter into an agreement.

Two ways exist to characterize this argument from a legal perspective. Because of the nature of mediation, the mediator has no duty to perform as a reasonably competent mediator. A better view is that, although the mediator might have some duty to behave in a reasonably competent manner, in most situations, failure to achieve that minimal standard will not be deemed to have a causal relation to any damages that result.[91]

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86. 622 S.W.2d 237, 238 (Mo. App. 1981).
87. *Id.*
88. *Id.* at 239.
89. *Id.* at 238.
90. *Id.*
91. As I noted earlier, causation in torts has two components: cause in fact and proximate cause. *See supra* text accompanying note 47. The better view is that "cause in fact" is established if plaintiff can show that defendant's conduct was a "substantial factor" in the causation of damages. *See* PROSSER, *supra* note 2, at 267; *see also* Note, *Medical Malpractice—Rejection of "But For" Test*, 45 N.C.L. REV. 799 (1967). The *Lange* court seems to have gotten hung up on the cause in fact issue because it adopted a strict "but for" approach to the problem. *See* Lange v. Marshall, 622 S.W.2d 237, 239

One corollary to this argument might be that the intentional acts of the parties themselves are superior to any activity on the part of the mediator that may have fallen below minimal standards of competence. This argument is similar to many traditional tort cases in which a defendant's negligent act is excused by the intervening and supervening activity of another actor.[92] For instance, the traditional tort rule is that plaintiffs cannot collect for criminal acts of third parties that might result from a minor negligent act on the part of the defendant.[93] It is for this reason that proprietors of businesses are generally not responsible for batteries committed in the parking lots of their establishments, unless they have some reason to know that there is specific danger in their parking lots.[94] It may also be argued that a mediator is not responsible for the damage caused by his own negligence where both parties intentionally and voluntarily entered into the agreement.

Most of the cases dealing with intentional intervening acts, however, rely on the concept that an intentional criminal act is a relatively unforeseeable result of the defendant's conduct.[95] In the context of a mediation, it is entirely foreseeable that if the mediator fails to perform his duties in accordance with minimal professional standards, damages may result. The foreseeability of this consequence may vary depending

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(Mo. App. 1981). The proximate cause issue is more closely related to the forseeability of the harm. *See* PROSSER, *supra* note 2, at 280. "If one could not reasonably foresee any injury as the result of one's act, or if one's conduct was reasonable in the light of what one could anticipate, there would be no negligence, and no liability." *Id. But see* Note, *Sultans, supra* note 3, at 1892 for an unorthodox view of proximate cause. The issue of proximate cause is difficult to discuss in general terms. In certain situations, however, it will be difficult for the mediator to argue that harm resulting to his client was an unforeseeable consequence of his negligence. *See id.* at 1892, n.6.

92. Bellotte v. Zayre Corp., 531 F.2d 1100 (1st Cir. 1976) (defendant is relieved of liability by a superseding cause of the accident which he could not reasonably be found to foresee); Morrow v. Greyhound Lines, Inc., 541 F.2d 713, 719 (8th Cir. 1976) ("[I]ntervening cause is a new and independant force which so interrupts the chain of events as to become the responsible proximate cause ....").

93. Ferguson v. Southwestern Bell Tel. Co., 8 Ill. App. 3d 890, 290 N.E.2d 429 (1972) (when an unforeseeable intervening act by a third person occurs, the first wrongful act is not the proximate cause of the harm); Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 593 (1979) (intervening acts do not bar liability except possibly by intentional acts of third parties); Merlo v. Public Service Co., 381 Ill. 300, 45 N.E.2d 665 (1943) (intervening act by a third person breaks the causal connection between first act and injury).

94. Kenny v. Southeastern Pa. Transp. Auth., 581 F.2d 351 (3rd Cir. 1978) (proprietor of business establishment is not responsible for injuries to patrons caused by criminal conduct of third party unless reasonably foreseeable), *cert. denied,* 439 U.S. 1073 (1978); Doe v. United States, 718 F.2d 1039 (11th Cir. 1983) (owner of business premises has no duty to protect business invitee from unforeseeable criminal attack by third person).

95. Lambert v. Will Bros. Co., 596 F.2d 799 (8th Cir. 1979) (an independent intervening cause is one not foreseeable to original wrongdoer); McCullough v. United States, 538 F. Supp. 694 (1982) (intervening cause must not be foreseeable to be considered such); Millette v. Radosta, 84 Ill. App. 3d 5, 404 N.E.2d 823 (1980) (intervening cause must not be foreseeable).

on the context of the mediation. If the *Lange* case had involved a dispute between two sophisticated business competitors in a commercial context, both of whom are represented by lawyers, it may be difficult to argue that any error in business advice offered by the mediator was the proximate cause of the eventual damage.

In this kind of situation, the law will probably require plaintiffs to exercise the special expertise they possess to protect themselves. In a very real sense, it is the parties that are responsible for the injuries suffered while the mediator will probably be excused from any liability.

However, in both this context and others, a jury may find that the acts of a mediator could cause foreseeable harm to the plaintiffs. It may be that the parties in *Lange* were relying on the mediators to effectuate a fair exchange of information and to provide a certain amount of accurate legal advice. If so, the mediator's behavior did cause damage to the plaintiff in a very real sense. Similarly, it is possible for businesses to hire a mediator with special expertise to help settle a dispute. If the mediator volunteers certain information which turns out to be false, it is arguable that the mediator's failure to provide accurate information is the cause of the damage to the plaintiff. It will often be a question of fact for the jury as to whether damage resulted from the mediator's activity[96] or from the failure of the parties to protect themselves properly.

This line of reasoning resembles the old concept of assumption of risk.[97] Under more modern tort theory, it would probably be characterized as a matter of whether the damage was caused by the mediator's failure to conduct the mediation in accordance with the proper professional standards, or whether the damage resulted from the plaintiff's own negligence in entering into the agreement. Viewed from this perspective, a strong possibility of comparative negligence exists in the area of mediator liability.[98]

Assuming that a court is willing to work around the causation problems outlined above, there remains the difficult issue of proving damages. In negligence actions, if there are no damages there is no basis for a

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96. *See,* Duty v. U.S. Dep't of Interior, 735 F.2d 1012 (6th Cir. 1984) (questions raised concerning damages are resolved by a trier of fact); United States v. Harue Hayashi, 282 F.2d 599 (9th Cir. 1960) (it is the function of the jury to evaluate all evidence produced on the question of damages); Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028 (7th Cir. 1969) (the question of damages is one particularly within the jury's province ....); Twin City Plaza, Inc. v. Central Sur. and Ins. Corp., 409 F.2d 1195 (8th Cir. 1969) (jury decides which conduct contributed to or caused all or part of damage).

97. *See,* Russon v. Range, Inc., 76 Ill. App. 3d 236, 237-39, 395 N.E.2d 10, 12-13 (1979), and Stephens v. United States, 472 F. Supp. 998, 1015-17 (1979) for a definition and explanation of assumption of risk.

98. By which I mean that a court may find that a defendant is 80% liable and thus, responsible for 80% of the damages. *See* PROSSER, *supra* note 2, at 470-79.

judgment against the defendant.[99] A black letter rule of law states that damages in a negligence action must be proven and may not be speculative.[100] Like most black letter rules, however, there is also an opposing rule, equally well established, that a jury may reasonably estimate and infer damages from the evidence provided.[101]

In *Lange,* the court found for the defendant because it found that there was no way for a jury to know whether the damages claimed by the plaintiff would have been incurred irrespective of the mediation process.[102] There was no proof that, had the plaintiff hired additional accountants and expended additional attorney time for discovery, that a more favorable settlement than that reached in the mediation would have occurred.[103] The court reasoned, therefore, that the additional expenses stemmed from the husband's intransigence, not the mediator's negligence.[104] In a similar fashion, the court found that the wife's success in obtaining a superior agreement from the husband may have had nothing to do with the mediator's alleged failures but rather was a result of the aggressive posture adopted by the wife's attorney after the mediation.[105]

The court's reasoning is subject to criticism. If the mediator/defendant in *Lange* had undertaken to ensure a fair exchange of information between husband and wife but had failed to conduct himself in accordance with minimal professional standards in achieving that end, there is a strong argument that the expenses incurred by the wife to obtain that information following the mediation were a direct result of the defendant's negligence. Many professional mediators have outlined specific procedures that ensure the free exchange of information in a divorce mediation. Apparently none of these procedures was followed in *Lange.* Furthermore, to the extent the mediator pursues an agreement between the two parties in such a way that a reasonable person would question the basic procedural fairness of the agreement, it is arguable that any loss to the parties as a result of the delay caused by the

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99. *See, e.g.,* Saylor v. Hall, 497 S.W.2d 218 (Ky. Ct. App. 1973) (cause of action does not accrue until injury occurs); Biscoe v. Kowalski, 290 S.W.2d 133 (Mo.1956) (no damages, no basis for action).

100. Bailey v. Meister Brau, Inc., 535 F.2d 982 (7th Cir. 1976) (damages may not be awarded on the basis of mere speculation).

101. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563-65 (1931) (if damages cannot be ascertained with certainty, a reasonable approximation will suffice); Knowell Constr. Co. v. Hanson, 209 Neb. 461, 308 N.W.2d 356 (1981) (damages can be ascertained with reasonable certainty); Melton v. United States, 488 F. Supp. 1066, 1075 n.35 (1980) (when amount of damages is uncertain, trier of fact may make reasonable inferences).

102. Lange v. Marshall, 622 S.W.2d 237, 239 (Mo. App. 1981).

103. *Id.*

104. *Id.*

105. *Id.*

mediator should be compensated by the mediator.[106]

In the *Lange* case, the mediator and the husband allegedly hounded the wife in the psychiatric ward of a hospital where she was receiving treatment for depression.[107] In addition, they allegedly forced her to conduct negotiations while she was sedated.[108] It is arguable that a reasonably competent mediator would refuse to operate under such conditions and would instead postpone the mediation until the wife recovered. As was the situation in Lange, the mediator who offers parties a fair dispute settlement process must assume responsibility for the failure to deliver this process in a reasonably competent manner. As a result of the mediator's negligence, the wife probably signed an agreement that was substantively biased and procedurally tainted. There was no pre-exchange of information, and the negotiations themselves were conducted while the wife was sedated. When the wife finally recovered from her illness, she opted out of the agreement, which resulted in a ten month delay of her support payments.[109] The wife's argument is that the lost payments constituted damages resulting from the mediator's negligence.

It would be difficult to estimate the support payments that would have been lost if a mediator had not gotten involved. But, as in this case where a mediator was part of the process, the jury may be justified in finding that the lost support was a direct result of the mediator's activity. Traditional tort law may require proof that damages were a reasonable result of the mediator's activity. It is one thing to prove that damages reasonably occurred as a result of a mediator's activity, it is another matter to demand proof that the damage did not result from any other possible cause. The *Lange* court exceeded traditional tort standards and required the latter.

Other damage theories exist that can apply to mediation cases. Opportunities have value.[110] If a mediator acts negligently, the parties involved in the mediation may lose the opportunities either to resolve the dispute more favorably or to receive the help of a more competent mediator who would aid them in reaching a more beneficial settlement.[111] Thus, when there is an increased risk of harm to a plaintiff, the imposition of liability is possible even if other factors could have caused the harm.[112]

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106. *See* Chaykin, *supra* note 1, at 749; *see* Note, *Sultans, supra* note 3, at 1888-91.

107. Lange v. Marshall, 622 S.W.2d 237,237 (Mo. App. 1981).

108. *Id.*

109. *Id.* at 238.

110. *See generally* Schaefer, *Uncertainty and the Law of Damages,* 19 WM. & MARY L. REV. 719 (1978).

111. *See, e.g.,* Hicks v. United States, 368 F.2d 626, 632-33 (4th Cir. 1966) (Erroneous diagnosis made it impossible for any other physician to save patient, thus defendant's argument that patient would have died anyway is rejected).

112. *See,* Thornton v. CAMC, 305 S.E.2d 316, 323-25 (W.Va 1983). Of course, the

Envision a situation where a mediator provides inaccurate information to parties who rely upon it in their negotiations. At least one argument exists that the parties have lost the chance of negotiating a better agreement because of the mediator's failure to disclose the false nature of the statements. This theory may also be applicable if a mediator negligently creates such a hostile and coercive atmosphere that the mediation itself presents a substantial risk of harm. The law in this area is not well developed,[113] but it may find application in the area of mediator liability as it evolves.

### C. *Fiduciary Duty as a Substitute for Torts*

The law of fiduciary duty may provide a way around some of the difficult damage and causation problems endemic to application of the law of professional negligence to mediators.[114] The law of fiduciary duties provides a flexible, equitable remedy when one places his trust in another and then has those expectations defeated.[115] Once a court determines that a fiduciary relationship exists, a high standard of behavior is imposed.[116] The fiduciary must be honest, serve only the interests of his charge, and operate in a careful and scrupulous manner.[117] The fiduciary may not benefit at the expense of his charge, nor may he violate the trust of one charge to vindicate the interests of another.[118]

Although a theory of liability based on fiduciary duty may be useful in some cases, it is probable that the negligence theory, where it can be established, will be preferred.[119] On the other hand, lawyers representing plaintiffs in tort suits against mediators will not want to overlook the possibility of a fiduciary duty theory. (In some cases, a fiduciary liability theory may provide an avenue for a sympathetic court to grant some relief when it finds it would have to do too much damage to established tort law to allow a negligence action.) As a practical matter, one would expect these theories to be brought together, with plaintiffs' lawyers hoping to succeed on one of the interrelated theories.

When applying the law of fiduciary duties to mediators, the theory's strengths can also be its weaknesses. The judicial interpretation of fiduciary relationships is not consistent.[120] Courts most often limit their

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amount of damages should probably be discounted, in some manner, by the likelihood of harm. *See* Schaefer, *supra* note 110, at 719-29.

113. Indeed further work on "value of chance" theory and its application to mediator liability is needed.

114. Chaykin, *supra* note 1.

115. *See id.* at 738.

116. *Id.* at 739-44.

117. *Id.*

118. *Id.*

119. This is partly because some courts are reluctant to discover fiduciary duties. *See supra* text accompanying note 4.

120. Chaykin, *supra* note 1, 745-49.

holdings to the peculiar facts of each case,[121] unless the case fits into one of the "semi-automatic"[122] fiduciary categories. Since it is difficult to predict the conditions under which a court will find a fiduciary duty, it would be difficult to draft model legislation that offers a single rule of law relative to the fiduciary duties of a mediator.

Moreover, even where a court finds that the parties justifiably placed such trust in a mediator/fiduciary, it will often be difficult for a court to proscribe specific rules. If a fiduciary relationship has involved paying one party for services, an appropriate remedy for a breach of the fiduciary's duties would be the return of the money. Consequential damages are also possible if a fiduciary duty has been breached. Fiduciary duties work well when the fiduciary has entered into a transaction on behalf of the client in which the fiduciary has benefited. A court imposing a fiduciary duty will also know what remedy to impose if the fiduciary has taken payments or improperly diverted funds from one to whom the duty is owed. In both cases, the fiduciary will be required to turn over the ill-gotten profits or to repay the plaintiff.

In most mediation situations, the structure is more complex. The parties will not just want to recover the funds paid to the mediator, they may want to collect for consequential damages caused by the breach of duty. Equitable remedies available in a fiduciary duties case impose serious limitations on courts, since tort damages are being redressed.[123] Thus, due to the sensitivity of this area, it is a poor place to interpose model legislation.

## V. Liability to Third Parties

### A. *Problem Revealed*

A mediator may be charged with liability to third parties who are not participants in the mediation process. (Already discussed were certain kinds of business liabilities like breach of contract or false advertising that could conceivably be brought against parties who are strangers to the mediation.) The focus of this section is on situations in which the mediator may incur liability as a result of his actions during mediation. The resolution of many of the questions that arise in this area bears a

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121. *Id. at 748.* "[T]he case decisions vary widely, often turning upon rather idiosyncratic facts." *Id.*

122. For instance, corporate officers, trustees, partners, and agents are almost always deemed to be acting under a fiduciary duty. *Id.* at 740-41.

123. The *Sultans* note criticized the fiduciary model partly because it would impose actual liability on the mediator instead of allowing for a restitutional remedy. Note, *Sultans, supra* note 3, at 1877 (mediators should not always be forced to internalize costs of defective agreements). Actually, the truth is just the opposite. Fiduciary duties work best to put the parties back where they were. *See* Chaykin, *supra* note 1, at 758, n.147.

strong relationship to the issues discussed in the section of mediator confidentiality. Consider the following:

*Situation 1:* M is a labor mediator working towards an agreement on a bitter labor dispute. During the negotiations, a terrible fight breaks out between two rival factions within the labor team. M calls for separate discussions with all parties. During a private conversation with a member of one of the more militant factions, a union member tells the mediator that "if that guy sells out the union for peanuts, we are going to make him pay." M believes that the threat is serious. M wants to warn the threatened party but (1) fears that it might endanger the prospects for agreement which depend on the strength of the more moderate faction, and (2) considers the statement made to him to be confidential. M decides not to reveal anything. The moderate faction settles the strike for modest gains. Three days later, the leader of the moderate faction is assaulted and severely injured. The injured party learns that M knew of the threat and made no effort to warn him. He sues M for damages.

*Situation 2:* M is a mediator in a neighborhood justice center attached to a local criminal court. An assault and battery case is referred to M. During the mediation, the victim and the alleged perpetrator determine that they have no quarrel with each other and that Smith, a third party, is at fault. The parties agree that they have to "get" Smith. M tells them that physically harming Smith would serve no purpose and suggests that Smith be called in so that further mediation can continue. The parties then say that "everything is fine" and "not to worry about Smith." M is sure that the parties are going to harm Smith. On the other hand, he told the parties that everything that they said during the mediation would be confidential. He decides to say nothing. The next day, Smith is severely beaten and suffers permanent injuries.

*Situation 3:* M is a family mediator. During the course of a divorce mediation between H and W, M hits an impasse over the issue of child visitation. M decides to hold separate caucuses with H and W. During one of the caucuses, W says, "you can't tell my husband I said this because he'll kill me for it, but the reason I can't allow any unsupervised visitation is because he beats the children and has been doing it for years. That's why I want to wrap this divorce up right away, because each day that he has access to those children is one more day that they're in danger." M advises W to seek orders of care and protection from the court, but W insists that she has friends who have obtained those orders and the children were beaten anyway because the police can never get there in time. She asks M to help her get the divorce wrapped up as soon as possible by convincing H that he should go along with the supervised visitation. The negotiation session for the day ends without an agreement. H is living separately but he still has access to the children. What should M do now?

*Situation 4:* During the course of a business mediation between two companies in the same industry, the parties enter into what amounts to an illegal conspiracy to restrain trade. The mediator suggests that this activity is illegal, but the parties go ahead anyway after stating, "you

can't say anything because all of this is confidential." The mediation ends. Does the mediator have an obligation to inform the proper parties? If he remains silent is he subject to suit as part of the conspiracy to restrain competition?

These problems illustrate the difficulty a mediator may face when he or she has knowledge that can protect the third party, but for various reasons fails to disclose the information. The last situation illustrates that the mediator may also harm third parties if he does disclose confidential information.

Many mediators guarantee a certain amount of confidentiality to their clients, and are thus predisposed to maintaining this promise. Because the law requires mediators to disclose some revelations when certain conditions prevail, no rule of confidentiality should exist that would override this rule of law. This position is consistent with the belief that mediators should not be immune from liability. Little proof exists to show that the social utility of allowing mediators to remain quiet outweighs the immediate social need for the information.

### B. *The Tarasoff Concept*

In *Tarasoff v. Regents of the University of California,*[124] the California Supreme Court found a psychotherapist negligent when he failed to warn a coed of his patient's threats to murder her.[125] The decision in *Tarasoff* is part of an expanding exception to the general common law rule that one is not responsible for the tortious acts of another.[126] As such, it is expected that the Tarasoff concept will have narrow application subject to many limiting criteria.

In *Tarasoff,* the psychotherapist's duty to disclose was triggered by the relationship between the psychotherapist and his patient.[127] The court reasoned that this special relationship placed the psycotherapist under a duty to control the patient's conduct.[128] It is unlikely, however, that this same duty will attach to a mediator because of the unique aspect of the doctor-patient relationship.

The psychotherapist has the ability to exercise physical control over the patient by involuntarily committing him to an institution. It is for this reason that the court found that the psychotherapist had both a duty to warn and a duty to take measures to gain physical control over the patient.

It is important to recognize that this duty is triggered only when the

124. 17 Cal. 3d 425, 551 P.2d 334 (1976).
125. *Id.* at 435, 551 P.2d at 343.
126. *Id.*
127. *Id.*
128. *Id.* at 435-39, 551 P.2d at 343-46.

defendant can foresee harm to third parties. In *Tarasoff*, the foreseeability of the patient's acts was considered common knowledge because the psychotherapist began to take actions to restrict the patient's freedom.[129] Those actions, however, were ineffective. It was therefore clear from the facts that the psychotherapist knew that the patient was dangerous and that he would do harm to the victim.[130]

If we compare the facts in *Tarasoff* to those that would normally arise as a result of a mediation, several important differences exist. A mediator does not have the ability, in most situations, to exercise the same kind of physical control over the participants in a dispute as does a psychotherapist treating a patient.[131] Moreover, partly because of this lack of control, it can be strongly argued that a mediator does not have the same close relationship with participants to a negotiation that a psychotherapist has with his patient. Unlike a psychotherapist, a mediator may not have the skills to determine whether a particular threat is real or not. The *Tarasoff* court clearly stated that even psychotherapists could not be found liable where they were exercising their professional judgment, as opposed to making a mistake that exceeded the scope of reasonable behavior in that profession. Therefore, as defined in *Tarasoff* the scope of liability is extremely narrow.[132]

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129. *Id.*

130. *Id.* at 439, 551 P.2d at 345.

131. One commentator suggests that mediators associated with criminal court programs may incur liability because they have some ability to incarcerate the party. Comment, *Wake of Tarasoff, supra* note 49, at 214-17. The short answer to this is that there are still other *Tarasoff* requirements that would have to be fulfilled before the mediator could be held liable. Moreover, the decision of which charges are to be filed is left to the prosecutor, with the mediator having only "input." *Id.* at 217, n.45. This is not the same kind of control described in *Tarasoff. Id.* at 214, n.23.

132. This article takes an opposite view from that presented in a well researched treatment of this issue. *See,* Comment, *Wake of Tarasoff, supra* note 49. The commentator takes the position that *Tarasoff* type liability presents a strong threat to mediators, and that legislation is needed to protect them. *Id.* at 212. It is true that some statutes, *id.* at 218-21 [discussing New York statutes], and the common law may impose limited duty to disclose confidential information. These duties, however, have not foreclosed the practice of psychotherapy, or other fields where limited disclosure of confidential information is required. The flaw in the *Wake* comment is that it equates the duty to disclose with the death knell of mediation. *Id.* at 210, n.5. There is little proof that this is true. Parties need not be promised absolute confidentiality in order for them to discuss a matter candidly. Partial protection from subpeona or evidentiary discovery may be appropriate, but this is a much more limited remedy than holding mediators harmless for their acts in the narrow circumstances in which a *Tarasoff* situation might occur. It should be noted that the *Wake* comment did not go that far, and that the major thrust of the author's analysis appears to be geared to the court adjunct mediator operating as an arm of the law. Comment, *Wake of Tarasoff, supra* note 49, at 221-24. Even here, however, there is no evidence demonstrating how much confidentiality mediators need in order for mediation to work. Furthermore, mediation is not a value that should be pursued in derogation of all other values in all cases. There are serious costs that arise from the protection of mediators and from imbuing mediators with special evidentiary privileges. Such privileges should not be extended unless it is clear that society will benefit. *See* Green, *supra* note 49.

The most likely impact of *Tarasoff* on mediators is that mediators will be responsible for the harm caused by others when they (1) know or should have known that such harm will occur and (2) have some special relationship with the party that disclosed the information so that there is a certain degree of control over that party or (3) have some special relationship with the potential victim of the threatened behavior. These conditions are most likely to prevail in family mediations where the negotiations are emotionally charged and, to some extent, the mediator may be perceived to carry obligations that go well beyond the expeditious settlement of the dispute. For instance, many family mediators feel that they have a special relationship to the children. In addition, the potential harm to innocent parties is immediate and often great. It is partly for this reason that most states have enacted laws requiring professionals to disclose any information that pertains to child abuse.[133]

In business and labor settings, the mediator is usually not as involved with the parties as he is in family disputes. A mediator in a business or labor context does not assume the same kind of responsibility for his clients as does a family mediator. This does not mean that the mediator has no role in settling business and labor disputes; it simply means that the emotional and professional relationship differs. Although all negotiations can be heated, labor and business disputes generally occur in a more public and less intimate context than family disputes. It is therefore unlikely that the same kinds of dangers that are present in family disputes would arise in the labor or business context.

Still, in both family, business, or labor settings, there may be situations in which the mediator will be convinced that irreparable harm to either a third party or one of the parties to the mediation is about to occur unless he warns the targeted party. No reason exists to require the mediator to keep this information confidential. If disclosure occurs, it could be argued that the mediator would be violating a duty of neutrality, or that the revelation would chill participation in the mediation. The mediator's knowledge that one party is violent is likely to affect his neutrality. If the mediator does not warn the endangered party, but keeps the information to himself, does that make him more neutral? If anything, he is hiding his bias from the parties which is arguably improper. Secondly, mediators clearly do not want to chill participation in the mediation since it may prevent dealing with underlying issues and produce an unrealistic agreement. It is quite likely that parties that reveal such information are somehow seeking help; it would be unfortunate to refuse help under the guise of some vague notion of confidentiality.

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133. OHIO REV. CODE ANN. § 5153.28 (Page 1981) is a good example.

Finally, various "confidential relationships" exist where the participants claim some social utility in keeping the information confidential. Few of these relationships are recognized by the law because of the belief that there is a more immediate social utility of disclosing information when certain conditions exist.

In sum, *Tarasoff* is an exception to the general rule that one is not responsible for the acts of another. Liability is unlikely in this situation because of the many safeguards built into the *Tarasoff* exception. However, when mediators are highly involved with their clients and bear an explicit or implicit responsibility to the parties of a mediation or certain third parties, it is reasonable to require a duty to warn where the mediator knows or should know that an innocent victim will be injured.[134]

## VI. THE OVERLAP OF THE LIABILITY THEORIES

Although different theories of liability are given various legal titles, in actuality, there is substantial overlap among tort theories, contract theories, and theories based on violation of a fiduciary duty. Before moving on to a discussion of mediation immunity, it is useful to review the landscape of mediator liability so that some of the broad concepts within and interconnections between the various liability theories may be understood.

Three relatively unique features distinguish mediator liability from analyses of other professionals' liabilities. First, the parties to the agreement remain in full legal control of the situation and are themselves responsible for the results regardless of the mediator's actions. Second, the mediator has no responsibility to any third party not involved in the mediation. Finally, the mediator has special privileges which can isolate him from any liability with respect to his actions or failure to act involving confidences.

These three concepts are exceptions pertinent only to mediator liability and will be representative in causes of action involving matters in contract, tort, or a breach of fiduciary duty. A breach of contract claim has the best chances of success, but only if there is a contractual provision on point, and only if the plaintiff can show that the breach caused damage. A professional malpractice theory is not dependent on the existence of a contract, but the plaintiff will have to satisfy the court that the mediator breached the minimal standard of practice for the profession and that the breach was a legal cause of the harm.

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134. It may be that mediators operating in criminal settings may also face some difficulties. *See* Comment, *Wake of Tarasoff, supra* note 49. Certain common law immunities may protect these mediators. *See infra* text accompanying notes 135-38. On the other hand, perhaps all mediators should be much more circumspect about their guarantees of confidentiality.

Failure-to-warn causes of action will be ineffective unless the plaintiff can meet the stringent requirements of *Tarasoff*. This may be easier to do when the person the mediator failed to warn was a participant in the mediation. Even here, however, some courts would not allow the plaintiff's cause of action. Torts based on defamation or invasion of privacy have some possibility of success, except that the mediator may claim that he or she is privileged to make those statements in a mediation context. At least in this last example, the burden will be on the mediator to prove the defense.

When viewed in context, liability claims against mediators will be difficult and usually unsuccessful. Additionally, the mediator may claim immunity from suit for all acts undertaken in the course of the mediation. This will shield the mediator from liability and can be raised at a pre-trial stage. As a result, this is the mediator's strongest defense.

## VII. MEDIATOR IMMUNITY FROM LIABILITY

### A. *The Temptation of Immunities*

Immunities shield defendants from liability.[135] No new immunities have been created recently, and existing immunities have been restricted.[136] The granting of an immunity is a matter of public policy that balances the social utility of the immunity against the social loss of being unable to attack the immune defendant.

In other words, immunity encourages carelessness by removing the incentive of cautiousness. One loss involves the concept that the possibility of liability creates important economic incentives among those in a given industry to strive to minimize the chances of liability. It is therefore not surprising that no new immunities have been created in modern American law, and that those that do exist have been severely limited. Of the immunities that remain, the two that offer the mediator the greatest hope of protection are the judicial and the arbitral immunity.

Although the judicial and arbitral immunities can be criticized upon various grounds, it is quite possible to accept the validity of both of these immunities and make a strong argument that neither of these should extend to mediators. The purposes behind the judicial and arbitral immunities are not implicated in mediation. Furthermore, it will be important to recognize that the judicial and arbitral immunities have limitations. Therefore, even if the immunity did extend to mediators, its utility may be exaggerated.

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135. "An immunity is a freedom from suit or liability." PROSSER, *supra* note 2, at 1032.

136. For instance, the scope of governmental and sovereign immunities have been restricted. "In recent years, traditional immunity doctrines have been criticized more and more, . . . ." Block, *supra* note 23, at 879.

The law of immunity is the most likely candidate for model legislation. Immunity statutes can be drafted so as not to damage general tort law. These statutes provide immunity based on public policy grounds to the certain class of individuals who mediate disputes. In fact, several mediator immunity statutes already exist.[137] Practical problems exist that inhere in drafting such a statute, such as deciding who is covered by the immunity,[138] but these problems can be overcome. In reality, however, the immunity probably is not necessary and traditional immunities do not apply.

### B. *The Purpose of the Judicial Immunity*

Judicial immunity has a long history dating back to early English Common Law.[139] The primary purpose of the immunity is the protection of judges from dissatisfied litigants who may find fault with the judge instead of looking to the weaknesses of their own case.[140]

The immunity is thought to be necessary, even though the judge has the same means of defending himself against frivolous lawsuits as any other litigant, because even the effort involved in defending frivolous suits is thought to be a serious threat to the judiciary.[141] In addition to conserving judicial resources, the immunity is based on the policy that judges who fear the possibility of a law suit as a result of their improper

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137. *See* COLO. REV. STAT. § 13-22-306(2) (Supp. 1985); OKLA. STAT. ANN. tit.12, § 1805(E) (West Supp. 1985).

138. In other words, how do we define "mediator" for the purposes of an immunity statute? Should the definition be limited to licensed or certified mediators? Should it be limited to court-appointed mediators, or mediators who operate in certain circumscribed contexts? A court might have difficulty drawing a logical distinction between the neighborhood elder who mediates an agreement between disputing neighbors and the business mediator who acts as a mediator in a commercial dispute. A legislature should be able to reach some politically acceptable compromise. On the other hand, there is no obvious reason why mediator immunity would have to be limited.

139. The Supreme Court's recent decision in Stump v. Sparkman, 435 U.S. 349 (1978), has revived scholarly interest in the scope of immunity doctrines. *See,* Comment, *What Constitutes a Judicial Act for Purposes of Judicial Immunity,* 53 FORDHAM L. REV. 1503 (1985) [hereinafter Comment, FORDHAM]; Rosenberg, *Whatever Happened to Absolute Judicial Immunity?* 21 HOUS. L. REV. 875 (1984) [hereinafter Rosenberg]; Block, *supra* note 23. Feinman & Cohen, *Suing Judges: History and Theory,* 31 S.C.L. REV. 201 (1980).

140. "Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of 'the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself.'" Stump v. Sparkman, 435 U.S. 349, 363 (1978) (footnote omitted) (quoting Bradley v. Fisher, 13 Wall 335, 347, 80 U.S. 646, 649 (1872)).

141. Several commentators have argued that an absolute judicial immunity, even one that would insulate judges from lawsuits alleging judicial malice, is the only way to assure that the purposes behind the doctrine of judicial immunity will be vindicated. These commentators fear that normal pretrial procedures will not offer sufficient protection, even if a qualified judicial immunity is promulgated. A qualified judicial immunity is a

judicial actions could become intimidated and lose independence in their decisionmaking.[142]

Historical evidence suggests that even with these important policy justifications, judicial immunity would still not be possible absent the existence of appellate review.[143] Appellate review supplies the alternative to bringing suit against a judge. Any error committed by a judge should be corrected through the appellate process and should not be addressed through the filing of a lawsuit. When viewed in this light, the judicial immunity tends to support the integrity of the appellate process by ensuring that litigants will appeal their grievances against the trial court instead of starting a collateral attack directly upon the judge.

At least one commentator defines the term "judicial act" in light of the opportunity of appellate review.[144] Certain activities performed by a judge that are subject to judicial review may be deemed covered by the immunity while other activity would be deemed legislative, administrative, or ministerial.[145] However, most jurisdictions do not define "judicial act" as logically,[146] thus the immunity is probably overly broad.

The historical requirement of the attaching judicial immunity only within the jurisdiction of the judge,[147] has been the subject of much criticism. For purposes of this Article, however, it is sufficient to understand that a judge is absolutely immune from liability if he is

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shield that can be pierced if the judge has acted with malice. *See,* Block, *supra* note 23, at 922. *See also* Comment, 47 U. MO. KAN. CITY L. REV. 81, 93 (1978), quoted in Block, *supra* note 23, at 922. "Thus, suits charging a judge with malice or corruption could not be easily disposed of under summary judgment procedures." *Id.*

Of course, there is no empirical evidence that judicial immunity is a necessary component of our system of justice. Even if we approve of judicial immunity for most cases, recent scholarly comment casts doubt on the propriety of the immunity when judges cause damage through acts not subject to appeal. *See* Block, *supra* note 23.

142. *See* Block, *supra* note 23, at 915 n.207.

143. *See id.* at 881-85, nn.11-28.

144. "Judicial immunity developed to protect the appellate system from collateral attacks on judgments, thus channeling actions upward through the appellate hierarchy for the correction of error. The availability of appellate correction of error is, therefore, absolutely central to the logic of judicial immunity. For this reason, in *Sparkman,* the action complained of prevented the complaintant from seeking normal appellate correction of error." Block, *supra* at 924.

145. *Id. Accord,* Comment FORDHAM *supra* note 139, at 1507-13. The courts appear to be putting the brakes on the burgeoning judicial immunity. *See,* Pulliam v. Allen, 104 S. Ct. 1970 (1984) (allowing suit for injunctive relief against judge under § 1983); Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980) (private agreement between judge and a party to find in party's favor not a judicial act), *cert. denied,* Zeller v. Rankin, 451 U.S. 939 (1981); Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979) (derogatory comments in media not judicial act). *See also,* "Rosenberg", *supra* note 139.

146. For example, in Stump v. Sparkman, Justice White argues that the appropriate test is "whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." Stump v. Sparkman, 435 U.S. 335, 362 (1978).

147. For a more complete discussion of the jurisdiction requirement see authorities cited at note 139, *supra.*

undertaking to perform a "judicial act." The definition of "judicial act" is crucial to the determination of the scope of judicial immunity, but no universal definition exists. Nevertheless, it is safe to state that judicial immunity is broad, all-encompassing, and highly effective in extinguishing most lawsuits against judges. It is essentially the independence of the judicial machinery that is being protected, and the existence of appellate correction that makes judicial immunity feasible.

### C. *The Extension of the Immunity to Arbitrators*

The extension of judicial immunity to arbitrators is based on the common sense concept that arbitrators are essentially performing a judicial function and should therefore enjoy the same kind of protection as do judges.[148] Arbitral immunity, sometimes called "quasi-judicial" immunity, acts as a shield only when the arbitrator performs acts that pertain to the rendering of a decision.[149] They are not immune for other administrative, contractual, or ministerial acts that fall beyond the decisionmaking function.[150] Some would argue that judicial immunity should be subject to that same limitation, but, to date, judicial immunity is still broader than arbitrator immunity.[151]

At any rate, it appears that arbitrators may be held liable if they delay issuing their decisions too long.[152] Support also exists for arguing that "expert arbitrators," like accountants or architects, who have an advisory or consultational role, are not immune for acts related to that

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148. "Because they frequently proceed quasi-judicially, arbitrators are generally afforded an immunity from liability for the consequences of their decisions or awards that are comparable to that accorded judges." Levine v. Wiss & Co., 97 N.J. 242, 250, 478 A.2d 397, 401 (1984).

"Courts of this country have long recognized immunity to protect arbitrators from civil liability for actions taken in the arbitrator's quasi-judicial capacity. Arbitral immunity, like judicial immunity, promotes fearless and independent decisionmaking. To this end, the courts have refused to hold judges and arbitrators liable for their judicial actions." Baar v. Tigerman, 140 Cal. App. 3d 979, 982-83, 189 Cal. Rptr. 834, 837 (Ct. App. 1983) (footnotes omitted).

149. "Cases in which courts have clothed arbitrators with immunity have involved disgruntled litigants who sought to hold an arbitrator liable for *alleged misconduct in arriving at a decision.*" Baar v. Tigerman, 140 Cal. App. 3d 979, 983, 189 Cal. Rptr. 834, 837 (Ct. App. 1983) (emphasis in original).

150. For instance, in *Baar*, the court held that an arbitrator was liable for failure to make findings on time. The court reasoned that the immunity for decisionmaking did not include immunity to avoid making the decision. *Id.* at 985, 189 Cal. Rptr. at 840. The court was careful to explain that arbitral and judicial immunity were not coextensive. The court was a bit vague as to how the judicial immunity was broader. "Judicial action therefore demands that civil immunity be granted a judge in all aspects of decisionmaking." *Id.* at 984, 189 Cal. Rptr. at 839. How this differs from "alleged misconduct in arriving at a decision," *id.*, is not exactly clear. It is quite apparent, however, that a judicial delay in issuing a decision would have been covered by the judicial immunity. *See, e.g.*, Wyatt v. Arnot, 7 Cal. App. 221, 94 P. 86 (1907).

151. *See supra* text accompanying notes 160-64.

152. Baar v. Tigerman, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (Ct. App. 1983).

role.[153] The arbitrator cannot be sued for issuing a decision that is clearly erroneous.

The rationale behind extending the immunity to arbitrators pursuing only their decisionmaking function appears to be related to the idea of protecting the independence of arbitrators. The law seems to favor fearless decisionmaking, unfettered by the fear of reprisal and recrimination. If the arbitrator has made a mistake in granting an award, the proper avenue is to test the arbitrator's decision in a court of competent jurisdiction. Given the purpose behind the extension of the judicial immunity to arbitrators, it can be strongly argued that the immunity should not be extended to mediators.

Mediators do not perform an adjudicatory function,[154] therefore they do not need such complete freedom from liability. Although arbitrators are free from liability pertaining to their decisionmaking roles, they are, liable for other acts. Since mediators have no decisionmaking role, arguably no immunity should exist.

This analysis is complicated somewhat by the hybrid forms of dispute resolution that are now attaining popularity.[155] Some mediators act as arbitrators in what are referred to as "med/arb." Under this model, should the mediation prove unfruitful, the mediator then arbitrates the dispute.[156] Some family mediators will send a recommendation to the judge if they cannot settle the case.[157] The question arises as to whether

153. For instance, in Levine v. Wiss & Co., 97 N.J. 242, 478 A.2d 397 (1984), accountants were designated to evaluate the value of a business owned by the husband as a basis for the negotiation of a marital dissolution. The evaluation was not done in accordance with accepted accounting procedures. The parties relied on the accountants' evaluation and made it a centerpiece of their separation agreement. *Id.* at 247, 478 A.2d at 398. After recognizing the accountants' negligence, the parties sought to have the divorce judgment, which incorporated the tainted separation agreement, vacated. The court refused to vacate the judgment. *Id.* The parties sued the accountants for negligence, but the accountants claimed arbitral immunity. *Id.* In a 4 to 3 decision, *id.* at 262, 478 A.2d at 408, the Supreme Court of New Jersey found that the accountants were not protected by arbitral immunity. *Id.* at 246, 478 A.2d at 399. The court found that the parties had contracted with the defendants who were to make an assessment with the skills expected of reasonably competent accountants. *Id.* The fact that the divorce court formally recognized the accountants with a court appointment was irrelevant. *Id.* at 247-48, 478 A.2d at 399-401. The distinction between expert consulting or assessment and arbitral decisionmaking appears to be fairly well established. *See,* Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955); E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex., 551 F.2d 1026, 1033 (5th Cir. 1977) *reh'g denied in part,* 559 F.2d 268, *cert. denied,* 434 U.S. 1067 (1978).

These cases demonstrate that even though one may be performing some of the functions of an arbitrator, one is not immune for those acts that deviate too far from the impartial judicial decisionmaking paradigm. Where one is acting as an expert, consultant, or advisor, there is probably no immunity for damages resulting from such activities.

154. *But see supra* text accompanying notes 138-47.

155. For a discussion of hybrid mediation/arbitration formats, *see* S. GOLDBERG, E. GREEN, & F. SANDER, ALTERNATIVE DISPUTE RESOLUTION 245-311 (1985) [hereinafter GOLDBERG].

156. *Id.*

157. *See* Coogler, *supra* note 8.

mediators who also act as arbitrators should be considered mediators or arbitrators for purposes of liability analysis.

It is first worth noting that this question is probably not as intractable in practice as it is when viewed theoretically. In most med/arbs, the mediation and arbitration components are carefully separated so that the arbitrator makes a decision soley on the record.[158] Even when the forms are not carefully separated, many med/arbs are structured as med/arb/opt-out, which means that the parties can withdraw from the process and select another arbitrator if the mediation is unsuccessful.[159] Further, most med/arbs envision a non-binding arbitration.[160]

Still, some instances remain in which it is unclear whether the third party is a mediator or an arbitrator.[161] It is difficult to state how the law shall respond to such a hybrid. First, even in med/arbs, the overriding goal of the neutral party is to help the parties voluntarily settle the dispute. Therefore, it is arguable that the dominant role played by the third party is mediational. This would also be true where the neutral third party operates in a mini-trial or other similar non-binding settings. Where the mediator does take on the role of a binding arbitrator, however, those acts connected to rendering the binding decision should be covered by the arbitral immunity.

Much will depend on the precise transgression of the med/arbitrator. If the med/arbitrator makes an error of fact or of law in rendering the decision, the arbitral immunity should probably apply. In many cases, the mediator's deficiencies will not be covered by the arbitral immunity. Mediators can be liable for bad expert advice and failure to perform their mediative role by not holding meetings in a timely fashion. These transgressions are actionable whether the neutral is labeled a mediator or arbitrator. However, where the neutral third party breaches confidentiality or defames a plaintiff during the proceedings, the distinction might matter. Only those utterances that pertain to the decisionmaking function should be protected by arbitral immunity. The prevailing goal of mediation is consensus, and therefore, it is hard to see why the arbitral immunity should be extended to mediation.

### D. *The Para Judge Angle*

One final analysis of the immunity issue relevant to this discussion must be addressed. Judges enjoy a broader immunity than arbitrators, even though a strong argument exists that the law should not grant

158. GOLDBERG, *supra* note 154, at 256-59.
159. *Id.*
160. *Id.*
161. Some of this role confusion is troubling and thus creates a strong argument against the med/arb model. *See id.* at 246.

such a broad immunity.[162] Nevertheless, judges are immune for all of their judicial acts, not just acts of decisionmaking.[163] It can thus be argued that when mediators act as part of a court referral project, they are replacing the judge, and should enjoy the protection of the judicial immunity. In other words, even if the narrower arbitral immunity is not extended to mediators, mediators who act as court adjuncts should be protected by the broader judicial immunity.

This argument, however, has at least two problems. First, it is irrelevant whether or not a mediator is appointed by a court.[164] Second, based on modern scholarship on judicial immunity,[165] such an extension would only compound a mistake in the law and intensify the impact of bad public policy.[166]

## VIII. CONCLUSION

Given the difficulty for resolving the issue of mediator liability, it may be best to allow it to develop naturally from common law. Although a mediator's errors may cause damage, courts are likely to view mediators as mere facilitators. Since so few standards exist that will enable courts to discern cases in which liability should be imposed, only the extremely gross abuses will trigger liability for the practitioner. In short, mediators do not need protection from common law liability at this time. Furthermore, few standards exist in the area of mediator liability which is one reason why only gross abuses are rightfully discovered.

If legislation is established providing for immunity or altering liability rules, the high standard of the profession may decline. The cost of this decline in professional conduct would be too great when compared with the socially redeeming value of mediation. Therefore, it may not be wise to propose mediator liability statutes at this time.

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162. *See* Block, *supra* note 23, at 879-81.

163. *But see supra* text accompanying notes 141-43, indicating some limits on the immunity.

164. Levine v. Wiss & Co., 97 N.J. 242, 252, 478 A.2d 397, 402 (1984).

165. Block, *supra* note 23, at 880.

166. It may be, however, that the court-adjunct mediator is so institutionally distinct, that he requires additional protection. *See,* Note, *Sultans supra* note 3, at 1881-82. I suspect that the real problem is that some court mediators are under-insured, under-trained, and under-supported. I do not think it serves society's interests or the mediation profession's interest to preserve this situation. One way to bring pressure for change is to show that mediators in these programs face responsibilities and legal duties. Those working in these programs should therefore obtain proper training, support, and appropriate insurance.