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A Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law

By David A. Hoffman and Natasha A. Affolder

To many mediators, “UPL” is an acronym with an increasingly ominous ring.

This growing concern about the unauthorized practice of law (UPL) arises from reports around the country of charges filed against mediators who are not lawyers. These prosecutions – or in some cases warnings – are primarily directed at divorce mediators as a result of their drafting of detailed marital settlement agreements. However, all mediators have reason to be concerned, because of uncertainties about what constitutes UPL in the context of mediation.

The legal standards governing UPL enforcement are highly indefinite, and vary by state.¹ The patterns of enforcement are also unpredictable, and disclaimers in mediation agreements may not be legally effective.² Yet the stakes are high, as the potential consequences for a mediator of being found to engage in the unauthorized practice of law range from civil and criminal liability to ethics charges. This article surveys today’s terrain, and argues that it’s time for new, clear and uniform standards for distinguishing between mediation and the practice of law.

Statutes, interpretations

There are two main reasons for UPL statutes. One is consumer protection – i.e., to ensure the competence and integrity of people who practice law, and to make sure that people who are seeking out legal services have the protection of the attorney-client privilege. The other reason, which attorneys may be more reluctant to admit, is that UPL statutes enable lawyers to maintain a monopoly over certain services. This means that prices can be maintained and competition limited.

UPL prohibitions are enforced by state and local agencies, such as the state Attorney General’s office, the district attorney’s office, and state bar UPL committees. UPL prosecutions tend to target law-related activities such as the work of accountants, real estate brokers,³ workers’ compensation specialists,⁴ eviction service professionals,⁵ title companies⁶ and the makers of “do-it-yourself” divorce kits.⁷ In several states, mediators have also become targets.⁸

The courts have developed five tests to distinguish the practice of law from other activities, a fact that itself underscores the difficulty in defining UPL. As applied to mediation, these tests are:

1. *The ‘Commonly Understood’ Test.* This broad test poses the question of whether mediation is commonly understood to be a part of the practice of law in the community. Factors that would inform this determination might include, for example, the extent to which lawyers in a given community, as opposed to non-lawyers, routinely provide mediation services.

2. *The ‘Client Reliance’ Test.* This test asks whether the parties who use a mediator believe they are receiving legal services. Evidence of what services the parties think they may

be getting can sometimes be found in the advertising materials of the mediator, or in a written agreement to participate in mediation. Under this test, whether the mediator is engaging in legal practice could be different in every case, depending on the perspectives of the individual parties.

3. *The 'Relating Law to Specific Facts' Test.* This test asks whether the mediator is engaged in activities "relating the law to specific facts" -- in essence, whether the mediation is an evaluative process. Prof. Carrie Menkel-Meadow, for example, argues that when a mediator evaluates the strengths and weaknesses of the parties' case by applying legal principles to a specific fact situation, he or she is engaged in the practice of law.⁹

4. *The 'Affecting Legal Rights' Test.* This test defines the practice of law as those activities affecting a person's legal rights -- an extremely broad test. Mediations involving litigation matters by definition involve the parties' legal rights. Even in non-litigation matters (such as neighborhood, family, or organizational disputes), however, a mediation can affect the parties' legal rights if the mediation results in a legally enforceable settlement agreement.

5. *The 'Attorney-Client Relationship' Test.* This test asks whether the relationship between the mediator and the parties is tantamount to an attorney-client relationship. One factor affecting this determination in the context of mediation might be whether the parties in the mediation were represented by counsel -- either at the negotiating table with the mediator and the parties, or in close consultation with the parties during the mediation but not actually attending mediation sessions. If not, there is greater risk in some situations that the parties could view the mediator as performing the role of attorney.

How useful are these tests? At a minimum, they underscore the point that there is no fixed definition of the practice of law in the context of mediation or otherwise. Moreover, courts are often also interested in matters that are significant but not mentioned in these tests -- particularly the question of money. Some courts and advisory bodies have thus found that the issue of whether an individual is paid is important in defining an activity as the practice of law.¹⁰

Two states set standards

At least two states -- Virginia and North Carolina -- have developed UPL standards specifically applicable to mediation. Rather than rely on any of the five tests described above, drafters in those two states identified the most common categories of mediator activities that could be considered the practice of law: providing legal advice to the parties, and drafting settlement agreements in a manner that goes beyond serving as a scrivener for the parties.

Legal advice. The Virginia *Guidelines on Mediation and the Unauthorized Practice of Law*, drafted by the Department of Dispute Resolution Services of the Supreme Court of Virginia, attempt to draw a line between providing legal information (which is not legal practice) and giving legal advice (which is).

Legal advice is defined in the Virginia Guidelines as applying legal principles to facts in such a way as to (1) predict a specific outcome of a legal issue or (2) direct, urge, or recommend a course of action by a disputant. Under these Guidelines, mediators can provide disputants with copies of relevant statutes or court cases, and they may state what they believe the law to be on a given legal topic, without being deemed to be practicing law.

However, the Virginia Guidelines prohibit a mediator from describing the application of the law to the parties' situation. They offer the following two statements as examples; the former would be permissible while the latter would not: "Generally speaking, a contract for the lease of goods that exceeds \$1,000 must be in writing to be enforceable. Since your agreement was in writing, you would have no problem getting a court to enforce it."

The North Carolina *Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law*, adopted by the North Carolina Bar in 1999, likewise permit mediators to provide "legal information," but prohibit mediators from advising or giving an "opinion upon the legal rights of any person, firm or corporation." Legal information may include printed material, such as brochures prepared by the bar association; presumably, providing copies of statutes, cases, or rules would fall within this category. But, in the words of the North Carolina Guidelines, "there are no bright lines."

Settlement agreements. With respect to the drafting of settlement agreements for the parties, the Virginia Guidelines recommend that mediators serve simply as scribes, using only those terms that the parties specifically request and avoiding legal "boilerplate."

The North Carolina Guidelines include, primarily for the benefit of non-attorney mediators, samples of recommended language for an agreement to mediate and a memorandum of understanding. The North Carolina Guidelines state that mediators "should not sign or initial" a memorandum of understanding, and if they do, they "shall advise the parties in writing that the signature does not constitute an opinion regarding the content or legal effect of any such document."

From the Guidelines formulated in Virginia and North Carolina, and the five tests discussed above, one can see that the biggest risk areas for mediators who are not lawyers, are activities that involve (a) applying legal norms to specific sets of facts, and (b) drafting documents that may be legally binding.

A good start, but...

The Virginia and North Carolina Guidelines are among the first attempts to articulate a UPL standard applicable specifically to mediators. The Virginia Guidelines offer a particularly thoughtful and detailed analysis of UPL issues, and advance the discussion of these issues by including examples of permissible and impermissible actions by mediators.

The distinction drawn in both sets of Guidelines between "legal information" and "legal advice" is a familiar dividing line between permissible and impermissible practice from the standpoint of mediator ethics.¹¹ One should not underestimate, however, the difficulty of enforcing a standard based on this distinction. Consider, for example, whether the following hypothetical statements made by a mediator constitute legal advice by "predicting a specific outcome of a legal issue."

- (a) "I think the plaintiff has a better liability case than you [the defendant] do."
- (b) "The plaintiff seems to have a better liability case than you do."
- (c) "The plaintiff may have a better liability case than you do."
- (d) "I can see how a jury might think the plaintiff has a better liability case than you do."

(e) “Do you really think you have a better liability case than the plaintiff?”

Statements (a) and (b) seem to cross the line; many would say the (d) and (e) do not. Is (c) UPL?

Enforcing a standard based on a prohibition against “directing, urging, or recommending a course of action by a disputant” is equally difficult. Consider the following hypothetical statements by a mediator to a party in a private session:

(a) “I think your interests would be well served by this proposal.”

(b) “I think you should strongly consider this proposal.”

(c) “This proposal could turn out to be a good thing for you.”

(d) “I can see how this proposal might be better than going to trial.”

(e) “Do you really think you will do better than this at trial?”

Again, statements (a) and (b) seem to cross the line, and many would say (d) and (e) do not. Is (c) UPL?

With respect to settlement agreements, both the Virginia and North Carolina Guidelines set boundaries for mediators that may be difficult, in practice, to enforce. In the subtle and complex interactions of parties and mediator while they are creating a memorandum of agreement, it will often be difficult to discern whether the mediator’s involvement has altered or enhanced the parties’ own language.

In short, there is an unavoidable measure of uncertainty in the various definitions of UPL, and for regulators an irreducible measure of discretion that must be employed when applying these definitions.

New approach needed

Uniformity from state to state would advance the process of drawing clear lines between mediation and the practice of law. The efforts currently under way to draft a Uniform Mediation Act could provide an opportunity for greater uniformity if the statute addresses this issue.¹²

However, there is widespread disagreement about how mediation should be defined, and this disagreement stands in the way of consensus on the boundary between mediation and UPL. For example, for those mediators who believe that providing the parties with “reality testing” and other kinds of evaluative feedback is not only permissible but often an essential part of the mediation process,¹³ the Virginia and North Carolina Guidelines are anathema. These mediators, many of whom mediate disputes in which lawyers (and litigation) are involved, believe they are not practicing law and that there is no risk of role confusion -- and therefore no reason to describe their work as UPL -- because the parties and their lawyers are sophisticated participants in the process.

For other mediators, however, any form of evaluation is anathema, because mediation (in their view) should be solely facilitative. These mediators, many (but not all) of whom practice in a community setting, believe that any definition of the line between mediation and UPL which permits evaluation and agreement-drafting by mediators fundamentally misconstrues the mediation process and debases it.

Yet another group of mediators believes that mediation can be practiced in many ways -- including evaluative forms of mediation -- but are nervous about non-lawyers providing case evaluation and agreement-drafting services. For these mediators, a primary concern is protection of the public from people who are unqualified to provide such services.

Integrating competing viewpoints

Integrating these points of view is no mean feat. One way to begin seeking such an integration is to focus separately, as the Virginia and North Carolina Guidelines do, on (a) the drafting of settlement agreements, and (b) providing legal advice, because these are the two primary areas of concern with respect to UPL.

In our view it makes sense to treat agreement-drafting quite differently from other kinds of mediator behavior for purposes of UPL enforcement. It is difficult to view the drafting of settlement agreements by mediators -- particularly detailed marital settlement agreements that go far beyond the words of the parties themselves -- as something other than the practice of law. Restricting such activities to lawyers does not impair the ability of mediators to assist the parties in reaching agreement, because the parties can either hire counsel to draft the agreement, or rely on the mediator to help them develop a simpler memorandum of understanding using their own language, or, in a litigated matter, ask the court to enter the terms of a memorandum of understanding as a court order. This approach is consistent with that of several ethical opinions from bar associations, which define the drafting of settlement agreements by mediators as the practice of law and provide guidance for the drafting of such agreements by lawyer-mediators.¹⁴

UPL enforcement: a disturbingly blunt instrument

With respect to providing legal “advice,” however, it seems appropriate to create a broad zone of protection from UPL enforcement for mediators. The reason for this is two-fold. First, it is virtually impossible to draw a sensible -- i.e., defensible -- line on the spectrum described above between reality testing and evaluating the parties’ claims and contentions. Second, unlike the words of a settlement agreement, which define the rights and obligations of the parties, a mediator’s evaluative feedback about a claim or contention -- or even a mediator’s recommendation -- leaves the parties in control of the decision whether to create enforceable rights or obligations.

To be sure, mediators can go overboard. Providing evaluative feedback or recommending that the parties consider a particular proposal or course of action can become so directive as to impair that party’s self-determination -- an essential element in the mediation process. However, given the subtlety of such a determination, and the many principles of mediation ethics that intersect in such a determination (e.g., informed consent, voluntariness, and confidentiality), UPL enforcement is a disturbingly blunt instrument with which to enforce the practice standards of the mediation field.

In other words, so long as the mediator’s so-called “advice” arises in the context of his or her serving as an intermediary, assisting in the negotiation of a dispute, and providing feedback to the parties about their case solely as a function of that intermediary role, these activities should not be considered UPL. Accordingly, it may be appropriate for UPL enforcers to cede entirely to those responsible for promulgating and enforcing mediation ethics the job of deciding

when, if ever, mediators should be sanctioned for crossing the line from facilitative to evaluative forms of mediation. Such a division of labor would leave the wide range of activities engaged in by mediators -- whether they are facilitative, evaluative, or transformative in their orientation -- entirely outside the scope of UPL enforcement.

Relying on mediation ethics

Currently, many if not most codes of mediation ethics prohibit mediators from providing professional advice or services (such as law or psychotherapy) in the context of mediation.¹⁵ However, the very definition of “professional advice” or “professional services” arises from a relationship far different from the relationship between the mediator and the parties. Existing codes of ethics for mediators also emphasize the role of “competence,” and therefore one might reasonably expect the enforcement of these codes, with respect to a mediator’s evaluative interventions, to take into account whether the mediator is qualified by training or experience to provide such interventions. The principle of “self-determination” might also be interpreted in such a way as to bar the use of evaluative feedback except in those instances where the parties request it.

In any event, the job of making these difficult determinations, which implicate passionately debated principles of mediation ethics and practice,¹⁶ should be in the hands of mediators not prosecutors. Of course it may be politically naive to think that UPL regulators and those responsible for bar discipline will permit non-lawyer mediators to provide case evaluations simply because they call it mediation. However, the alternative -- continuing to permit these issues to be resolved by governmental agencies with little experience or understanding of mediation -- is an unappealing prospect.

A “hands off” approach to mediation by UPL and bar regulators might be more acceptable to them if there were some form of regulation of mediation. Certification and other types of formal regulation of mediation is a topic that lies outside the scope of this article. Suffice it to say, however, that there is a wide range of views among mediators about the desirability of such regulation. One factor to consider as regulation is debated is whether it might enable mediators to prevent regulation by those outside the field of mediation, such as those who enforce UPL statutes.

Conclusion: Need for greater clarity about UPL

Clear standards and uniform laws, while desirable, are not a cure-all. Applying those standards in a manner that is sensitive to the nuances of mediation practice will be difficult. And any regulation of the practice of mediation -- a confidential process -- poses the same risks that exist in the regulation of law, medicine, psychotherapy and other occupations where confidentiality is closely guarded. Yet however difficult the job of setting and enforcing standards may be, the field of mediation needs greater clarity with respect to this issue, so that mediators -- regardless of whether they are lawyers or not¹⁷ -- can perform their useful work without having to wonder, at each step of the way, whether they should be looking over their shoulders.

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Endnotes

¹ There has been considerable scholarly discussion of whether mediation per se, or certain aspects of mediation practice, amount to the practice of law. See generally, N. Rogers and C. McEwen, *Mediation: Law, Policy, Practice* ch. 10 (1994). Compare C. Menkel-Meadow, “Is Mediation the Practice of Law?” 14 *Alternatives* 57 (1996) (contending the certain aspects of mediation, such as agreement writing, amount to the practice of law) with B. Meyerson, “Lawyers Who Mediate Are Not Practicing Law,” 14 *Alternatives* 74 (1996) (arguing that mediation is not the practice of law because there is no attorney-client relationship).

2. It is common for mediators to ask the parties to sign an agreement to mediate, in which the parties acknowledge that the mediator is not providing legal advice in connection with the mediation, and that the mediator is not representing either or both parties as an attorney at any time in connection with the dispute. However, where the parties are not represented by counsel, there may be a question as to whether they understand the import of such a disclaimer.

3. *Sharon Village Ltd. v. Licking County Board of Revision*, 78 Ohio St. 3d 479 (Ohio 1997) (agent, a non-lawyer, who prepared legal documents and gave advice to his clients on their real estate property taxes, was held to have engaged in the unauthorized practice of law).

4. *Turner v. Kentucky Bar Association*, 980 S.W.2d 560 (Ky. 1998) (holding that workers’ claims specialists could process claims as long as their work is supervised by an attorney. They could not represent parties before adjudicative tribunals as this would involve the unauthorized practice of law).

5. *People v. Merchants Protective Corporation*, 215 Cal. App. 3d 1599 (Ct. App. Cal. 1989) (finding that eviction service professionals engaged in UPL).

6. *State Bar v. Guardian Abstract & Title Co.*, 575 P.2d 943 (N.M. 1978) (practice of title insurance company employees filling in blanks on attorney-drafted real estate legal instruments did not constitute UPL; however, exercising judgment about which standardized form to use did constitute UPL).

7. *Oregon State Bar v. Gilchrist*, 272 Ore. 552 (Ore. 1975) (merely selling divorce kits does not constitute the practice of law but personal contact with customers including “consultation, explanation, recommendation, or advice or other assistance in selecting particular forms” would cross the line).

8. *See e.g. Werle v. Rhode Island Bar Ass’n*, 755 F.2d 195, 199-200 (CA1 1985) (finding no constitutional violation in a bar association letter to a psychologist-mediator requesting cessation

of divorce mediation business).

9. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 428 (1997).

10. In Tennessee, two advisory opinions from the Board of Professional Responsibility of the state's Supreme Court have been issued on the subject of whether mediation services constitute the unauthorized practice of law. The Committee decided that the mediation program which charged a fee was engaging in the practice of law (Opinion 83-F-39). And yet another program which was providing mediation services for free was not engaged in the practice of law (Opinion 85-F-98). This distinction seems both unprincipled and unhelpful for defining the practice of law.

11. *See, e.g.*, Rule 9(c)(iv) of the ethical rules in the Massachusetts Uniform Rules on Dispute Resolution: "A neutral may use his or her knowledge to inform the parties' deliberations, but shall not provide legal advice, counseling, or other professional services in connection with the dispute resolution process."

12. *See* Richard C. Reuben and Nancy H. Rogers, *Choppy Waters: Movement Toward a Uniform Confidentiality Privilege Faces Cross-Currents*, 5 DISP. RESOL. MAG. 4 (1998).

¹³ *See* L. Love & K. Kovach, "Evaluative' Mediation is an Oxymoron," *Alternatives* (March 1996).

¹⁴ *See, e.g.*, Massachusetts Bar Association Ethics Opinion 85-3 (1985); Boston Bar Association Ethics Opinion 78-1 (1978).

¹⁵ *See, e.g.*, AAA/ABA/SPIDR Standards of Practice for Mediators ("A mediator should . . . refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.").

¹⁶ *See, e.g.*, J. Folger & R. Baruch Bush, *The Promise of Mediation* (1994).

¹⁷ In April 1999, the ABA Section of Dispute Resolution adopted a resolution recognizing the importance of permitting nonlawyers to serve as mediators. The Resolution states in part: "The Section of Dispute Resolution . . . believes that the eligibility criteria for dispute resolution programs should permit all individuals who have the appropriate training and qualifications to serve as neutrals, regardless of whether they are lawyers."