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## What's a Mediator to Do - Adopting Ethical Guidelines for West Virginia Mediators

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# WHAT'S A MEDIATOR TO DO? ADOPTING ETHICAL GUIDELINES FOR WEST VIRGINIA MEDIATORS

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## I. INTRODUCTION

“As a peacemaker the lawyer has a superior opportunity of being a good man.”<sup>1</sup>

Mediation is here to stay. The terrific growth of the practice over the last few decades can leave little room for doubt that mediation will play a significant role in the development and resolution of disputes of every kind in years to come.<sup>2</sup> While professionals in all fields are often met with moral dilemmas,

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<sup>1</sup> Abraham Lincoln, *Abraham Lincoln's Notes for a Law Lecture*, Abraham Lincoln Online (July 1, 1850), at <http://showcase.netins.net/web/creative/lincoln/speeches/lawlect.htm> (last visited Aug. 29, 2003).

<sup>2</sup> See generally Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the*

mediation, in part because of that terrific growth, may be said to cause its practitioners a particular amount of trepidation. The ethical uncertainties in the field arise also because of the professional backgrounds of those within it.<sup>3</sup> Lawyer-mediators, in particular, are likely to find themselves at a loss as they struggle to come to terms with the moral obligations of two very different occupations.<sup>4</sup> Unfortunately, West Virginia has not yet acted to mitigate the ethical uncertainties facing its mediators by adopting rules of ethics to govern their conduct.

Some recent developments have drawn added attention to the situation of mediators. In February of 2002, the American Bar Association (ABA) adopted a number of revisions to its Model Rules of Professional Conduct (MRPC) for lawyers.<sup>5</sup> Among these revisions was the notable inclusion of a new rule aimed specifically at those in the cross-practice of law and mediation.<sup>6</sup> Closer to home, the case of *Riner v. Newbraugh*<sup>7</sup> drew attention to issues of confidentiality involved in the practice of mediation.

What follows is a discussion of the ethical complexities facing mediators, particularly where they have no standards of conduct to which they can look for guidance. Also provided is an analysis of the steps taken by some jurisdictions to govern mediator conduct. Finally, this article concludes by arguing for West Virginia to adopt ethical guidelines for mediators, in general, and specifically for lawyer-mediators.

## II. BACKGROUND ON MEDIATION

The practice of mediation has been in existence worldwide since ancient times.<sup>8</sup> Although we have made use of it in the United States since the days of the Colonial Period, mediation did not enjoy significant formal recognition in this country until the establishment of the United States Department of Labor in 1913, which brought about the use of mediation to settle disputes between labor and management.<sup>9</sup> For a time, mediation's popularity was confined largely to

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*Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715. "Recently, mediation has grown in epic proportions with programs being established in a multitude of areas. Evidence of mediation's growth can be found in the 1996 *Martindale-Hubbell Dispute Resolution Directory*, which names approximately 60,000 individuals and service organizations that provide alternative dispute resolution services." *Id.* at 719.

<sup>3</sup> See *infra* note 16 and accompanying text.

<sup>4</sup> See discussion *infra* Part II.A.

<sup>5</sup> See Nancy J. Moore, *Revisions, Not Revolution*, A.B.A. J., Dec. 2002, at 46, 48.

<sup>6</sup> *Id.* at 49.

<sup>7</sup> 563 S.E.2d 802 (W. Va. 2002).

<sup>8</sup> Kentra, *supra* note 2, at 719.

<sup>9</sup> *Id.*

the role it played in labor-management relations, but the boom the field has enjoyed since the mid-1960s is clearly evident today.<sup>10</sup>

The tremendous success of mediation in recent decades comes as little surprise, given its considerable benefits to litigants. Perhaps the most frequently cited reason for using any type of alternative dispute resolution (ADR) procedure is that, in general, it costs less than litigation. In one study of the litigation costs of four hundred companies during the period of 1990 to 1993, the companies reported collectively saving \$150 million through the use of ADR programs.<sup>11</sup> In addition to being economically sound, mediation often provides faster, less stressful resolutions to disputes than does traditional litigation.<sup>12</sup> Consider, for example, the toll taken on parties and their lawyers by suits that do not go to trial until years after they are filed, not to mention the increased risk such suits bring that witnesses' memories will not be as sharp at trial time or that evidence will be lost altogether. Further benefits of the mediation process include increased flexibility to participants<sup>13</sup> and the assurance of confidentiality.<sup>14</sup> This latter characteristic of mediation may be one of its most appealing, considering the unease many litigants would likely feel at airing their disputes publicly.<sup>15</sup>

#### A. *Lawyers as Mediators*

In view of the tremendous growth of this field over a relatively short period of time, it is not terribly surprising that the numerous ethical considerations raised by today's mediation climate have yet to be fully resolved. One considerable obstacle to the resolution of these considerations is the diverse background of those in the practice of mediation. While mediators may come to the profession with any of a variety of educational and practical backgrounds, each with ethical quandaries unique to their individualized backgrounds,<sup>16</sup> the situa-

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<sup>10</sup> *Id.* In 1996, there were approximately 60,000 individuals and organizations providing alternative dispute resolution services listed in the *Martindale-Hubbell Dispute Resolution Directory*. *Id.*

<sup>11</sup> *Id.* at 721. Kentra cites another impressive testimonial as proof of the cost-saving power of ADR: Chevron Corporation has reported that it saved approximately \$2.5 million by mediating a single (albeit major) case, instead of litigating it. *Id.*

<sup>12</sup> *Id.* at 721-22.

<sup>13</sup> Kentra gives, as an example, an employment discrimination lawsuit, in which "a court would typically be concerned with issues of financial liability. However, in mediation, parties can not only address the issue of money, but can also include any multitude of creative options" such as changing job descriptions or requiring sensitivity training. *Id.* at 720-21.

<sup>14</sup> *Id.* at 722.

<sup>15</sup> *Id.*

<sup>16</sup> This "cross-professionalism" can be an issue for psychologist-mediators and social worker-mediators, for example. These professions entail their own standards or rules of ethical conduct that sometimes conflict with the standards of mediation. Where they do not conflict, they may

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tion of lawyer-mediators is far more problematic than that of any other cross-profession.<sup>17</sup>

Consider the respective fundamental bases of law and mediation. Law is generally thought a deeply adversarial process; by nature, legal disputes usually result in winners and losers.<sup>18</sup> In contrast, mediation has as its goal the resolution of disputes by way of a voluntary agreement reached by the parties themselves.<sup>19</sup> “This fundamentally different practice-orientation gives rise to the principal ethical issue that emerges when lawyers, trained as advocates and problem-solvers, serve as mediators – that of preserving the integrity of the mediation process as a forum where an impartial third party assists the participants in resolving their own disputes.”<sup>20</sup>

Naturally, the lawyer-mediator is left with unclear ethical obligations. Some main concerns arise in the areas of representation, confidentiality, and conflict of interest.<sup>21</sup> Additionally, there is the concern that if mediation guidelines are added in any particular jurisdiction, those in the cross-profession of law and mediation might be subject to two sets of penalties (the rules for lawyers and those for mediators) for one iniquitous act.<sup>22</sup> This has led some participants in the debate to argue for an “exit door” for lawyer-mediators, allowing them to escape the requirements of the Rules of Professional Conduct<sup>23</sup> for lawyers when acting as mediators.<sup>24</sup>

However, as the solution TO the issue of lawyer-mediators’ duties as lawyers under the Rules of Professional Conduct plays out, one thing is clear: the rules provide little, if any, guidance to lawyer-mediators in their roles as third-party neutrals. Although Rule 2.2 mentions mediation, it does so in regard to a lawyer’s role as neutral between existing clients.<sup>25</sup> Rule 8.3 is the source of a further dilemma, in that it places conflicting responsibilities on lawyer-

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remain silent, leading to even more confusion for the cross-profession practitioners. Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 479, 479 (2000).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 480.

<sup>19</sup> *Id.* at 480-81.

<sup>20</sup> *Id.* at 481; *see infra* Part II.C. (discussing the categorization of mediation styles as facilitative or evaluative).

<sup>21</sup> Matt Wise, *Separation Between the Cross-Practice of Law and Mediation: Emergence of Proposed Model Rule 2.4*, 22 HAMLINE J. PUB. L. & POL’Y 383, 385 (2001).

<sup>22</sup> *See id.* at 390.

<sup>23</sup> Where this article refers to the Rules of Professional Conduct as opposed to the MODEL RULES OF PROFESSIONAL CONDUCT (1994) [hereinafter MRPC], it is referring to the version of the MRPC currently in force in West Virginia (i.e., pre-2002 revisions).

<sup>24</sup> Wise, *supra* note 21, at 422.

<sup>25</sup> *Id.* at 388.

mediators.<sup>26</sup> This rule requires lawyers to report the misconduct of their fellow bar members, including lack of adequate representation, conflict of interest, etc.<sup>27</sup> A particularly perplexing situation faces the lawyer-mediator who learns of another lawyer's misconduct during a mediation session. Here, the lawyer is presented with two conflicting duties: the duty to report misconduct and the duty to preserve the confidentiality of mediation sessions.<sup>28</sup> Yet another example of the inadequacy of the Rules of Professional Conduct vis-à-vis lawyer-mediators is found in Rule 5.7, which covers lawyers in their performance of ancillary services; this rule is unclear as to whether mediation is included in those services.<sup>29</sup>

### B. *Situation of Non-Lawyer Mediators*

Complicated as the situation of lawyer-mediators can be, they are not the only practitioners in an ethical predicament. Non-lawyer mediators face their own quandaries, the most significant of which centers around whether the practice of mediation by a non-attorney constitutes the unauthorized practice of law.<sup>30</sup> It is interesting to note that some of the most perplexing ethical dilemmas surrounding the practice of mediation arise either because of the fundamental differences between law and mediation or because of how closely the two professions are linked.<sup>31</sup>

Non-attorney mediators would not be unjustified in wondering whether their place in the future of mediation is uncertain. Some commentators have suggested that certain issues in the ethics of mediation could be solved if the definition of the practice of law were expanded to encapsulate mediation.<sup>32</sup> This approach, of course, would have the effect of causing mediation to become attorney and court-controlled, shutting out the non-attorney mediators who have played such a large role in the formation of the profession.<sup>33</sup> Some non-attorney mediators also see a potential threat in the addition of an ADR rule to the MRPC. These individuals argue that such an addition has the possibility of con-

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<sup>26</sup> W. VA. RULES OF PROF'L CONDUCT R. 8.3.

<sup>27</sup> *See id.*

<sup>28</sup> Wise, *supra* note 21, at 396-97.

<sup>29</sup> W. VA. RULES OF PROF'L CONDUCT R. 5.7.

<sup>30</sup> *See* Wise, *supra* note 21, at 398-402.

<sup>31</sup> *See* Laflin, *supra* note 16, at 480.

<sup>32</sup> Wise, *supra* note 21, at 392.

<sup>33</sup> *Id.* This is hardly a just result from the viewpoint of the non-attorney mediators, and some would argue that it is an undesirable result, given the assets non-attorney mediators can potentially bring to the profession as a result of their varied backgrounds: "[M]ediators need to be skilled at bringing out and resolving emotional issues. That's not the sort of thing that you'll get in a legal file." *Id.* at 407 (citation omitted).

firming that some aspects of mediation constitute the practice of law, and thus, the unauthorized practice of law for non-attorney mediators.<sup>34</sup> Whichever jurisdiction a jurisdiction chooses in attempting to deal with the ethics of mediation, it is clear that the jurisdiction must keep non-attorney mediators, as well as attorney-mediators, in mind.

### C. *Practice of Law Debate*

The question of what constitutes the practice of law ought to be considered by anyone attempting to formulate ethical guidelines for mediators. Indeed, “[t]he preservation of integrity is centered in whether mediation and other minor facets of ADR are to be considered the ‘practice of law.’”<sup>35</sup> Carrie Menkel-Meadow, one of the foremost authorities on the ethical concerns of ADR practitioners, has said that “[h]ow one defines the role(s) of participants in ADR may suggest different ethical treatments.”<sup>36</sup>

The debate over whether mediation constitutes the practice of law has intensified largely because of a change in the style of mediation employed by some mediators. Today, a mediator’s style of practice is often characterized as being either facilitative or evaluative.<sup>37</sup> Facilitative mediation is essentially defined as “when the neutral assists both sides in recognizing their individual interests in hope of creating a mutually beneficial settlement.”<sup>38</sup> Evaluative mediation, on the other hand, generally implies some analysis of strengths and weaknesses by the neutral to provide his or her opinion of the parties’ relative situations, including the likelihood of a given party prevailing at trial.<sup>39</sup> Facilitative mediation is certainly the traditional method, and it is still used by many scholars as the basic model in defining the mediation process.<sup>40</sup> Evaluative mediation is a relatively young phenomenon, and much more controversial, par-

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<sup>34</sup> *Id.* at 393.

<sup>35</sup> *Id.* at 384.

<sup>36</sup> 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, 421 (1997). Some commentators have expressed concern over the “practice of law” approach to mediator ethics, arguing that such an approach suggests that lawyer-mediators cannot bring with them to the profession of mediation any legal skills and practices without stepping into the realm of the “practice of law.” They argue that “[I]aw, like medicine and psychology, is but one available tool of mediation.” Wise, *supra* note 21, at 400.

<sup>37</sup> Laflin, *supra* note 16, at 483.

<sup>38</sup> Wise, *supra* note 21, at 391 n.32.

<sup>39</sup> *Id.*

<sup>40</sup> See Laflin, *supra* note 16, at 483-84. “The historical approach to mediation has been facilitative, through which the neutral assists both sides in recognizing the desires and interests of the adversarial party and, if at all possible, structuring a mutually beneficial settlement.” Wise, *supra* note 21, at 403.

ticularly with respect to the practice of law issue.<sup>41</sup> It has been argued that the evaluative style may confuse parties as to the mediator's role; the parties may be more likely to believe, mistakenly, that the mediator represents them in the nature of an advocate.<sup>42</sup>

Despite its controversy, the evaluative style certainly has its proponents.<sup>43</sup> Their argument is generally that, in order for mediation to be truly effective, it must include some analysis of the strengths and weaknesses of the parties' respective positions.<sup>44</sup> In order to further the goal of party self-determination that is at the center of mediation, this argument goes, the parties must be well-informed as to the reality of their situations.<sup>45</sup> In response to the argument that evaluative mediation constitutes the practice of law, these commentators may question how a mediator could receive confidential information from two parties with adverse interests and be practicing law with respect to either of them – or both of them.<sup>46</sup> Despite the numerous arguments put forth in favor of evaluative mediation,<sup>47</sup> it remains a hot concern in the debate over whether mediation is the practice of law.

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<sup>41</sup> See Wise, *supra* note 21, at 403.

<sup>42</sup> *Id.* at 391. A case that illustrates the potential confusion parties may encounter is *Lange v. Marshall*, 622 S.W.2d 237 (Mo. Ct. App. 1981), in which the “attorney attempted to use the confusion between mediation and the practice of law to relieve himself of liability for alleged malpractice.” *Id.* at 237.

<sup>43</sup> See, e.g., Donald T. Weckstein, *In Praise of Party Empowerment — and of Mediator Activism*, 33 WILLAMETTE L. REV. 501 (1997).

<sup>44</sup> Wise, *supra* note 21, at 406. In explaining why lawyer-mediators may be more inclined toward the evaluative approach, the Wise article highlights the way in which lawyers are trained. Law schools, of course, train students to analyze situations with applicable case law, rules, statutes, etc., to obtain the best solution for their clients. *Id.* at 403-04. It is not surprising, then, that some lawyer-mediators would find it difficult to leave this training at the door when entering a mediation session.

<sup>45</sup> Laflin, *supra* note 16, at 483-84. Facilitative mediators often reach this goal through use of Socratic techniques to do “reality testing.” *Id.* at 493. “For these mediators, [q]uestions become suggestions in the guise of a query.” *Id.* (internal quotations and citation omitted).

<sup>46</sup> John W. Cooley, *Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR*, DISP. RESOL. J., Aug. – Oct. 2000, at 72, 73.

<sup>47</sup> One such argument is that the application of law to facts is not inherently the practice of law. As the basis of this argument, proponents of evaluative mediation point to other situations in which non-attorneys apply law to facts without being accused of practicing law. These situations include police officers in their daily work, jurors in the courtroom setting, CPAs and accountants applying the tax laws, and real estate appraisers applying zoning and environmental laws. Proponents of evaluative mediation question why lawyer-mediators should be treated differently than individuals in the foregoing situations. Wise, *supra* note 21, at 410.



#### D. Potential Liability

Some major areas of concern relating to practitioners' potential liability are confidentiality, evaluative mediation, and the drafting of certain binding settlement agreements.<sup>48</sup> This latter area was at issue in *Lange v. Marshall*,<sup>49</sup> in which a lawyer-mediator was sued on a negligence theory for failing to help one party to a mediation session negotiate a better settlement.<sup>50</sup> Other theories of negligence that may be used against lawyer-mediators in similar situations include the failure to meet a higher standard of care if the lawyer-mediator represents himself as having special knowledge or expertise; the failure to notify the parties of clear aspects of the mediation that might otherwise be perceived as disadvantages; and the failure to reproduce accurately the terms agreed upon in the mediation session in drawing up a settlement agreement.<sup>51</sup> These potential liabilities could, perhaps, be remedied by full-disclosure requirements, but that solution does not take into consideration whether lawyer-mediators would still be disciplined under the Rules of Professional Conduct.<sup>52</sup> Furthermore, although most mediators require the parties to sign a contract clarifying the role of the mediator, if the mediator knows of the parties' confusion as to the mediator's role and does nothing to rectify that confusion, the mediator could be liable under a negligence or general liability theory.<sup>53</sup>

One factor in clarifying liabilities can be defining the style of mediation used (i.e., facilitative or evaluative).<sup>54</sup> "A lawyer-neutral providing an evaluative opinion as to the probable outcome of a court case or the fairness of a proposed settlement may be held to the same standard as a lawyer who renders a formal legal opinion to a client."<sup>55</sup> In this situation, the safest course would be to refer a party's request for prediction or evaluation to another lawyer retained specifically to provide independent evaluation, developing the facts and applying legal principles to them in making a prediction.<sup>56</sup> However, if lawyer-mediators are found to have put themselves into a representational role because of inadvertent conduct, they could be sued for malpractice in their capacity as an

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<sup>48</sup> *Id.* at 393.

<sup>49</sup> 622 S.W.2d 237 (Mo. Ct. App. 1981).

<sup>50</sup> *Id.* at 237.

<sup>51</sup> Wise, *supra* note 21, at 393-94.

<sup>52</sup> *Id.* at 394.

<sup>53</sup> *Id.* at 391.

<sup>54</sup> *Id.* at 394.

<sup>55</sup> *Id.* (citation omitted).

<sup>56</sup> *Id.*

attorney and also be subject to accountability for negligent actions as a mediator – double liability.<sup>57</sup>

Finally, there is the matter of liability arising from confidentiality issues. It is widely agreed that confidentiality lies at the heart of the mediation process and that any guidelines on the conduct of lawyer-mediators must contemplate a confidentiality privilege.<sup>58</sup> Failure to do so would have a drastic effect on the success of the mediation process.<sup>59</sup> The threat of mandated disclosure puts lawyer-mediators on the defensive, and confidential information is often an important part of facilitating an effective mediation session since it fosters candid negotiations and communications.<sup>60</sup>

Confidentiality was at issue in the case of *Poly Software International, Inc. v. Su*.<sup>61</sup> There, the appropriate ethical rule in mediations in which the lawyer-mediator was privy to confidential information limited the mediator's subsequent representation in the same manner as rules limiting attorneys from representing a party adverse to a former client.<sup>62</sup> The rule of *Poly* could arguably undercut the exchange of confidential information since the case more or less created a ban on representational relationships by lawyer-mediators who "received confidential information in the course of a mediation."<sup>63</sup>

#### E. Responding to the Uncertainties

Given the plethora of ethical questions arising in the field of mediation,<sup>64</sup> it is no surprise that numerous individuals and organizations have attempted to formulate ethical guidelines for those in the practice of mediation. At the national level, the most prominent set of guidelines aimed at mediators in general is the Model Standards of Conduct for Mediators (Model Standards).<sup>65</sup> The Model Standards, which consist of nine rather broadly – phrased standards and accompanying commentary, were developed in 1994 by the American Arbitration Association, the ABA Section of Dispute Resolution, and the Society of

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 395. If a lawyer-mediator were required by law or by a court to divulge confidential matters from mediation, the party whose information was revealed would have a claim against the lawyer-mediator for breach of the duty of confidentiality.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> 880 F. Supp. 1487 (D. Utah 1995).

<sup>62</sup> Wise, *supra* note 21, at 395.

<sup>63</sup> *Id.* at 396 (internal quotations and citation omitted).

<sup>64</sup> The outline above is by no means a comprehensive list.

<sup>65</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994), *reprinted in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 257 (Phyllis Bernard & Bryant Garth eds., 2002).

Professionals in Dispute Resolution.<sup>66</sup> Many of the states that have adopted ethical guidelines for mediators have used the Model Standards as a blueprint.<sup>67</sup> In those states where no rules have been adopted, the standards are frequently offered as a guide.<sup>68</sup>

At the state level, there exists tremendous variation in the way guidance is given to mediators. In a number of states, specific, compulsory standards have been adopted for mediators in court-sponsored programs.<sup>69</sup> At least four states include standards for mediators in their rules for all neutrals involved in the practice of ADR.<sup>70</sup> Still other states provide some form of ethical standards merely as recommended, aspirational guidelines.<sup>71</sup>

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<sup>66</sup> James J. Alfini, *Mediator Ethics*, in *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE* 65, 66 (Phyllis Bernard & Bryant Garth eds., 2002). These Model Standards are meant not as the final word on mediative ethics, but rather as a first step toward more comprehensive ethical provisions for practitioners. *Introduction to MODEL STANDARDS OF CONDUCT FOR MEDIATORS*, reprinted in *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE*, 257 (Phyllis Bernard & Bryant Garth eds., 2002). Consistent with traditional ideas about a mediator's role, the Model Standards take a largely facilitative approach toward the practice of mediation, meaning that they emphasize the propriety of providing legal information, as opposed to providing legal advice. See *Preface to MODEL STANDARDS OF CONDUCT FOR MEDIATORS*, reprinted in *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE* 257 (Phyllis Bernard & Bryant Garth eds., 2002). Additionally, the MODEL STANDARDS impart guidance, with varying levels of specificity, on topics including impartiality, conflicts of interest, qualifications, confidentiality, advertising, and compensation. See generally *MODEL STANDARDS OF CONDUCT FOR MEDIATORS*, reprinted in *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE* 257 (Phyllis Bernard & Bryant Garth eds., 2002). Although the Model Standards may fairly be described as mostly general in nature, the foregoing list of covered topics makes clear that they also delve in some depth into a number of topics of significance to practitioners of mediation. For an in-depth analysis of the Model Standards, see *infra* Part IV.C.

<sup>67</sup> Alfini, *supra* note 66, at 66.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 66-67. These states include Alabama, Florida, Georgia, Kansas, New Jersey, Oklahoma, and Virginia. Virginia, which uses a complex system of laws and guidelines to regulate its mediators, see *infra* notes 118, 134, and accompanying text, is notable as the first state specifically to address the concerns of those in the cross-practice of law and mediation. Laffin, *supra* note 16, at 518. The Virginia Rules of Professional Conduct, adopted by the Virginia State Bar Association in 1999 as part of the state's regulatory scheme for mediators, attempt to strike a balance between the evaluative and facilitative approaches to mediation, although they do give preference to the latter style. *Id.* at 519. These rules include specific provisions dictating under what circumstances a mediator may give certain types of legal information (as distinguished from legal advice, which may not be given). VA. RULES OF PROF'L CONDUCT R. 2.11(d). Virginia's rules also provide guidance as to how lawyer-mediators should handle parties who are current or former clients, *id.*, and how mediators in general are to interact with parties who are unrepresented by counsel. *Id.* at 2.10. For an in-depth analysis of Virginia's guidelines on mediator conduct, see *infra* Part IV.B.

<sup>70</sup> Alfini, *supra* note 66, at 67. Alfini mentions Indiana, Maine, Minnesota, and Tennessee in this category of states. *Id.*

<sup>71</sup> *Id.* Hawaii, Oregon, and Texas fall in this category. *Id.*

### III. STATE OF THE LAW IN WEST VIRGINIA

Although West Virginia has not yet adopted guidelines on professional ethics for mediators, there does exist a limited body of state law governing the conduct of those engaging in mediation.<sup>72</sup>

#### A. *The Rules*

The most significant source of statutory law governing mediator conduct in West Virginia is found in the state trial court rules, Rule 25 being the relevant provision.<sup>73</sup> With the exception of domestic relations matters, it applies to the mediation of all civil cases in the state circuit courts.<sup>74</sup>

Included in the provisions of Rule 25 is a definition of mediation that one might characterize as “facilitative” in its approach.<sup>75</sup> Rule 25.02 describes mediation as an “informal, non-adversarial process whereby a neutral third person, the mediator, assists parties to a dispute to resolve by agreement some or all of the differences between them.”<sup>76</sup> The provision reinforces the non-decisional nature of the mediator’s role, reiterating that decision-making authority remains with the parties.<sup>77</sup> Consistent with the facilitative spirit of the definition, the rule adds that “[t]he role of the mediator is to encourage and assist the parties to reach their own mutually acceptable settlement by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring

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<sup>72</sup> In the late 1990s, a subcommittee of the West Virginia State Bar Board of Governors was assigned the task of formulating proposed ethical guidelines for lawyers acting as mediators within the state. Telephone Interview with Debra Scudiere, Kay Casto & Chaney PLLC (July 28, 2003). After making minor changes, the State Bar Board of Governors submitted these guidelines, some part of which were drawn from the Model Standards, to the West Virginia Supreme Court of Appeals. *Id.* Additionally, another subcommittee of the State Bar has been assigned the task of reviewing Rule 25 of the State Trial Court Rules, which governs various aspects of mediation in West Virginia. *Id.* However, the author was unable to find any indication that the West Virginia Supreme Court of Appeals has moved forward with the recommendations of these State Bar subcommittees.

West Virginia has adopted certain rules governing the conduct of mediators involved in Family Court proceedings. *See generally* W. VA. RULES OF PRACTICE AND PROCEDURE FOR FAMILY COURT. However, the focus of this article is the adoption of a code of ethics for those engaged in the mediation of general litigation matters. Therefore, an analysis of the family court provisions for mediation is beyond the scope of this work.

<sup>73</sup> W. VA. TRIAL CT. R. 25.

<sup>74</sup> *Id.* at 25.01.

<sup>75</sup> *See* Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 175-76 (1999); *supra* Part II.C.

<sup>76</sup> W. VA. TRIAL CT. R. 25.02.

<sup>77</sup> *Id.*

settlement alternatives, and other similar means.”<sup>78</sup> The rule concludes with the observation that the procedures used in mediation should remain flexible and may be tailored to fit the needs of the parties to the process.<sup>79</sup>

Although much of the remainder of Rule 25 deals with the routine process by which mediation is to be carried out,<sup>80</sup> the rule does contain a few additional significant provisions. First, the rule governs the confidentiality of the mediation process:

Mediation shall be regarded as confidential settlement negotiations, subject to W. Va. R. Evid. 408.<sup>81</sup> A mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. A mediator shall keep confidential from opposing parties information obtained in an individual session unless the party to that session or the party’s counsel authorizes disclosure. A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Rule 25 dictates how cases are to be selected for mediation, *id.*; provides for a list of mediators to be compiled and maintained by the West Virginia State Bar, *id.* at 25.04; directs the selection, *id.* at 25.05, and compensation, *id.* at 25.06, of mediators; suggests guidelines for the provision of preliminary information to the mediator, *id.* at 25.08, and for time frames by which mediation is to be conducted, *id.* at 25.09; directs the participation of the parties, *id.* at 25.11, and provides for the possible imposition of sanctions in the event a necessary party fails to participate, *id.* at 25.10; and gives the Supreme Court of Appeals the authority to compile statistical information relating to mediation conducted under the rule. *Id.* at 25.16. Rule 25 further directs that mediators are to have immunity to the same extent as circuit judges, *id.* at 25.13; that written settlement agreements reached in mediation are to be enforceable in the same manner as other written contracts, *id.* at 25.14; and that, within certain guidelines, the mediator is to report the outcome of the mediation to the court, *id.* at 25.15.

<sup>81</sup> Rule 408 provides as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

W. VA. R. EVID. 408.

confidential information in any proceeding relating to or arising out of the dispute mediated.<sup>82</sup>

Second, Rule 25 provides for disqualification of mediators by dictating that “[a] mediator shall be subject to Canon 3 of the West Virginia Code of Judicial Conduct<sup>83</sup> regarding disqualification for partiality or conflict of interest. Any party may move the court to disqualify a mediator for good cause.”<sup>84</sup> Additionally, it should be noted that Canon 4 of the West Virginia Code of Judicial Conduct prohibits judges from acting as mediators or arbitrators, with certain exceptions.<sup>85</sup>

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<sup>82</sup> W. VA. TRIAL CT R. 25.12.

<sup>83</sup> Section E of Canon 3 is the provision referred to here, and it provides as follows:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, parent or child wherever residing, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimus interest that could be substantially affected by the proceeding;

(d) the judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

i) is a party to the proceeding, or an officer, director or trustee, of a party;

ii) is acting as a lawyer in the proceeding;

iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

iv) is to the judge’s knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge’s personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge’s spouse and minor children.

W. VA. CODE OF JUD. CONDUCT Canon 3E.

<sup>84</sup> W. VA. TRIAL CT. R. 25.07.

<sup>85</sup> W. VA. CODE OF JUD. CONDUCT Canon 4F. “Section 4F does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of judicial duties. Section 6B permits retired judges to act as mediators in a private capacity.” *Id.* at Canon 4F cmt.

## B. Case Law: *Riner v. Newbraugh*

There is not a wealth of case law in West Virginia on the subject of mediator conduct. Even so, the recent case of *Riner v. Newbraugh*<sup>86</sup> posed some interesting issues, though it added relatively little in the way of guidance to practicing mediators.

### 1. Background

*Riner* involved a dispute between certain landowners and developers that arose out of the landowners' attempt to develop a piece of farmland into a subdivision.<sup>87</sup> When the parties disagreed on the apportionment of expenses and the disbursement of funds involved in the project, the landowners filed suit alleging fraud and breach of fiduciary duty on the part of the developers.<sup>88</sup> After an unsuccessful court-ordered mediation conference, the parties were able telephonically to reach an agreement, which the mediator later reduced to writing.<sup>89</sup> He and the landowners signed the agreement and immediately transmitted it to the developers.<sup>90</sup>

Choosing not to sign the agreement, the developers had their counsel prepare a lengthier document that restated parts of the earlier agreement and included other provisions not addressed at the mediation conference.<sup>91</sup> When the landowners refused to sign this second document, the developers filed a motion to enforce the settlement agreement.<sup>92</sup> After two hearings on the dispute, at which the mediator was among those to testify, the circuit court granted the developers' motion to enforce, ordering the landowners to execute the document prepared by the developers' counsel.<sup>93</sup> The landowners then appealed that order to the Supreme Court of Appeals of West Virginia.<sup>94</sup>

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<sup>86</sup> 563 S.E.2d 802 (W. Va. 2002).

<sup>87</sup> *Id.* at 804.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 804-05.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 805.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

## 2. Holding

The Supreme Court of Appeals of West Virginia overturned the enforcement order of the circuit court,<sup>95</sup> and, at the same time, imparted some disapproval relevant to the mediation. As a preliminary issue, the court noted that the original settlement agreement prepared by the mediator contained no time requirement for performance.<sup>96</sup> Although the court declined to take a position as to the one-month period between preparation of the original settlement agreement and preparation of the second document by the developers, the court did express its strong preference for the use of performance dates in mediation agreements.<sup>97</sup>

The court addressed more of its attention to the questioning of the mediator by the trial court. On this point the court voiced its firm disapproval:

While the trial court's questioning of the mediator ensued due to his presence having been secured by subpoena, we question the wisdom of permitting the mediator to testify in the fashion allowed in this case. To the mediator's credit, he informed the trial court prior to his testimony that the trial court rules<sup>98</sup> prohibit him from subsequently testifying for trial purposes. . . . He did acknowledge, however, that a mediator can be called to testify to the generalized issue of whether an agreement has been reached. While it does not appear that the mediator disclosed any confidential information through his testimony, and neither party has raised such a claim, the trial court's questioning of the mediator went beyond the basic issue of whether in fact an agreement was reached and identifying the terms of that agreement.<sup>99</sup>

Although the court clearly disapproved of the trial court's handling of the situation, it found no violation of the trial court rule on confidentiality in mediation.<sup>100</sup>

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<sup>95</sup> *Id.* at 809-10.

<sup>96</sup> *Id.* at 807.

<sup>97</sup> *Id.* (“[W]e note that specification of a date by which performance of a settlement agreement is to take place is clearly preferable to permitting the breakdown of an agreement on grounds of untimely performance.”).

<sup>98</sup> See W. VA. TRIAL CT. R. 25.12 (dictating that a “mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated”).

<sup>99</sup> *Riner*, 563 S.E.2d at 808-09.

<sup>100</sup> *Id.* at 809.



#### IV. A LOOK OUTSIDE WEST VIRGINIA

Any attempt to provide guidance to West Virginia's mediators must be made with at least two preliminary considerations in mind. First, while all mediators are sometimes faced with moral dilemmas, those in the cross-practice of law and mediation are in a uniquely perplexing position. The lawyer-mediator's dual roles result in dual sets of responsibilities. Rather than assisting the lawyer-mediator through this ethical quagmire, the rules governing him in his capacity as advocate serve only to confuse and frustrate him in his capacity as peacemaker.<sup>101</sup> Therefore, any attempt to govern the conduct of mediators must begin with the rules governing the conduct of lawyers. Specifically, the Rules of Professional Conduct must include an "exit door"<sup>102</sup> for lawyer-mediators when they are acting as third-party neutrals.

Second, some standards must be set to govern the conduct of mediators generally. It is not merely those in the cross-practice of law and mediation who are met with difficult moral questions. Mediators from all professional backgrounds require direction as to what constitutes correct practice. Accordingly, it is also necessary that a set of ethical precepts be adopted to clarify what is expected of those practicing mediation in West Virginia.

With these goals in mind, the following sections offer an analysis of two sets of guidelines aimed at lawyer-mediators. The Virginia guidelines and the recent ABA revisions to the MRPC were chosen for scrutiny here because of their similarities and differences. While both sets of guidelines constitute additions to the same basic framework of ethical rules for lawyers (the MRPC), they differ considerably in what they have to add to that framework in directing the conduct of lawyers as third-party neutrals.

Naturally, a review of ethical rules for mediators must encompass more than those rules focused only at lawyer-mediators. Because West Virginia mediators of all professional backgrounds require direction in matters of mediation practice, an analysis of ethical standards applicable to mediators in general, the Model Standards, also follows.

##### A. *American Bar Association Revisions to the MRPC*

The American Bar Association recently voted to pass a number of revisions to the ABA's Model Rules of Professional Conduct,<sup>103</sup> on which the West Virginia Rules of Professional Conduct are based. Among these revisions were

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<sup>101</sup> See, e.g., Laflin, *supra* note 16, at 512.

<sup>102</sup> See text accompanying note 23.

<sup>103</sup> Moore, *supra* note 5, at 48. The revisions are a product of the Ethics 2000 Commission, the ABA commission that had as its task the modernization of the ABA's MODEL RULES OF PROFESSIONAL CONDUCT (1994).

provisions relating to lawyers in the cross-profession of law and mediation.<sup>104</sup> One major impetus for the development of a rule aimed at those in the cross-practice of law and mediation was the silence of the Model Standards on the subject.<sup>105</sup> Indeed, the commentary accompanying the revisions acknowledges that lawyer-mediators may be subject to multiple codes of ethics and cites specifically to the Model Standards as an example.<sup>106</sup>

The most notable addition to the MRPC in regard to mediation is the inclusion of Rule 2.4, which states:

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of disputes that have arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer impartially to assist the parties to resolve their dispute.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. 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.<sup>107</sup>

Another revision relating to ADR appears early in the text of the rules; an acknowledgment of lawyers-as-neutrals appears in the preamble.<sup>108</sup> Additional changes include the deletion of Rule 2.2 covering intermediation<sup>109</sup> and

<sup>104</sup> Moore, *supra* note 5, at 48.

<sup>105</sup> Laflin, *supra* note 16, at 512 ("With its model rule, the Commission on Ethics hoped to clarify the distinct role of the lawyer-mediator while remedying . . . the silence toward cross-practice issues found in the ABA Model Rules and the state ethics rules for lawyers.").

<sup>106</sup> MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. 2 (2002).

<sup>107</sup> *Id.* at 2.4.

<sup>108</sup> The third paragraph of the preamble states, "In addition to . . . representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these matters apply directly to lawyers who are or have served as third-party neutrals." MODEL RULES OF PROF'L CONDUCT pmbl.

Recognition of lawyer-neutrals in the preamble of the MRPC is seen by some as a significant acknowledgment of the field of ADR. Carrie Menkel-Meadow, a professor at Georgetown University Law Center and an authority on the ethics of mediation, commented, "It's a big deal in the sense that the Ethics Commission now acknowledges the attorney's third-party neutral role." *States to Weigh New Ethics Standards*, 20 ALTERNATIVES TO HIGH COST LITIG. 50, 51 (2002).

<sup>109</sup> Wise, *supra* note 21, at 418. Part of the basis for this change was the possibility for confusion as to whether Rule 2.2 suggested that lawyers acting as intermediaries between clients are not

the extension of Rule 1.12, with its conflict of interest provisions, to lawyer-mediators.<sup>110</sup> “This means that former mediators, like former judges and arbitrators, may not represent a client in any matter in which they participated personally and substantially while a mediator, but others in their firm may do so if the former neutral is screened.”<sup>111</sup> Finally, included in the commentary to Rule 2.1 is the suggestion that lawyers inform their clients about options available to them in the field of ADR.<sup>112</sup>

While the ABA revisions are regarded by many as a well-deserved nod to the importance of mediation and other ADR practices, the revisions have also met with criticism. One concern is that Rule 2.4 does not take a sufficiently decisive stand on the issue of mediation as the practice of law.<sup>113</sup> Additionally, there are potential fairness issues relating to the conflict of interest provisions.<sup>114</sup> It has been suggested that the rules might benefit from a requirement that lawyer-mediators get the parties to mediation to sign an agreement to the effect that they understand the mediator’s role.<sup>115</sup> Principally, however, Rule 2.4 has been criticized as lacking in substance. It has been lamented that the rule contributes little more than an acknowledgment of the lawyer’s potential role as third-party

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subject to the conflict of interest provisions in Rule 1.7. The newly added Rule 2.4 addresses some of the issues previously covered by Rule 2.2, and additional portions of the former rule’s substance have been moved to the commentary accompanying Rule 1.7. Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 454 (2002).

<sup>110</sup> Wise, *supra* note 21, at 418-19.

<sup>111</sup> *Id.* at 419.

<sup>112</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 5 (“[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.”).

By contrast, the Virginia rules make compulsory what is merely suggested in the new MRPC provision. “[A] lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate . . . .” VA. RULES OF PROF’L CONDUCT R. 1.2 cmt. 1.

<sup>113</sup> See Duane W. Krohnke, *ADR Ethics Rules to Be Added to Rules of Professional Conduct*, 18 ALTERNATIVES TO HIGH COST LITIG. 108 (2000). For example, comment 3 to Rule 2.4 says: “[T]he role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases.” MODEL RULES OF PROF’L CONDUCT R. 2.4 cmt. 3.

<sup>114</sup> Comment 4 to Rule 2.4 says: “A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same or substantially related matter. The conflicts of interest that arise for both the individual lawyer and the lawyer’s firm are addressed in Rule 1.12.” MODEL RULES OF PROF’L CONDUCT R. 2.4 cmt. 4. It is arguably unfair to represent one party to mediation if the other objects. Revised Rule 1.12 could arguably discourage lawyers from acting as mediators “by erecting a bar to an entire firm’s involvement in the same or substantially related matter and prohibiting the screening of the lawyer who had acted as a neutral.” Krohnke, *supra* note 113, at 115.

<sup>115</sup> Wise, *supra* note 21, at 421-23.

neutral and an admonishment to the lawyer to advise parties to ADR proceedings as to his nonrepresentational role.<sup>116</sup>

Regardless of these strictures, Rule 2.4 makes a decidedly advantageous contribution to the MRPC in that it acts as the essential "exit door" for lawyer-neutrals. By advising the parties that the lawyer-neutral is not acting as an attorney, but as a neutral, the lawyer-neutral, in effect, escapes the lawyer-related guidelines of the MRPC and functions only under the ADR guidelines.<sup>117</sup>

## B. Virginia

The Virginia State Bar Association adopted the Virginia Rules of Professional Conduct in 1999.<sup>118</sup> Certain sections of these rules, which are part of a complex regulatory scheme governing alternative dispute resolution,<sup>119</sup> focus directly on those in the cross-practice of law and mediation. This focus is notable because prior to the adoption of these rules, no state had attempted to address specifically the practice of mediation by lawyers.<sup>120</sup>

Not surprisingly, the Virginia rules deal with the "facilitative versus evaluative" issue.<sup>121</sup> The solution at which the drafters of these rules arrived was what has been termed "a delicate compromise" between the two approaches.<sup>122</sup> Key to the Virginia approach is the notion that any regulation in this area must allow for flexibility, must recognize that mediation is an evolving profession, and must provide guidelines and boundaries without tying the hands of mediators.<sup>123</sup> With this in mind, the drafters of the Virginia rules adopted the pragmatic approach that, while facilitation is at the heart of the practice of me-

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<sup>116</sup> Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949 (2002).

<sup>117</sup> Wise, *supra* note 21, at 421-23.

<sup>118</sup> See Charles H. Oates & Marie S. Hamm, *A New Twist for an Olde Code: Examining Virginia's New Rules of Professional Conduct*, 13 REGENT U. L. REV. 65 (2001).

<sup>119</sup> Virginia uses several mediums to address mediation, including its statutes, *see* VA. CODE ANN. § 8.01-581.23 (West 2001), its requirements for those certified as mediators in the state, *see* VA. STANDARDS OF ETHICS AND PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS, its training guidelines, *see* VA. GUIDELINES FOR THE TRAINING AND CERTIFICATION OF COURT-REFERRED MEDIATORS, and in certain materials addressing concerns about the unauthorized practice of law, *see* VA. GUIDELINES ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW.

<sup>120</sup> Laflin, *supra* note 16, at 518.

<sup>121</sup> For example, the rules characterize the evaluative approach as involving a look at the strengths and weaknesses of the parties' positions, an assessment of the cost/value of alternatives to settlement, or an assessment of the barriers to settlement. VA. RULES OF PROF'L CONDUCT R. 2.11.

<sup>122</sup> Laflin, *supra* note 16, at 518.

<sup>123</sup> *Id.*

diation, that practice may also benefit from a fair amount of evaluative activity if the parties to the mediation so desire.<sup>124</sup>

It should be noted, however, that the Virginia rules do give a decided preference to the facilitative method of mediation.<sup>125</sup> For example, Rule 2.11 places “restrictions on evaluative techniques designed to protect the essential, facilitative purpose of the mediation process.”<sup>126</sup> Thus, evaluative activity on the part of the mediator must be “incidental to the facilitative role” and must not “interfere with the lawyer-mediator’s impartiality or the self-determination of the parties.”<sup>127</sup>

A brief review of the Virginia provisions for lawyer-mediators makes readily apparent how much West Virginia lacks in guidance for its mediators. Under the Virginia scheme, although lawyer-mediators are prohibited from offering legal advice to the parties to mediation,<sup>128</sup> they may give legal information under certain circumstances because it constitutes “an educational function which aids the parties in making informed decisions.”<sup>129</sup> As long as there is no interference with the mediator’s impartiality, or with the self-determination of the parties, the lawyer-mediator may, under certain circumstances, offer an evaluation of the strengths and weaknesses of the parties’ positions, assess the value and cost of alternatives to settlement, or assess the barriers to settlement.<sup>130</sup>

The Virginia rules provide guidance as to how a mediator should handle a few common matters relating to the representation of the parties. Mediators are required to encourage those mediation participants who are unrepresented to seek legal counsel before executing a binding agreement.<sup>131</sup> Additionally, lawyers are not prohibited from acting as mediators in disputes involving current or former clients, as long as the subject matter of the dispute is not related to the representation (and as long as certain other conditions are met).<sup>132</sup>

There are some obvious differences in methodology between the ABA rule and the Virginia provisions. Most significantly, Virginia has attempted to

<sup>124</sup> This emphasis on participant control is fundamental to the Virginia rules. “It appears that the Virginia Rules tend to emphasize participant control over choices and expectations, including preferences as to the use of evaluative techniques . . . . The choice was made to adopt a broad definition of mediation emphasizing the importance of informed consent.” Wise, *supra* note 21, at 413.

<sup>125</sup> Laffin, *supra* note 16, at 519.

<sup>126</sup> VA. RULES OF PROF’L CONDUCT R. 2.11(d).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 2.11(d) cmt. 7.

<sup>130</sup> *Id.* at 2.11(d).

<sup>131</sup> *Id.* at 2.10.

<sup>132</sup> *Id.* at 2.11(d); see also Oates & Hamm, *supra* note 118, at 86-87.

include more in the way of specific direction to its lawyer-mediators than has the ABA rule.<sup>133</sup> Some have criticized it for this attempt, arguing that the Virginia provisions go just far enough into the realm of specificity to cause more confusion.<sup>134</sup>

C. *Model Standards of Conduct for Mediators*

As was previously discussed, one of the most significant contributions to the subject of the ethics of mediation occurred in 1994 with the development of the Model Standards of Conduct for Mediators.<sup>135</sup> Although the Model Standards do touch on a number of different areas of concern to the field, they are meant to serve more as a behavioral framework for practitioners, rather than as a comprehensive guide to ethical conduct.<sup>136</sup> Furthermore, the drafters recognized their effort as a preliminary step toward more comprehensive provisions, that is, as “a beginning, not an end.”<sup>137</sup> It was further recognized by the drafters that the Model Standards would, in some cases, require application in conjunction with local law or individual contractual agreement.<sup>138</sup>

These nine standards for mediator conduct, in conformance with the traditional paradigm of mediation as a process strictly founded on the self-determination<sup>139</sup> of the parties, are predominantly facilitative in their approach.<sup>140</sup> For example, the Model Standards, similarly to the Virginia guide-

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<sup>133</sup> See VA. RULES OF PROF'L CONDUCT R. 2.10(b)(2) (requiring lawyer-mediators to encourage unrepresented parties to seek legal counsel before executing settlement agreements); *id.* at 2.10(g) (prohibiting lawyer-mediators from mediating on a contingency fee basis); *id.* at 2.11(e)(1) (requiring the lawyer-mediator, prior to mediation, to consult with the parties as to their expectations, and as to the mediation style to be used).

<sup>134</sup> See Laflin, *supra* note 16, at 523-24.

<sup>135</sup> See *supra* Part II.E.

<sup>136</sup> *Introduction to MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994), reprinted in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 257 (Phyllis Bernard & Bryant Garth eds., 2002)* (“The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation.”).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Indeed, Standard I states, “Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.” *Id.* at Standard I. It further provides that, at any time, a party may withdraw from the mediation.

<sup>140</sup> See *Preface to MODEL STANDARDS OF CONDUCT FOR MEDIATORS, reprinted in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 257 (Phyllis Bernard & Bryant Garth eds., 2002)*. “Mediation is a process in which an impartial third party – a mediator – *facilitates* the resolution of a dispute by promoting voluntary agreement (or “*self-determination*”) by the parties to the dispute. A mediator *facilitates* communications . . . .” *Id.* (emphasis added). Despite this slant toward the facilitative approach, the Model Standards do not prohibit the use of evaluative techniques. Laflin, *supra* note 16, at 506 n.141.

lines, draw a line between the permissible provision of legal information and the impermissible provision of legal advice.<sup>141</sup> While the standards acknowledge the value of ensuring that parties are coming to an agreement as a result of a fully informed choice,<sup>142</sup> they also recognize the potential problems that may arise if a mediator takes a more direct role in educating the parties as to legal issues affecting their case:

While the mediator may view certain information as essential to informed decision-making, if the mediator provides this information, he or she may be viewed as giving an advantage to a party, thereby running the risk of compromising his or her impartiality. Moreover, the parties may take the information as a form of advice, which would erode the goal of party self-determination.<sup>143</sup>

Apart from this admonition concerning the giving of legal advice, the Model Standards impart instruction in numerous other areas of mediation procedure. On the subject of impartiality, Standard II dictates that a mediator conduct a mediation session impartially and withdraw if the mediator becomes unable to do so.<sup>144</sup> In the same vein, the mediator is required by Standard III to disclose any conflicts of interest, actual or potential, of which the mediator reasonably

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<sup>141</sup> The Virginia guidelines categorize a mediator's giving of legal advice as the practice of law. David A. Hoffman & Natasha A. Affolder, *Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution?*, 17 GPSOLO 38, 38-39 (2000).

<sup>142</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I cmt. 2, reprinted in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 257 (Phyllis Bernard & Bryant Garth eds., 2002).

<sup>143</sup> Alfani, *supra* note 66, at 76. The Model Standards make their concern on this point explicit:

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore 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.

MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI cmt. 4, reprinted in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 257 (Phyllis Bernard & Bryant Garth eds., 2002).

<sup>144</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II, reprinted in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 257 (Phyllis Bernard & Bryant Garth eds., 2002). Additionally, Standard II and its comments stress the significance of party confidence in the mediator's impartiality, warning against even the appearance of partiality. *Id.* at Standard II cmt. 1.

knows.<sup>145</sup> Following disclosure, the mediation may only continue if all parties choose to retain the mediator,<sup>146</sup> unless serious doubt is cast on the integrity of the process by the conflict of interest. In that event, the mediator is required to withdraw from the mediation.<sup>147</sup> In all situations, mediators are reminded that their commitment “must be to the parties and the process” and that they should prevent themselves from being influenced by external pressures.<sup>148</sup>

Yet another provision of the Model Standards that stresses party empowerment is Standard IV, which governs mediator competence.<sup>149</sup> Qualification to mediate is defined by the reasonable expectations of the parties,<sup>150</sup> with the observation that effective mediation often requires training and experience in the field.<sup>151</sup> Standard V’s confidentiality provision is couched in similar terms; it requires the mediator to maintain the parties’ reasonable expectations with regard to confidentiality.<sup>152</sup> To that end, the mediator is directed to talk to the parties about their expectations of confidentiality.<sup>153</sup> These rather general terms are employed because confidentiality laws, being creatures of state statutes and court rules, vary so much from jurisdiction to jurisdiction.<sup>154</sup> For the same reason, the Model Standards do not address exceptions to confidentiality.<sup>155</sup>

Two of the remaining standards are narrower in focus. Standard VII, governing advertising, admonishes mediators to be truthful in advertising and to refrain from promising or guaranteeing results.<sup>156</sup> Fees for mediation are covered in Standard VIII, which, in addition to requiring full explanation and disclosure of the costs of mediation, requires that a mediator keep his fees reason-

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<sup>145</sup> *Id.* at Standard III. Conflict of interest is defined as “a dealing or relationship that might create an impression of possible bias.” *Id.* Again, the mediator is warned to avoid even the appearance of a conflict of interest.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at Standard III cmt. 2.

<sup>149</sup> *Id.* at Standard IV.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* The mediator is further advised to have available for the parties information relevant to such qualifications.

<sup>152</sup> *Id.* at Standard V.

<sup>153</sup> *Id.* at Standard V cmt. 1.

<sup>154</sup> Alfini, *supra* note 66, at 74-75; *see, e.g.*, W. VA. TRIAL CT. RULE 25.12.

<sup>155</sup> Alfini, *supra* note 66, at 74-75.

<sup>156</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VII, *reprinted in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 257 (Phyllis Bernard & Bryant Garth eds., 2002). In connection with advertising, the drafters expressed concern that this interaction with the public be used to educate and encourage confidence in the process. *Id.* at Standard VII cmt. 1.



able in view of all circumstances.<sup>157</sup> Additionally, Standard VIII dictates the handling of several other fee-related issues.<sup>158</sup>

Standard VI is more general in scope. In the manner of a catchall provision, it commands the mediator to “conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties.”<sup>159</sup> Various obligations on the part of the mediator are included in this section, such as terminating or postponing a session being used in the furtherance of illegal conduct, and refraining from behavior influenced by a desire for a high settlement rate.<sup>160</sup> Finally, Standard IX confers upon the mediator the duty to improve the practice of his profession.<sup>161</sup>

The most prevalent criticism of the Model Standards has been that they are too general and vague in their terms.<sup>162</sup> It has been observed that they fail to address certain areas that have come to light through the practice of mediation.<sup>163</sup> The standards would, for example, benefit from a provision governing the mediator’s role regarding finalization of agreements.<sup>164</sup> However, in evaluating these criticisms, one should bear in mind the purpose for which the Model Standards were created. In the words of Dean John Feerick, the chair of the joint committee that developed the Model Standards, they are “intended to be guideposts toward the development of uniform standards of conduct for mediators.”<sup>165</sup>

<sup>157</sup> *Id.* at Standard VIII. In setting rates, the mediator is advised to take into consideration “the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community.” *Id.*

<sup>158</sup> Namely, the mediator who withdraws from mediation is required to return unearned fees, the mediator is forbidden from entering into contingency fee agreements for the provision of mediation services, co-mediators must allocate shared fees reasonably, and the mediator is forbidden from accepting a referral fee. *Id.* at Standard VIII cmt. 1-4.

<sup>159</sup> *Id.* at Standard VI.

<sup>160</sup> *Id.* at Standard VI cmt. 6, 7.

<sup>161</sup> *Id.* at Standard IX. The sole comment to this section adds, “Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.” *Id.* at Standard IX cmt. 1.

<sup>162</sup> Alfini, *supra* note 66, at 84-85.

<sup>163</sup> *Id.* At least one commentator has remarked on the Model Standards’ failure to address the unauthorized practice of law issue and on the lack of anything in the standards suggesting or mandating that the parties sign a written agreement to mediate. *Id.* at 80-81.

<sup>164</sup> *Id.* at 78-79 (noting that the Model Standards are largely silent on this point).

<sup>165</sup> John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 477 (1997).

## V. CONCLUSIONS AND RECOMMENDATIONS

Although both the Virginia and the ABA provisions for lawyer-mediators are laudable attempts to solve a difficult problem, it would probably be wisest at this juncture for West Virginia to consider adopting the recent ABA revisions relating to mediation. Since forty-three states base their rules of professional responsibility for lawyers on the MRPC, and most of these states have already begun the process of reviewing the recent revisions to the MRPC, it is logical to predict that the ABA revisions will become the standard for lawyer-mediator conduct in many states.<sup>166</sup> West Virginia's adoption of the revisions would stand it in good stead in an increasingly "multijurisdictional practice environment where more and more lawyers must be aware of the ethics standards in more than one jurisdiction."<sup>167</sup> Although the revisions are not without flaws, their adoption in West Virginia would constitute a significant improvement over the status quo, in which lawyer-mediators are left to maneuver between two, often incompatible, sets of obligations.

Likewise, it is incumbent upon West Virginia to provide some form of guidance to all mediators practicing in the state. It is fortunate that the confidentiality issue raised in *Riner v. Newbraugh*<sup>168</sup> fell under the scope of the state's current provisions relating to mediation (and surprising, given the scarcity of such provisions<sup>169</sup>), but in light of the volume and complexity of ethical problems that may arise in the field of mediation, it cannot be denied that our mediators must often face questions for which the current law provides no answers.

While the criticisms of the Model Standards are not without merit, it must be remembered that their drafters never intended them as a panacea. The

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<sup>166</sup> Moore, *supra* note 5. Virginia has reviewed the MRPC revisions and has apparently declined to adopt Rule 2.4. See Virginia State Bar, *Virginia State Bar Council to Review the Standing Committee on Legal Ethics' Proposed Revisions to the Rules of Professional Conduct*, at [http://www.vsb.org/profguides/proposed/legalethics1\\_2-8\\_4.html](http://www.vsb.org/profguides/proposed/legalethics1_2-8_4.html) (last visited Aug. 29, 2003).

<sup>167</sup> Moore, *supra* note 5. Further evidence of the increasingly multijurisdictional nature of the practice of law may be found in the ABA's creation of a Commission on Multijurisdictional Practice, which had this to say on the subject:

One of the major concerns facing the legal profession as we enter the 21st Century is how to deal with the multijurisdictional practice of law. American businesses have become transnational, if not global, in nature. As the nature of clients' business has changed, the practice of law has also become multi-jurisdictional. The multijurisdictional practice of law involves issues of legal ethics, bar admission, regulation of lawyers and the unauthorized practice of law.

John A. Holtaway, *Commission on Multijurisdictional Practice*, at <http://www.abanet.org/cpr/mjp-home.html> (last visited Aug. 29, 2003).

<sup>168</sup> 563 S.E.2d 802 (W. Va. 2002); see also *supra* Part III.B.

<sup>169</sup> See *supra* Part III.A.

Model Standards are intended to serve (and have served<sup>170</sup>) as a starting point – a foundation on which to build.<sup>171</sup> If the time has come to revise and update them, as some have suggested,<sup>172</sup> that ought not preclude our consideration of them as a first step toward more comprehensive instruction.<sup>173</sup> Furthermore, the prevalence of the Model Standards gives jurisdictions adopting them, in part or in whole, the benefit of a much greater volume of interpretive literature to assist in resolving the questions that will inevitably arise regarding how to apply them.<sup>174</sup> Whichever course West Virginia elects to take in adopting ethical guidelines for its mediators, one thing is abundantly clear: it must take that first step, and soon.

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<sup>170</sup> See *Introduction to MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994)*, reprinted in *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 257* (Phyllis Bernard & Bryant Garth eds., 2002); Laflin, *supra* note 16, at 508 n.152 (noting that Louisiana incorporates the Model Standards by reference for all registered mediators in the state, and that South Carolina has adopted them almost verbatim).

<sup>171</sup> See *Introduction to MODEL STANDARDS OF CONDUCT FOR MEDIATORS*, reprinted in *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 257* (Phyllis Bernard & Bryant Garth eds., 2002).

<sup>172</sup> See Alfini, *supra* note 66, at 85.

<sup>173</sup> Indeed, this would constitute merely a “first step,” for it is similarly imperative that West Virginia establish some sort of certification requirements for mediators. See Laflin, *supra* note 16, at 511 (observing that a lawyer who has never sought certification as a mediator, but who has assumed such a role, is not subject to general standards like the Model Standards).

<sup>174</sup> See Oates & Hamm, *supra* note 118, at 69. In discussing the benefits to Virginia that would follow its 1999 adoption of the MRPC for lawyers, Oates and Hamm observed that “ABA legal ethics opinions, as well as most case law and scholarly works, discuss ethical principles within the context of the Model Rules. In addition, the majority of law schools focus on the Model Rules in teaching professional responsibility. Thus, adopting the Model Rules format allows Virginia lawyers to operate within a widely accepted and readily understandable set of standards.” *Id.* Although the Model Standards have not yet reached the level of acceptance of the MRPC, it is unlikely at this point that any other set of standards for mediators would be more likely to do so.

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