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The New Maryland Rules of Professional Conduct and Mediation: Perplexing Questions Answered and Perplexing Questions That Remain

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ARTICLE

THE NEW MARYLAND RULES OF PROFESSIONAL CONDUCT AND MEDIATION: PERPLEXING QUESTIONS ANSWERED AND PERPLEXING QUESTIONS THAT REMAIN

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Attorneys have become increasingly involved in mediation in recent years both as mediators and as counsel to parties in mediation. The rules of professional conduct governing attorneys have slowly begun to reflect the significance of this new role.

The American Bar Association's ("ABA") "Commission on Evaluation of the Rules of Professional Conduct," better known as the "Ethics 2000 Commission," considered some of the ethical questions raised by the growth of mediation, as well as a host of other issues. After considering the work of the Ethics 2000 Commission, the ABA House of Delegates adopted extensive changes to the ABA Model Rules of Professional Conduct in 2002 and 2003 in light of the work of the Ethics 2000 Commission ("Ethics 2000 Amendments").

As have courts in many other jurisdictions,[1] the Maryland Court of Appeals appointed a committee to undertake a thorough review of its Rules of Professional Conduct in light of the Ethics 2000 Amendments and to recommend changes where appropriate.[2] The Committee offered its recommendations to the Court.[3] The Maryland Court of Appeals adopted most of the Committee's recommendations and

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1. For an ongoing list of the status of jurisdictions' review and adoption of the Ethics 2000 Amendments, *see* http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf (last visited Nov. 15, 2005).
2. http://www.mdarchives.state.md.us/msa/mdmanual/29ap/html/com/defunct/ sethics.html (last visited Dec. 30, 2005).
3. *Id.*

ordered numerous revisions to the Maryland Rules of Professional Conduct ("the Amended MRPC"), effective July 1, 2005.[4]

A substantial portion of these changes derives from the Ethics 2000 Amendments to the ABA Model Rules, while others are Maryland additions or changes. Given that the Amended MRPC has only became effective as of July 1, 2005, as of this writing, there have been no judicial interpretations or Maryland Bar Association Ethics Opinions construing these rules. While most amendments do not address mediation, a substantial number do. This article will offer the first sustained examination of the Amended MRPC as it relates to lawyers and mediation. The article examines amendments that have an impact on lawyers who mediate – "attorney-mediators" – and amendments that have an impact on lawyers who represent clients in mediation. This article concludes by surveying areas of uncertainty that remain about the ethical obligations surrounding lawyers involved in mediation after the adoption of the Amended MRPC.

Given that this article focuses on the intersection of legal ethics and mediation as embodied in the newly Amended MRPC, I will not attempt a wholesale review of the ethical obligations of mediators – a controversial and unsettled issue in its own right. Rather, I will focus almost exclusively on how the Amended MRPC sheds light on the ethical obligations of lawyers acting as mediators and lawyers representing clients in mediation. I will go beyond this focus only when necessary to insure a meaningful treatment of a given issue.

One final caveat: in order to maintain readability and provide an overview, this article sometimes summarizes the Amended MRPC Rules and their associated Comments. The practitioner, however, should always refer to the complete Rules and Comments for direction because they are the final binding word on ethical obligations of Maryland attorneys. More importantly, since these Rules remain the object of intense scrutiny by the bench and bar, they will no doubt be revised and amended in the coming years.

I. MEDIATION IN MARYLAND

The term "mediation" is often used loosely, and there is no consensus among practitioners or scholars as to what "mediation" is or is not. In Maryland and elsewhere, mediation is practiced in an

4. 32 Md. Reg. 421, 528-29 (March 4, 2005) (citing Rules Order, Md. Ct. App. (Feb. 8, 2005)).

extraordinary range of contexts, including disputes involving families or commercial entities, environmental issues, community issues, labor-management relations, and criminal matters.[5]

Moreover, in Maryland, as in most jurisdictions, mediation takes place in both private and judicially-referred settings. Some mediation is extra-judicial: parties can make arrangements with individual mediators either before or after formal judicial proceedings or may pursue mediation through a number of non-profit organizations, such as "Community Mediation Centers," which are available in many counties in Maryland.[6] In terms of court-referred mediation, well-established mediation programs exist under the auspices of both Maryland Circuit and District Courts.[7]

Defining "mediation" is thus a tangle. One leading text on mediation lists no less than eleven "definitions of mediation."[8] Nevertheless, Maryland has a legal definition of mediation, albeit one limited to court-referred mediation in Circuit Court. Rule 17-102(d) – discussed in more detail below[9] – defines mediation as follows:

> "'Mediation' means a process in which the parties work with one or more impartial mediators who, without providing legal advice, assist the parties in reaching their own voluntary agreement for the resolution of the disputes or issues in the dispute. A mediator may identify issues and options, assist the parties or their attorneys in exploring the needs underlying their respective positions, and, upon request, record points of agreement reached by the parties. While acting as a mediator, the mediator does not engage in arbitration, neutral case evaluation, neutral fact-finding, or other alternative dispute resolution processes and does not recommend the terms of an agreement.[10]

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5. Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 Clin. L. Rev. 833, 847-48 (2004).
6. For information on the Maryland Association of Community Mediation Centers, *see* http://www.marylandmediation.org/embedded/embedcenters.htm (last visited Dec. 29, 2005).
7. Title 17 of the Maryland Rules governs mediation in Circuit Courts. Many District Courts in individual counties have also initiated mediation programs. For an "ADR Map" of mediation programs associated with Maryland District courts, *see* http:/www/courts.state.md.us/district/ADR/adrmap.html (last visited Nov. 19, 2005).
8. KIMBERLEE KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 27-28 (3d ed. 2004).
9. *See* text accompanying notes 47, 71.
10. MD. RULE 17-102(d) (2005).

This definition scrupulously seeks to maintain the distinctiveness of mediation. Mediation is not conventional adversarial adjudication. It is mediation's distinctiveness that furnishes some of the difficult ethical quandaries that face lawyers involved in mediation, and it is to those quandaries that this article now turns.

II. RULES GOVERNING ATTORNEY-MEDIATORS

The Amended MRPC offers explicit ethical guidance for the attorney-mediator. One completely new Rule regulates the communications of attorney-mediators, albeit in a limited context, and a new conflicts provisions limits the ability of attorney-mediators to represent parties in mediation.

A. Rule 2.4 – Disclosing the Role of an Attorney-Mediator

A striking addition to the Amended MRPC is Rule 2.4 – a Rule proposed in the Ethics 2000 Amendments and adopted verbatim in Maryland. As noted by the Reporter for the Ethics 2000 Amendments, the impetus behind the adoption of this Rule is that "lawyers are increasingly serving" as attorney-mediators.[11] As a result, for the first time in the history of professional ethics governing lawyers, there is now a Rule that, as its title suggests, addresses issues when lawyers are "serving as third party neutrals."

Despite its symbolic importance, the actual substance of Rule 2.4 is relatively modest. At its core, Rule 2.4 addresses situations where parties to mediation misconstrue the role of an attorney-mediator as a lawyer who is "representing them." To help counteract confusion on this point, the Rule tracks the long-established language of Rule 4.3, which provides limitations on what lawyers can say when communicating with unrepresented persons.

Rule 2.4 first defines the nature of a lawyer who is acting as a "third-party neutral." The Rule carefully notes that such a "neutral" may include "service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter."[12] It is significant that for the first time the Rules refer to lawyers acting on behalf of individuals in a strictly non-

11. Model Rule 2.4, *Reporter's Explanation of Changes*, Report 401 on Amendments to Model Rules of Professional Conduct (Ethics 2000) to the House of Delegates of the American Bar Association (2002).

12. MRPC R. 2.4(a) cmt. [1] (2005) (The Rule's Comments further allude to other roles usually associated with being a "third-party neutral," such as "conciliator or evaluator.").

representational capacity by explicitly stating that a third-party neutral "assists two or more persons *who are not clients*."[13]

The Rule and its associated comments place the following obligations on attorney-mediators:

1. When one of the parties to mediation is not represented by an attorney, "[a] lawyer serving as third-party neutral *shall* inform" the party or parties "that the lawyer is not representing them."[14]
2. "When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."[15]
3. In explaining this difference, the attorney-mediator may need to, as appropriate, explain "the inapplicability of the attorney-client evidentiary privilege."[16]
4. Lawyers acting as third-party neutrals "may . . . be subject to various codes of ethics" adopted in Maryland or by other non-governmental organizations.[17]

While this Rule is especially pertinent in the many court-referred mediations currently taking place in Maryland involving *pro se* participants who might want and need legal advice but cannot obtain it – a situation particularly common in family law mediations[18] – the Rule, by its terms, is not limited to this situation.

B. Rule 1.12 - Conflicts of Interest Involving Attorney-Mediators

Previously, Rule 1.12 addressed conflicts of interest involving "Judges and Arbitrators." The newly amended Rule 1.12 now extends its provisions to "mediator[s] or other third-party neutral[s]."[19] The Rule is largely intuitive. It prohibits an attorney-mediator from

13. *Id.* (emphasis added).
14. MRPC R. 2.4(b) (2005) (emphasis added).
15. *Id.*
16. MRPC R. 2.4 cmt. [3] (2005).
17. I address the potential tension between conflicting ethical obligations at *infra* text accompanying notes 77-97.
18. *See* MD. RULE 9-205 (providing for referral of "child custody and visitation disputes" to mediation). The Article addresses this issue in greater detail *infra* text accompanying notes 58-60.
19. MRPC R. 1.12 (2005).

"represent[ing] anyone in connection with a matter" in which the attorney-mediator had previously acted as a mediator absent "informed consent, confirmed in writing" from all parties.[20] This disqualification is "imputed" to the attorney-mediator's firm unless the attorney-mediator is properly "screened" from participation in the case.[21] A Comment to the Rule notes that "[o]ther ... codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification."[22] The Rule also prohibits an attorney-mediator from negotiating for employment with a party or with an attorney representing a party in mediation.[23]

By its terms, the Amended MRPC 1.12 addresses the situation where an attorney-mediator seeks to represent a mediation participant *after* conclusion of the mediation. It would also almost certainly be a conflict of interest for an attorney to: 1) act as a mediator in a dispute in which he or she had previously represented one party; or 2) act as a mediator in a dispute in which he or she had previously represented multiple parties. While it is difficult to generalize, such an act would offend norms and codes of mediation ethics governing mediator impartiality and neutrality.[24] While some mediators may choose to mediate in such circumstances if all parties to the mediation consent, many mediators would consider prior legal representation of a party or parties to a mediation as a disqualifying conflict of interest even if all parties offer to consent.

III. RULES OF PROFESSIONAL CONDUCT GOVERNING ATTORNEYS REPRESENTING CLIENTS

Not only are lawyers increasingly acting as mediators, but the rise of mediation means that more and more lawyers are representing clients who are parties to mediation. This newly expanding role raises important issues.

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20. MRPC R. 1.12(a)(2005).
21. MRPC R. 1.12(c) (2005).
22. MRPC R. 1.12, cmt. [3] (2005).
23. MRPC R. 1.12(b) (2005).
24. For example, the MARYLAND STANDARDS OF CONDUCT FOR MEDIATORS, ARBITRATORS, AND OTHER ADR PRACTITIONERS notes that if a "conflict of interest casts serious doubt on the integrity of the process, the neutral shall decline to proceed" even if the parties offer to consent. MARYLAND STANDARDS OF CONDUCT FOR MEDIATORS, ARBITRATORS, AND OTHER ADR PRACTITIONERS, STANDARD I (2001), *see* http://www.courts.state.md.us/macro/standardsfinal.pdf [hereinafter *Standards*].

A. *The Applicability of the Maryland Rules of Professional Conduct to Lawyers Representing Clients in Mediation*

Amid substantial uncertainty, one thing is clear in this area: when a lawyer is representing a client in mediation, the Amended MRPC applies to that lawyer's conduct.[25] This does not mean that conflicting obligations will not arise between the rules and norms governing the lawyer's role and those governing mediation – an issue to be explored later[26] – but a lawyer representing a party in mediation is acting as a lawyer in the traditional sense of representing clients, and thus is bound by the Amended MRPC.

There is one relatively technical issue relating to representing clients in mediation that the Amended MRPC definitively answers. A lawyer's duty of candor, embodied in the Amended MRPC in both Rule 3.3 ("Candor to the Tribunal") and Rule 4.1 ("Truthfulness in Statements to Others"), is governed by Rule 4.1 alone when a lawyer represents a party in mediation. This is because "mediation" is, by definition, not a "Tribunal" pursuant to the Amended MRPC.[27] As a result, the intricate set of mandatory and discretionary disclosures set forth by Rule 3.3 when lawyers appear before a Tribunal – most commonly a court – do not apply to lawyers representing parties in mediation. Nevertheless, Rule 4.1, which does apply to lawyers representing clients in mediation, obligates a lawyer representing a client in mediation to "not knowingly make a false statement of material fact or law to a third person" or "fail to disclose a material fact when" needed "to avoid assisting a criminal or fraudulent act by a client."

B. *Counseling Clients About the Availability of Mediation*

Arguably the most significant change in the Amended MRPC relating to mediation is an inconspicuous change to the wording of

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25. MRPC R. 2.4 cmt. [5] (2005) (Makes explicit that "Lawyers who represent clients in alternative dispute resolution processes are governed by the Maryland Lawyers' Rules of Professional Conduct"). This is not to say, however, that representing a client in mediation does not raise a series of challenging questions regarding what effective representation can or should be in a non-adversarial context. For some treatment of these issues, *see* Harold I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING A PROBLEM-SOLVING PROCESS (2004); *see also* Rubinson, *supra* note 5.

26. *See infra* text accompanying notes 77-97.

27. MRPC R. 2.4, cmt. [5] (2005). For a definition of "Tribunal," *see* Rule 1.0(o).

Comment [5] to Rule 2.1. Rule 2.1, by its terms, is the only rule in the Amended MRPC that addresses the lawyer's role as "Advisor."

Before exploring the change itself, some background is in order. With the rise of mediation, increasing numbers of commentators have been calling for lawyers to counsel clients about the availability of ADR – and mediation in particular – as a more cost effective, less adversarial mode of resolving disputes.[28] Some have argued that this is a tall order. For example, one leading commentator on mediation has noted that some lawyers may have a built-in bias against mediation because of "how lawyers look at the world, the economics and structure of contemporary law practice, and the lack of training in mediation."[29] Others claim that the rise of mediation was, in part, an attempt to move away from the adversarial norms of legal representation and that mediation's most distinctive characteristic – the direct participation of parties (not lawyers) as the primary force behind resolving disputes – is inherently inconsistent with the norms of a system through which lawyers act as agents for parties to resolve disputes.[30]

Somewhat inconsistent with these relatively pessimistic assessments of lawyers and mediation is a substantial push by national and state courts for an expansion of mediation programs. In Maryland, Chief Judge Robert M. Bell of the Maryland Court of Appeals created a Maryland ADR Commission in 1998, which ultimately led to the establishment of the Maryland Mediation and Conflict Resolution Office ("MACRO"), a court-related agency that supports and acts as a resource for a wide variety of ADR initiatives in the State.[31] While some of the judiciary's embrace of mediation is no doubt motivated by a desire to manage overwhelming dockets, many judges view mediation as a potentially more constructive and comprehensive alternative to litigation that generates greater satisfaction among parties.[32]

The increasing acceptance of mediation as a meaningful alternative to litigation led to the addition of new language to Comment [5] of

28. *See, e.g.*, Craig A McEwan, et al., *Bring in the Lawyers: Challenging the Dominant Approaches To Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317 (1995); Robert Rubinson, *Client Counseling, Mediation and Alternative Narratives of Dispute Resolution*, 10 Clin. L. Rev. 833 (2004).
29. Leonard Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29, 57-59 (1982).
30. *Id.*
31. *Id., see* http://www.courts.state.md.us/macro/ (last visited November 19, 2005) (MACRO's website describes its history and activities).
32. Robert Rubinson, *A Theory of Access to Justice*, 29 J. Legal Prof. 89, 151 (2005).

Rule 2.1. This change was included in the Ethics 2000 Amendments and adopted verbatim in Maryland. The additional language is as follows: "[W]hen a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." The language is a striking example of careful phrasing: "may be necessary" acts as a mandatory/discretionary combination that hints that there may sometimes be an obligation to "inform the client" about ADR, although neither the Comment nor Rule 1.4 to which it alludes details what these circumstances might be. Interestingly, at least one other jurisdiction has adopted language that unambiguously makes counseling by lawyers about ADR mandatory.[33]

That said, the Committee appointed by the Maryland Court of Appeals of Maryland to study the Ethics 2000 Amendments, in responding to public comments on the new language, noted that "[i]n the view of the Committee, this language powerfully vindicates the importance of advising clients about ADR by making it mandatory in appropriate cases.[34] The Committee, however, is reluctant to propose that the Rules of Professional Conduct mandate details about the nature of legal advice to be rendered to clients in all circumstances."[35] An array of rules in the Amended MRPC add further weight to the Comment's "powerful vindication" of the idea that counseling about ADR is either ethically mandated or, at a minimum, something that lawyers should do to properly serve their clients. These rules include Rule 1.1, which mandates "[c]ompetent representation"; Rule 1.2(a), which requires that "a lawyer . . . abide by a client's decisions concerning the objectives of the representation and, when appropriate, shall consult with the client as to the means by which they are to be pursued"; and Rule 1.4(b), which mandates that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[36]

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33. GA Code of Professional Responsibility Canon 7-5 (before Jan. 1, 2001) ("When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation.").
34. Report of the Select Committee Appointed by the Court of Appeals of Maryland to Study the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, *see* www.courts.state.md.us/lawyersopc_final.rept03.pdf [hereinafter Rodowsky Committee Report].
35. Rodowsky Committee Report, *see* www.courts.state.md.us/ lawyersopc_final.rept03.pdf, at p. 370. (It should be noted that the comments of the Committee are not those of the Maryland Court of Appeals.).
36. MRPC R. 1.1, R. 1.2 (a), R. 1.4 (a) (2005).

Apart from the issue of *whether* lawyers must counsel clients about ADR is the question of *how* lawyers should do so. This crucial topic is beyond the scope of this article, but materials exist that address this topic.[37]

C. *Conflicts of Interest When Attorneys Represent Clients in Mediation*

I have already addressed how the Amended MRPC addresses situations where an attorney-mediator subsequently seeks to represent a party to the mediation.[38] A number of new provisions exist that addresses ethical issues when attorneys represent clients in mediation.

First, in a Comment to Rule 1.7, the Amended MRPC alerts attorneys to potentially disqualifying conflicts of interest when an attorney simultaneously represents "adverse parties to a mediation."[39] While the Comment merely notes that such a situation "may" constitute a conflict of interest, attorneys would be well advised to read the amended Rule 1.7 carefully to determine whether such a situation is subject to parties' "informed consent, confirmed in writing" or would (in my view, more commonly) constitute a so-called "non-consentable conflict," which would prohibit such concurrent representation even if all represented clients consent.

Second, language unique in Maryland attenuates conflict of interest limitations in some instances when attorneys represent clients in mediation. Rule 6.5, newly adopted by the ABA as part of the Ethics 2000 amendments, relaxes conflicts of interest rules when an attorney works for "a program sponsored by a nonprofit organization or court [that] provides short-term limited legal services to a client." The impetus behind the addition of this Rule, as described by the Reporter's Notes to the Ethics 2000 amendments, is the "concern that a strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are providing short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program."[40]

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37. *See* Rubinson, *supra* note 5, at 858-73; Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology To Structure Advocacy in a Nonadversarial Setting*, 14 Ohio St. J. Disp. Resol. 269 (1999).
38. *See infra* text accompanying notes 19-23.
39. *See generally* MRPC R. 1.7, cmt. [17] (2005).
40. *See supra* note 14.

Comments to the Maryland version of Rule 2.4, however, go further than the ABA language by addressing conflicts of interest and mediation. Maryland relaxes conflicts of interest rules when attorneys offer limited legal services by "represent[ing] clients on a pro bono basis for purposes of mediation only."[41] One such pilot program in Maryland, a project involving the Baltimore City Legal Aid Bureau, the Pro Bono Resource Center of Maryland and the Family Mediation Clinic at the University of Baltimore School of Law, provides limited representation in family law cases through pro bono attorneys to other *pro se* parties.[42]

D. Rule 5.5 – The Unauthorized Practice of Law and Representing Clients in Mediation

The Amended MRPC substantially reformulates and expands Rule 5.5, which addresses when attorneys may practice in jurisdictions in which they are not admitted without engaging in the unauthorized practice of law. The newly amended rule expressly addresses circumstances under which out-of-state attorneys may represent parties in Maryland mediations:

> A lawyer admitted in another United States jurisdiction . . . may provide legal services on a temporary basis in this jurisdiction that . . . are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.[43]

In other words, an out of state lawyer may participate in Maryland mediations so long as: 1) the legal services "arise out of or are reasonably related" to a lawyer's practice in a jurisdiction in which the lawyer is admitted; and 2) the forum through which the mediation is taking place (assuming it is through a forum) does not require pro hac

41. MRPC R. 6.5, cmt. [1] (2005).
42. Rachel Wohl, Executive Director of the Maryland Mediation and Conflict Resolution Office, describes this program in comments reproduced in the Rodowsky Committee's Report. *See* http://www.courts.state.md.us/lawyersopc_finalrept03.pdf, at p. 370.
43. MRPC R. 5.5(c)(3) (2005).

vice admission. A Comment to this rule makes clear that the latter limitation refers to "court-annexed . . . mediation."[44]

Similarly, Maryland attorneys who wish to provide legal services in jurisdictions in which they are not admitted should consult the Rules of Professional Conduct in that jurisdiction. Due to the widespread adoption of the Ethics 2000 amendments, it is possible that the jurisdiction might contain similar language and thus permit Maryland attorneys to provide "legal services that are in or reasonably related" to mediation in that jurisdiction, so long as the legal services are "in or reasonably related to the lawyer's practice" in Maryland.[45]

IV. UNANSWERED QUESTIONS FOR THE PERPLEXED

As the preceding discussion demonstrates, the Amended MRPC addresses a variety of issues that arise when lawyers act as mediators or represent parties in mediation. These amendments, however, are only the first steps in what will likely be a much longer process of developing norms and rules to guide lawyers in this area. These rules will likely develop further as mediation continues to spread and the ethics of mediation matures. There thus remain many areas of uncertainty that await answers.

A. Are Attorney-Mediators Practicing Law?

Maryland, like most states, does not require that mediators be attorneys.[46] This would seem to conclusively answer the question of whether lawyers are practicing law when mediating: mediation is not the practice of law because it is not illegal for non-lawyers to be mediators. Moreover, the definition of mediation for purposes of Circuit Court-referred mediation referenced earlier[47] is clear in noting that mediation involves mediators "who, without providing legal advice, assist the parties in reaching their own voluntary agreement" – yet another sign that Maryland law considers mediators – whether they are lawyers or not – as not engaging in the practice of law.

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44. MRPC R. 5.5, cmt. [12] (2005).
45. For a continually updated list of the status of individual jurisdictions' adoption of the Ethics 2000 Amendments, *see* http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf (last modified Nov. 28, 2005).
46. MD. RULE 17-104 (setting forth qualifications for Circuit Court-referred mediators "in general" and which require only "a bachelor's degree from an accredited college or university").
47. *See* text accompanying notes 9-10.

The question, however, is not quite so simple as it first appears. At a conceptual level, the Amended MRPC for the first time recognizes a new "nonrepresentational role" for attorneys, primarily as "third-party neutrals."[48] This shift, while seemingly modest, is profound; after all, the norm for attorneys for centuries, with few exceptions, is that lawyers advocate and counsel clients, which is an inherently representative function.[49] When lawyers ascend to the bench and thereby take on new roles as judges, a distinct set of ethical guidelines govern their new non-representational role. In Maryland, this is the Maryland Code of Judicial Conduct.[50]

While it would be a stretch to construe the Amended MRPC's recognition of a new "non-representational" role for attorneys acting as mediators as meaning that attorney-mediators are practicing law in some "non-representational" sense, there remains the more difficult question of whether attorney-mediators, as a practical matter, actually do practice law in the conventional sense when mediating. Attorney-mediators may, as a result of training, easily slip into the role of offering parties legal advice or go beyond ministerial drafting when recording settlement agreements reached in mediation. Perhaps the risk of such activities is greatest in the many mediation sessions that take place in court-referred settings where litigants are often *pro se* and, in many cases, mediators are attorneys.

The difficulty of defining the "practice of law" adds yet more uncertainty to the question of whether attorney-mediators are practicing law. Defining the "practice of law" has been an extraordinarily difficult undertaking. The Amended MRPC, for its part, only notes that "[t]he definition of the practice of law is established by law and varies from one jurisdiction to another."[51] Maryland has law on the issue, but, as is typical in virtually all jurisdictions, the law is broad and imprecise enough in its application

48. MRPC, Preamble, cmt. [3] (2005).

49. One arguable exception that existed previously is that the prior Maryland Rules of Professional Conduct, like the ABA Model Rules of Professional Conduct, previously included Rule 2.2, which regulated a lawyer's role as an "intermediary." Rule 2.2 explicitly addressed when a lawyer representing two clients simultaneously, which is not a lawyer acting as a mediator. In any event, Rule 2.2 proved confusing to practitioners and was deleted by the ABA through its Ethics 2000 Amendments, *see supra* note 14. Maryland has followed suit. MRPC R. 2.2 [Deleted] (Effective July 1, 2005).

50. MD. RULE 16-813 (2005). A separate set of guidelines govern the conduct of "judicial appointees," such as masters or referees. MD. RULE 16-814 (2005).

51. MRPC R. 5.5, cmt. [2] (2005).

to encompass a wide range of activities.[52] Indeed, an ABA Task Force on the Model Definition of the Practice of Law, organized in 2002, itself gave up on reaching consensus on this issue after its proposed definition generated substantial criticism.[53]

There is thus ambiguity both on the "mediation" side and on the "practicing law" side of when and if attorney-mediators are practicing law when mediating. For Maryland practitioners who are acting as mediators, there is, nevertheless, simple advice that is easier to state than to apply: resist any impulse to offer legal advice as a mediator and thereby stay as far away as possible from the practice of law when mediating.

Engaging in the practice of law while mediating generates almost certain ethical problems for attorneys acting as mediators. First, engaging in the practice of law while mediating triggers the application of the full panoply of ethical obligations set forth by the Amended MRPC with an inherent risk of violating rules. Perhaps the greatest risk is that it is extraordinarily challenging – perhaps impossible – to render legal advice to one party or to both parties simultaneously without having a conflict of interest, which would constitute a violation of, at a minimum, Rule 1.7 ("Conflict of Interest: General Rule"). In addition, if legal advice delivered by an attorney-mediator is incompetent, the attorney-mediator might violate Rule 1.1 ("Competence").

Second, virtually all canons of ethics governing mediation prohibit mediators from giving legal advice. As noted previously, this is true under Title 17 governing Circuit Court-referred mediations in Maryland, as well as under the more generally applicable – if only aspirational – *Maryland Standards of Conduct for Mediators, Arbitrators, and Other ADR Practitioners*.[54] These *Standards,* the legal status of which is described in greater detail below, go to considerable lengths to note that "a mediator may provide information" but only "without giving legal or other professional advice," that "[m]ixing the role of a mediator and the role of a professional advising a client is problematic," and that a "mediator should . . . refrain from providing professional advice."[55] Indeed, it is

52. MD. CODE ANN. BUS. OCC. & PROF. § 10-101(h) (2005). For judicial statements on the issue, *see* Att'y Grievance Comm'n v. Hallman, 343 Md. 390, 396, 681 A.2d 510, 513 (1996); Att'y Grievance Comm'n v. Shaw, 354 Md.636, 648, 732 A.2d 876, 882 (1999).

53. DEBORAH RHODE & DAVID LUBAN, LEGAL ETHICS 774-75 (4th ed.) (2004).

54. *Standards*, *see* http://www.courts.state.md.us/macro/standardsfinal.pdf.

55. *Id. Standards,* Standard I & VI.

a norm in many forms of mediation that mediators suggest that parties have attorneys at least review any settlement agreements reached in mediation.[56]

Nevertheless, it is the distinction between "providing information" and "providing legal advice" noted by the *Standards* that generates such difficulty in practice. As with the challenge facing lawyers who encounter *pro se* parties and "should not give legal advice to an unrepresented person, other than the advice to secure counsel,"[57] where is the line to be drawn? This intensely contextual question cannot be answered here. What can be said, however, is that attorneys should remain acutely sensitive to the risks of engaging in the practice of law in mediation and should strive to avoid it.

Despite all the reasons why attorney-mediators should refrain from giving legal advice, there remains the vexing issue of the many *pro se* participants in mediation and their inability to obtain legal counsel because they cannot afford it. The notion that mediators should not give legal advice rests in part on the assumption that parties to mediation can obtain legal advice from another source. In the case of low-income parties, this is a false assumption. Particularly in the area of family law both in Maryland and nationwide, "[t]he number of pro se litigants in family cases has increased dramatically in recent years" and "divorce proceedings where both sides are represented by counsel are no longer the norm; rather, they are surprisingly rare."[58] Some argue that, in fact, mediators in such cases – as well as judges when hearing cases involving *pro se* litigants – might have to abandon or at least modify the prohibitions against giving legal advice.[59] These issues, however, raise profound systemic questions about access to justice that extend well beyond the scope of this article.[60]

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56. For example, Standard I the "Maryland Standards of Conduct for Mediators, Arbitrators, and Other ADR Practitioners" – discussed in greater detail *infra* at notes 91-97 – notes that "a mediator should make the parties aware of the importance of consulting lawyers and other professionals, where appropriate, to help them make informed decisions and review contracts of agreements."
57. MRPC R. 4.3, cmt. [2] (2005).
58. Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 Wm. & Mary J. Women & L. 145, 165-66 (2003).
59. Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revising the Roles of Judges, Mediators and Clerks*, 67 Fordham L. Rev. 1987, 2026 (1999).
60. For an extended discussion of these issues – including the efficacy of mediation for low-income parties – *see* Robert Rubinson, *A Theory of Access to Justice*, 29 J. Legal Prof. 89 (2005).

B. Fee Sharing Between Lawyers and Non-Lawyer Mediators

The uncertainties surrounding attorney-mediators and the practice of law implicate what, on their face, appear to be an unrelated set of MRPC issues: the restrictions on how lawyers can organize themselves.

There has been substantial controversy surrounding the wisdom of lifting restrictions on lawyers' ability to form business associations with non-lawyers – the creation of so-called "interdisciplinary practices." The Ethics 2000 amendments maintain the traditional prohibition on "fee splitting" with non-lawyers as a means to "protect the lawyer's professional independence of judgment."[61] The Amended MRPC Rule 5.4 and its associated Comments are substantially similar to their Ethics 2000 counterparts. The specific prohibitions – maintained verbatim from the prior version of the MRPC – are the following: 1) with only narrow exceptions mostly related to performing services on behalf of clients of a deceased lawyer, a "lawyer or law firm shall not share legal fees with a non-lawyer"[62]; 2) a lawyer "shall not form a partnership with a non-lawyer";[63] and 3) a lawyer "shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit" if a nonlawyer has a pecuniary interest in the organization.[64]

The issue of lawyer/non-lawyer business associations had taken on particular urgency in mediation. As of yet, mediators do not constitute a unified "profession." Indeed, both the Reporter to the Ethics 2000 Commission[65] and the Rules themselves note that "[t]he role of third-party neutral is not unique to lawyers."[66] Mediators come from many professions, especially from the mental health field. Questions thus arise about the ethical propriety of associations involving lawyers and non-lawyers who provide mediation services. This is not merely an academic question. For example, in the context of family disputes, which almost inevitably raise psychological issues in which many lawyers have no particular expertise, attorney-mediators often co-mediate with a mental health professional.[67] Indeed, some evidence suggests that involving non-lawyers – particularly psychologists or

61. MRPC R. 5.4, cmt. [1] (2005).
62. MRPC R. 5.4(a) (2005).
63. *Id.* at 5.4(b).
64. *Id.* at 5.4(d).
65. *See supra* note 14.
66. MRPC R. 2.4, cmt. [2] (2005).
67. *See* Rubinson, *supra* note 60, at 149-50.

psychotherapists – in such mediations may substantially benefit parties and improve the quality of the mediation process and the durability of agreements generated by it.[68]

Can a formal business relationship between a lawyer and a non-lawyer to perform mediation services – whether through a partnership or some other business organization – be permissible under Rule 5.4? A recent opinion of the Maryland State Bar Association's Committee on Ethics that predates the Amended MRPC sought to address this question[69]. The Committee's Opinion noted that this question "has spawned great division and debate nationally."[70] The Opinion concludes that "a limited safe harbor" would be an association that only "performed court-ordered mediation as defined by Title 17," which, as noted above, defines mediation in that limited context as not constituting the practice of law.[71] The Committee did not categorically hold that a lawyer/non-lawyer partnership that performed non-Circuit Court-annexed forms of mediation would violate Rule 5.4. Rather, the Committee could not reach a conclusion one way or another because "this Committee lacks the authority to define the practice of law."[72] In any event, there is no question that the Committee's "safe harbor" would be safe if the association *only* performed mediation services. An association between a non-lawyer mediation who mediated and an attorney-mediator who both mediated and practiced law would unquestionably violate Rule 5.4.

One could argue that the MSBA opinion equates the definition of mediation under Rule 17-102[73] with the reality of what actually happens in the privacy of a mediation session, thereby sidestepping the possibility that attorney-mediators in court-referred Circuit Court mediations actually *do* offer legal advice and thereby provide legal services. Indeed, perhaps the very value of a lawyer and a non-lawyer co-mediating is in the distinctive roles they undertake, with the lawyer at least implicitly providing the legal background as necessary. This practical dimension might render the "safe harbor" of the Opinion problematic given the particular nature of the practice at issue.

68. JANET R. JOHNSTON ET AL., IMPASSE OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT 198 (1988).
69. MSBA Ethics Op. 03-02 (2003).
70. *Id.*
71. *Id.*
72. *Id.*
73. MD. RULE 17-102 (2005).

There remains a further issue related to fee splitting raised by the Amended MRPC. Rule 5.7 is one of the completely new "Ethics 2000" rules that Maryland has adopted. Rule 5.7 addresses "law-related services." The operation of this Rule is quite intricate and novel. Briefly, Rule 5.7 defines "law-related services" as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer."[74] Such law-related services may be "controlled" by the lawyer with non-lawyers: such a sharing of authority does not violate Rule 5.4 because, under the terms of the Rule, the "law-related services" are not legal services. Rule 5.4 provides that a lawyer is not bound by the Amended MRPC for law-related services if the lawyer takes "reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist."[75]

The impact of Rule 5.7 on the issue of whether lawyers can ethically associate with non-lawyers to provide mediation services is not altogether clear. It is first questionable whether mediation is a "law-related service" at all: mediation is not among the examples of "law-related services" listed in Comment [9] to the Rule, although "social work" and "psychological counseling" are listed.[76] Second, there remains the knotty question of if and under what circumstances mediation constitutes the "practice of law." After all, if mediation services are the practice of law, it is, by definition, not a "law-related service" but a "law service," thus rendering Rule 5.7 irrelevant.

Nevertheless, the very presence of Rule 5.7 does offer at least an alternative idea for attorneys wishing to provide mediation services: an attorney can presumably establish a "law-related mediation service" with a non-lawyer. As noted above, this solves some, but not all, of the Rule 5.4 issues, and it carries, in many respects, the same uncertainties the issue has had even prior to the adoption of Rule 5.7.

The Rule 5.4 fee-splitting restrictions will likely remain in place for the foreseeable future and it is uncertain how courts and ethics committees will interpret Rule 5.7. Prudence dictates that at least for

74. MRPC R. 5.7(b) (2005).

75. *See id.* at 5.7(a)(2).

76. The balance of the examples are "title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis . . . tax preparation, and patent, medical or environmental consulting." *Id.*, cmt. [9].

the time being, attorney-mediators approach associations with non-lawyer mediators with great care and strict adherence to Rule 5.4.

C. *Inconsistency Between Ethical Obligations of Attorneys-Mediators and Attorney Representing Parties in Mediation*

What about when one's obligations as an attorney – whether acting as a mediator or as an attorney representing a party in mediation – conflict with rules governing mediation? Indeed, in at least two points, the Amended MRPC notes that attorney-mediators might face conflicting obligations from differing sets of ethical obligations: those as a lawyer and those as a mediator.[77] In order to approach these challenging questions, I will explore the primary sources of mediator ethics in Maryland – currently a very limited set of guidelines – and address some of the ethical quandaries that lawyers may face because of inconsistent ethical obligations.

1. *Title 17 of the Maryland Rules*

In 1998, Maryland adopted Title 17 to the Maryland Rules. Title 17 governs "alternative dispute resolution" and applies only to "civil actions in a circuit court,"[78] which, in and of itself, substantially limits the scope of its provisions.

A substantial portion of these rules govern qualification requirements for mediators, but one Rule – Rule 17-109 – addresses the confidentiality of mediation proceedings. The Rule establishes a number of principles:

1. With only limited exceptions, "a mediator . . . shall maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding."[79]
2. The exceptions are
    a. A written agreement signed by the parties "as a result of mediation . . . unless the parties agree otherwise."[80]

77. *See* MRPC R. 1.12, cmt. [3] (regarding conflicts of interest rules for attorney-mediators); *See also id. at* R. 2.4, cmt. [2] (regarding lawyers acting as third party neutrals).
78. MD. RULE 17-101(a) (2005).
79. MD. RULE 17-109(a) (2005).
80. MD. RULE 17-109(c) (2005).

b. The mediator may disclose information to "prevent serious bodily harm or death" or to "assert or defend against" either "allegations of mediator misconduct or negligence" or "a claim or defense that because of fraud or duress a contract arising out of mediation should be rescinded."[81]

c. Any disclosures required by law.[82]

3. Confidential communications in mediation "are privileged and not subject to discovery" and "do[] not become inadmissible or protected from disclosure solely by reason of its use in mediation."

The Amended MRPC does offer some modest guidance on how these provisions interact with its confidentiality obligations, which are largely contained in Rule 1.6.[83] One Comment in the Amended MRPC notes that "lawyers who serve as third-party neutrals do not have information concerning the parties that is protected by Rule 1.6."[84] This Comment seems intuitive, as Rule 1.6 protects information "relating to representation." According to the preamble to the MRPC, an attorney-mediator is not engaging in a "representational" activity.[85] Thus, Rule 1.6 does not apply to attorney-mediators.[86]

This is not, however, the end of the story. The Amended MRPC mandates disclosure of information in certain contexts that would, on its face, conflict with Rule 17-109.[87] For example, assume that an attorney-mediator observes a lawyer representing a party in mediation acting in a way that conclusively demonstrates his or her unfitness to practice law. Rule 8.3 would mandate disclosure, because as a self-governing profession, lawyers must report misconduct of their fellow lawyers to appropriate disciplinary authorities.[88] Would adherence to Rule 8.3 violate the confidentiality provisions of Rule 17-109?

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81. MD. RULE 17-109(d) (2005).
82. MD. RULE 17-109(d) (2005). Perhaps the most frequently encountered legal disclosure obligation, particularly in family mediation, would be of child abuse. *See* MD. CODE ANN. FAM. LAW § 5-705 (2005).
83. MRPC R. 1.6 (2005).
84. MRPC R. 1.12, cmt. [4] (2005).
85. *See* MRPC R. 1.6, cmt. [1] (2005).
86. MRPC, preamble [3] (2005).
87. *See infra* notes 95-96.
88. MRPC R. 8.3 (a) & cmt. [1] (2005).

Another example would be an attorney's duty under Rule 8.1 "to respond to a lawful demand for information from an admissions or disciplinary authority."[89] What if an attorney-mediator is asked to respond to information on a bar application by a participant in mediation or respond to a disciplinary complaint against a participant in mediation, either of which would involve disclosure of information learned during the course of acting as a mediator?

As a matter of statutory interpretation, perhaps the most likely result would be that the Amended MRPC provisions would prevail because Rule 17-109 contains an exception for "disclosures required by law," and the Amended MRPC is law. It is unclear, however, whether the drafters of these provisions have considered the conflicting policy issues in play: the crucial role that confidentiality plays in mediation and the importance of maintaining the integrity of the legal profession. In any event, it is crucial to keep in mind the limited application of Rule 17-109, which only applies to mediation associated with civil cases in a Maryland circuit court.[90]

2. *Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners*

The Maryland Court of Appeals has adopted a set of guidelines entitled *Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners*.[91] Unlike Rule 17-109, the *Standards,* by its terms, are not limited only to Circuit Court mediations, although they do apply to such mediations pursuant to Rule 17-109(a)(4). Indeed, the *Standards* apply to *all* mediations in Maryland, whether court-annexed or otherwise.

The *Standards*, while sometimes framed as mandatory and "approved" by the Court of Appeals, appear to be unenforceable. Indeed, its "Preface" quite clearly states that the *Standards* are "intended to perform three major functions: to serve as a guide for the conduct of ADR practitioners; to inform the participants involved in ADR processes; and to promote public confidence in ADR processes as a means for resolving disputes or addressing issues."[92] An

89. MRPC R. 8.1 (b) (2005).
90. MD. RULE 17-101 (a) (2005).
91. *Standards*, (The Court of Appeals finding that the "Standards of Conduct . . . are . . . approved" was signed on Oct. 31, 2001).
92. *Standards,* Preface (2005).

"intention" to "guide . . . ADR practitioners" is not the language of a mandatory set of enforceable rules.

That said, the *Standards* are important for a number of reasons. First, the *Standards* are the only code of conduct addressing mediation in Maryland that has both general applicability and the imprimatur of the Maryland Court of Appeals.[93] Second, in a Maryland addition to the Ethics 2000 amendments, a Comment to the Amended MRPC expressly refers to the *Standards* as something attorney-mediators "may . . . be subject to."[94] As a result, whatever its formal legal status, the *Standards* are surely something an attorney-mediator should, at a minimum, pay close attention to as a guide to appropriate norms for mediation in Maryland.

Most of the Standards set forth relatively uncontroversial norms of mediation embodied in other codes of conduct governing mediation.[95] Nevertheless, conflicts might still arise with the Amended MRPC. For example, *Standard III* states the following: "Neutrals shall disclose all actual and potential conflicts of interest reasonably known to them. After disclosure, neutrals shall decline to participate unless all parties choose to retain them."[96] This emphasis on disclosure generates a potential ethical conflict: what if the requisite disclosure under this *Standard* would involve the revelation of information "relating to representation" that the attorney-mediator learned through her activities as a lawyer and thus would be otherwise confidential under Rule 1.6? An attorney-mediator could most appropriately resolve this conflict by simply declining to proceed with only the limited explanation that she believes that there is a conflict of interest. While such an action sidesteps the *Standards*' emphasis on disclosure, it still vindicates the underlying policy of ensuring that mediators are fair and free from conflicts.

Most significantly, however, the *Standards* incorporate many of the confidentiality provisions of Rule 17-109 and expressly cite to that Rule without limiting its application to Circuit Court mediations.[97] The *Standards* contains mandatory language on this issue: "As

93. *Standards*, Order (signed Oct. 31, 2001).
94. MRPC R. 2.4, cmt. [2] (2005).
95. Indeed, the *Standards* often track verbatim the leading general ethics code for mediators – the "Joint Code" adopted by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution. This "Joint Code" is reprinted in KOVACH, *supra* note, at 528.
96. *Standards*, Standard III. (The capitalization of the Standard has been regularized.).
97. *Standards*, Standard V.

required by Maryland Rule 17-109, a mediator . . . shall maintain the confidentiality of all mediation communications." Some of the *Standard*'s language is identical to that of Rule 17-109, but there are some omissions and additions as well. Given that the legal status of the *Standards* is unclear, it remains uncertain whether the *Standards* have now endowed Rule 17-109 with the force of law for all mediations, public or private. If so, all of the ethical quandaries facing attorney-mediators in relation to the interaction of the Amended MRPC and Rule 17-109 come into play in all mediations.

3. Other Ethical Rules

Practitioners involved in mediation in any capacity – whether as mediators or as attorneys representing parties in mediation – should closely monitor ethical rules associated with mediation. It is entirely possible – indeed likely – that there will be revisions and additions to existing ethical guidelines relating to mediation that might answer perplexing questions or generate new ones. Entire codes of conduct might be incorporated into Maryland law or, like the *Standards,* operate as judicially sanctioned "guidelines." Some candidates likely to be considered for adoption as guidelines or binding law in Maryland include the *Uniform Mediation Act*, approved by the National Conference of Commissioners on Uniform State Law in 2001,[98] the *Model Standards of Conduct for Mediator*s promulgated by the American Arbitration Association, the ABA, and the Association for Conflict Resolution, which was most recently revised in 2005,[99] and the *National Standards for Court-Connected Mediation Programs*, issued by the Center for Dispute Settlement and the Institute of Judicial Administration.[100] There are also a number of codes of conduct governing particular forms of mediation, most prominently the *Model Standards of Practice for Family and Divorce Mediation*, issued by, among others, the Association of Family and Conciliation Courts and the ABA Section on Dispute Resolution.[101] Additionally, other jurisdictions including Canadian provinces that have particularly well-developed systems of mediation have adopted codes of ethics for various forms of mediation that might serve as models for Maryland in

98. UNIF. MEDIATION ACT (2001), *see* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

99. Reproduced at http://www.abanet.org/dispute/modelstandardardsofconduct.doc (last visited Nov. 19, 2005).

100. KOVACH, *supra* note 8, at 574.

101. These *Model Standards* are reproduced at http://www.afccnet.org/resources/resources_model_mediation.asp (last visited Nov. 19, 2005).

the future.[102] The trend of ever multiplying codes of conduct and revision of existing codes by non-governmental organizations and states promises to continue for the foreseeable future.

V. CONCLUSION

As this article has shown, the newly amended Maryland Rules of Professional Conduct have taken initials steps in providing guidance and rules for lawyers to follow when involved in mediation. These steps, however, are just the beginning. As mediation continues to grow and mature, and as more lawyers become increasingly familiar with mediation through law school courses and training programs, the Maryland Rules of Professional Conduct and other statutes or Rules will begin to address the unanswered questions described in this article, and many others as well.

102. KOVACH, *supra* note 8, at 535.