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# Indigency, Secrecy, and Questions of Quality: Minimizing the Risk of "Bad" Mediation for Low- Income Litigants

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# INDIGENCY, SECRECY, AND QUESTIONS OF QUALITY: MINIMIZING THE RISK OF “BAD” MEDIATION FOR LOW-INCOME LITIGANTS

ROBERT RUBINSON\*

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## I. INTRODUCTION

Mediation can be magical. In the face of seemingly insurmountable differences, it can lead to productive resolutions far beyond what litigation could ever produce.<sup>1</sup> In the hands of sophisticated practitioners and in appropriate cases, it offers a means for participants to engage in self-determination and more flexible conflict resolution.<sup>2</sup> In light of how well mediation can work, it has experienced explosive growth in all areas of conflict, and in both private and court-connected contexts.<sup>3</sup> There is, nevertheless, a risk that mediators can be unskilled or, worse, affirmatively damaging. This risk is endemic to all mediation but play out in particularly troubling ways when low-income litigants participate in mediation through court-annexed programs that have few resources, high volume, and uncertain quality control.

There are a number of reasons why such a risk exists. There is little consensus about how best to practice mediation. Mediators can and do advocate a wide range of, and sometimes inconsistent, approaches to mediation. The debate becomes foundational, even to the extent that mediators claim that another style of mediation is not mediation at all. This means that mediators do not agree about what the norms of their profession are, and thus, do not agree about whether a mediator is unskilled or not. Indeed, to the extent codes for mediators exist, such as the Uniform Mediation Act<sup>4</sup> and the Model Standards of Conduct for

1. For some compelling statements—perhaps hyperbolic—about the value of mediation, see Lela P. Love, *The Top Ten Reasons Why Mediators Should not Evaluate*, 24 FLA. ST. U. L. REV. 937, 939, 945 (1997) (Mediation is a means “to continue to survive and evolve as a species.”); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 258 (rev. ed. 2005) (Mediation is “an essential positive force in constituting human identity and shared meaning.”).

2. This Article will use the term “participants” instead of “parties” when discussing mediation. This is because mediation can and does take place prior to litigation or in matters in which litigation is not appropriate or contemplated.

3. For a review of the array of matters that are the subject of mediation, see KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 479–505 (3d ed. 2004). The growth has extended internationally as well. TAMARA RELIS, *PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES* 3 (2009) (noting the “worldwide” growth of mediation).

4. UNIF. MEDIATION ACT (2003).

Mediators,<sup>5</sup> they are not detailed because there is not consensus as to what good mediation is. Moreover, confidentiality, while valuable, also has unintended consequences of largely insulating mediations from scrutiny.

The risk of poor mediation intensifies in settings where there are large numbers of low-income litigants. These litigants often know nothing about mediation, may face more powerful litigants, and, in almost all cases, have no legal counsel. The lack of an effective means to assess quality in such a setting creates a risk that such participants will not only fail to experience the many benefits that good mediation can offer, but instead experience the negative consequences that bad mediation can generate.

This Article traces these interlocking circumstances as a means to explore the risks faced by low-income mediation participants. The Article first explores the range of issues that have impeded a unified understanding of the professional norms and identities of mediators. Second, the Article defines bad mediation and the particular vulnerability low-income litigants face in the context of high-volume court-annexed programs. The Article concludes with recommendations about how best to minimize the risk of bad mediation, with a particular emphasis on insuring quality mediation for low-income litigants.

A note before continuing: the Article speaks of the “risk” of bad mediation, and does so for a reason. It is misleading to paint mediators who engage in important work in court-annexed programs as mostly bad or unskilled. This is not only unfair, but inaccurate. Most are effective mediators and perform this work—often for little or no compensation—out of a commitment to extend the benefits of mediation to individuals who otherwise could not afford it. Moreover, individuals who work in court-annexed mediation programs perform remarkable work, sometimes under difficult conditions. “Risk” is thus not meant to imply that bad mediation is common. Nevertheless, even a few bad mediators can do affirmative harm to a vulnerable population, and they can do this harm with virtually no means to ameliorate the consequences or prevent its recurrence. This is a risk worth minimizing, and that is the ultimate goal of this Article.

## II. DIVERGENT PROFESSIONAL IDENTITIES AMONG MEDIATORS

Any attempt to address “bad” mediation must begin with what is

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5. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. BAR ASS’N 2005).

“good” mediation. Remarkably, the question is harder to answer than might first appear.<sup>6</sup> This section explores why.

### A. *Defining Professional Norms*

Roscoe Pound defined a “professional” as someone who pursues activities to fulfill the “chief purpose” of “traditions.”<sup>7</sup> Professionals explicitly self-identify as adherents to such “traditions.”<sup>8</sup> While there are subspecialties within professions, an accountant will still self-identify as an accountant, a lawyer as a lawyer, and so on.

In contrast, the majority of mediators come to mediation from other professions, such as law, social work, mental health, accountancy, and the clergy.<sup>9</sup> Most mediators, therefore, see being a mediator as a “secondary profession.”<sup>10</sup> For example, a lawyer may mediate, but would still currently practice law and thereby continue to be subject to ethical rules

6. The efforts that have been undertaken in this regard remain unsuccessful. Art Hinshaw, *Regulating Mediators*, 21 HARV. NEGOT. L. REV. 163, 204–05 (2016) (discussing the “struggles” and “difficulties” that characterize efforts to define mediation).

7. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 4–8 (1953).

8. *Id.*

9. See Brian Jarrett, *Exploring and Practising Integral Mediation*, 6 DISP. RESOL. INT’L 37, 43 (2012) (noting that mediation practitioners are from “divergent disciplines of origin, such as law, social work, social work, psychology, counseling, sociology[,] and business”); Hinshaw, *Regulating Mediators*, *supra* note 6, at 172 (“[P]eople typically come to mediation . . . after being educated and employed in another field.”). The range of professionals who mediate reflect the nature of particular mediations. For example, given the emotional concerns that often accompany family dissolution, mental health professionals are commonly family law mediators. Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887, 893–94 (2012) (“[M]any mediators in court-connected settings are still mental health professionals.”). There are, nevertheless, programs that offer degrees in dispute resolution. These include: University of Baltimore (offering a Masters in Negotiations and Conflict Management (*Negotiations and Conflict Management*, UNIVERSITY OF BALTIMORE, <http://www.ubalt.edu/cpa/graduate-programs-and-certificates/degree-programs/negotiations-and-conflict-management/> [https://perma.cc/36VW-JYZ4])); and Pepperdine School of Law (offering a Master of Dispute Resolution (*Learn about the Straus MDR at Pepperdine*, PEPPERDINE SCHOOL OF LAW, <http://law.pepperdine.edu/request-information-straus-mdr/> [https://perma.cc/DS5D-UU9B])).

10. See Art Hinshaw, *Mediators as Mandatory Reporters of Child Abuse: Preserving Mediation’s Core Values*, 34 FLA. ST. U. L. REV. 271, 290 (2007) (“[M]ediation is a secondary profession for most mediators.”). The diversity of professional backgrounds of mediators is consistent with the interdisciplinary history of mediation. Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000). Menkel-Meadow notes that mediation is “an eclectic field intellectually” which has drawn “not only from law and legal theory, but from anthropology, sociology, international relations, social and cognitive psychology, game theory and economics, and most recently, political theory.” *Id.* at 3.

that apply to that profession.<sup>11</sup>

### B. The “Models” Debate

In addition, and related to the lack of uniformity of professional identity of mediators, there has been a robust—sometimes heated—debate about the proper approach to mediation. These are usually referred to as “styles” or “models” of mediation.<sup>12</sup> The debate originates from influential work by Leonard Riskin, who proposed a “grid” of mediator orientations comprised of what came to be known as “facilitative mediation” and “evaluative mediation.”<sup>13</sup> A more recent addition to the grid—and one that is almost universally recognized as a distinct model—is “transformative mediation.”<sup>14</sup> These three models are so embedded in the literature of mediation that they have been called “the big three.”<sup>15</sup> The models debate shows that what is “competent” mediation is a loaded question, because, to many, what model a mediator adheres to defines what is competent or not.

11. The ABA Model Rules of Professional Conduct reflect the risks in eliding professional boundaries when lawyers act as mediators. The Rules mandate that when “a party does not understand the lawyer’s role [as a third-party neutral] in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and the lawyer’s role as one who represents a client.” MODEL RULES OF PROF’L CONDUCT r. 2.4 (AM. BAR. ASS’N 2016).

12. The following discussion assumes that mediators follow only one approach, but, in fact, it is common for mediators to be pragmatic, incorporating a range of “models” consciously or subconsciously as circumstances warrant. See, e.g., Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 248 (2000).

13. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 51 (1996). Despite its extraordinary success, or perhaps because of it, Professor Riskin himself has subsequently expressed reservations about how his “grid” has come to be used. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

14. BUSH & FOLGER, *supra* note 1, at 1. There are other named approaches to mediation in the literature. See KENNETH R. MELCHIN & CHERYL A. PICARD, *TRANSFORMING CONFLICT THROUGH INSIGHT* 43 (2008); JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2001). For a discussion of commonalities of these approaches with other models of mediation, see Cheryl Picard & Janet Siltanen, *Exploring the Significance of Emotion for Mediation Practice*, 31 CONFLICT RESOL. Q. 31, 33–34 (2013).

15. Dorothy J. Della Noce, *Evaluative Mediation: In Search of Practice Competencies*, 27 CONFLICT RESOL. Q. 193, 195 (2009). While this Article adopts the almost universal distinctions among these approaches, some have noted that they simplify debates about what these approaches mean. Lorig Charkoudian et al., *Mediation by Any Other Name Would Smell as Sweet—Or Would It? The Struggle to Define Mediation and Its Various Approaches*, 26 CONFLICT RESOL. Q. 293, 313 (2009) (noting a lack of agreement as to defining “approaches to mediation”).

What follows is a brief discussion of the three models of mediation.

### 1. Evaluative Mediation

Evaluative mediators assume an active role in mediation.<sup>16</sup> Such mediators “make assessments about the conflict as well as its resolution and communicate those assessments to the parties.”<sup>17</sup> Evaluative mediators seek to offer a “neutral” view about likely outcomes in adjudication or whether an agreement is, in a more general sense, “fair.”<sup>18</sup> In so doing, this model assumes that a mediator can, and should, make meaningful assessments about the legal merits of different positions and that mediators can and should act as finders of fact.<sup>19</sup> Many commentators have noted that evaluative mediation, with its overtones of litigation, is litigation or a “settlement conference” under another name.<sup>20</sup>

### 2. Facilitative Mediation

Facilitative mediators hold that participants are experts on their lives, conflicts, and relationships.<sup>21</sup> Participants are thus best equipped to define their own conflicts and determine how best to resolve them.<sup>22</sup> Under this view, evaluative mediation is inappropriate because

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16. Tracey S. Wiltgen, *Different Models of Mediation: Finding the Right Fit?*, 8 HAW. B. J. 35 (2004) (“Consequently, the evaluative mediator plays a[n] . . . active role in the substantive nature of the conflict and the agreements that are reached.”).

17. L. Randolph Lowry, *Evaluative Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 73 (Jay Folberg et al. eds., 2004).

18. Scott H. Hughes, *Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One*, 59 ALA. LAW. 246, 246–47 (1998).

19. See Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 848 n.65 (2004) (“In contrast, an evaluative mediator may suggest and argue in favor of certain solutions, may assess the strength of a parties’ legal or non-legal position, and may predict what will happen if the parties do not reach a mediated settlement.”).

20. See generally Love, *supra* note 1. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of Good Mediation?*, 19 FLA. ST. U. L. REV., 47, 50 (1991) (Lawyers or retired judges acting as mediation bring a litigation mindset to mediation, thereby portending “the end of good mediation.”). One study, however, found that once immersed in mediation, some lawyer-mediators tend to move away from a strictly legal mindset. RELIS, *supra* note 3, at 17–18.

21. Riskin, *Mediator Orientations*, *supra* note 13.

22. Leonard Riskin, for example, notes that a “facilitative mediator assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than either their lawyers or the mediator. . . . [T]he facilitative mediator assumes that his principal mission is to enhance and clarify communications between the parties in order to help them decide what to do.” *Id.* at 111.

evaluating legal positions, defining issues, or assessing the fairness of proposed resolutions disempowers parties—the antithesis of what mediation should be about.

An important characteristic of facilitative mediation is that facilitative mediators tend not to dwell on the past.<sup>23</sup> While in litigation “fact finders . . . are historians, examining ‘evidence’ to predict what happened,”<sup>24</sup> facilitative mediators encourage a forward-looking orientation. They seek to “shift attention from retrospective positions and accounts to prospective stories, effectively disconnecting the problem from its history.”<sup>25</sup> As a result, “facts” are defined by mediation participants, and what facts are “relevant” is a decision made by participants.<sup>26</sup>

Adherents of the “facilitative” model heatedly criticize evaluative mediation.<sup>27</sup> They argue, among other things, that evaluators promote an adversarial process indistinguishable from litigation, and thus, are not real mediators.<sup>28</sup>

### 3. Transformative Mediation

Transformative mediators assume an even less active role than a facilitative mediator.<sup>29</sup> Robert A. Baruch Bush and Joseph A. Folger, the founders of transformative mediation,<sup>30</sup> characterize transformative mediation as follows:

The mediation process contains within it a unique

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23. Robert Rubinson, *Of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 *CARDOZO J. CONFLICT RESOL.* 873, 879 (2016).

24. *Id.*

25. Sara Cobb & Janet Rifkin, *Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation*, in 11 *STUD. L. POL. & SOC'Y* 69, 71 (Austin Sarat & Susan S. Silbey eds., 1991). This, however, is not an absolute rule: most facilitative mediators acknowledge that exploration of the past, and the corresponding catharsis that might arise from that exploration, can be an integral part of mediation. See, e.g., CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 162–69, 182 (3d ed. rev. 2003).

26. For an extended discussion of this idea, see Robert Rubinson, *Mapping the World: Facts and Meaning in Adjudication and Mediation*, 63 *ME. L. REV.* 61, 78–82 (2010).

27. Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 *MARQ. L. REV.* 155, 163–68 (1998) (discussing the evaluative/facilitative debate).

28. Love, *supra* note 1, at 937–38. Love argues that an evaluative process needs to be “properly advertised” and “accurately labeled.” *Id.* at 948.

29. Wiltgen, *supra* note 16 (“A transformative model is much less structured than the . . . facilitative model[] . . . , and focuses solely on opening and improving communication between the parties.”).

30. For the definitive discussion of transformative mediation, see BUSH & FOLGER, *supra* note 1.



potential for transforming conflict interaction and, as a result, changing the mindset of people who are involved in the process. This transformative potential stems from mediation's capacity to generate two important dynamic effects: empowerment and recognition. In simplest terms, *empowerment* means the restoration to individuals of a sense of their value and strength and their own capacity to make decisions and handle life's problems. *Recognition* means the evocation in individuals of acknowledgment, understanding, or empathy for the situation and views of the other. . . . [P]arties are helped to transform their conflict interaction—from destructive to constructive—and to experience the personal effects of such transformation.<sup>31</sup>

As suggested by this description, settlement is not the goal of transformative mediation. While settlement might be a byproduct of the process, it is just that: a byproduct. Bush and Folger repeatedly stress this idea as a foundational dimension of transformative mediation.<sup>32</sup>

Moreover, as opposed to facilitative mediators, transformative mediators do not encourage participants to look to the future, or to brainstorm, or to problem-solve, or to focus on “interests” rather than “positions”—that is, the norms of facilitative mediation.<sup>33</sup> Rather, a “goal” of transformative mediation, if it can even be characterized as such, is embedded in the name “transformative”: the quality of participants' interaction will be transformed in a positive way.<sup>34</sup> There is one primary basis to promote such transformation: “to follow the parties wherever they may decide to go next.”<sup>35</sup>

#### 4. Other Models.

Although less cited than the “big three,” other models of mediation do exist. Two examples are “insight mediation”<sup>36</sup> and “narrative mediation.”<sup>37</sup> There are substantial points of agreement with these two models and with, in particular, transformative mediation, albeit with

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31. *Id.* at 22–23 (emphasis in original).

32. *Id.* at 87.

33. *Id.* at 217.

34. *Id.* (“[T]he mediator assists the parties in clarifying and deciding *for themselves* what they consider a successful resolution.”) (emphasis in original).

35. *Id.* at 184.

36. See MELCHIN & PICARD, *supra* note 14, at 76.

37. WINSLADE & MONK, *supra* note 14.

different emphases in the roles mediators undertake.<sup>38</sup> These other models suggest an ongoing impulse to carve out distinct approaches—a sign of continuing dissatisfaction with existing definitions of mediation.

## 5. The Impact of the Models Debate

The crux of the models debate, then, is that there is no consensus about how to conduct mediation<sup>39</sup> or, even at the most fundamental level, what its goals are.<sup>40</sup>

### C. Of Mediation Codes

Mediation codes themselves reflect the divergence of opinions as to what is an appropriate “model” of mediation. The following offers an overview of why this is the case.

#### 1. Ethics Codes Outside of Mediation

Ethics codes exist for virtually all professions. Examples include law,<sup>41</sup> medicine,<sup>42</sup> accountancy,<sup>43</sup> social work,<sup>44</sup> nurse anesthetists,<sup>45</sup> audiologists,<sup>46</sup> realtors,<sup>47</sup> and many others.<sup>48</sup> While some critique these

38. For a discussion of these commonalities, see Picard & Siltanen, *supra* note 14.

39. For an example that starkly demonstrates this lack of consensus, see Love, *supra* note 1, at 940 (arguing that “evaluation is antithetical to the goals of mediation”).

40. Hinshaw, *Regulating Mediators*, *supra* note 6, at 175 (“[A]most anything a mediator does can be explained by one or more competing mediation theories.”).

41. MODEL RULES OF PROF'L CONDUCT, (AM. BAR ASS'N 2016), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) [<https://perma.cc/88ZX-6KXG>].

42. CODE OF MED. ETHICS (AM. MED. ASS'N 2016), <https://www.ama-assn.org/about-us/code-medical-ethics> [<https://perma.cc/6LKN-G2GT>].

43. CODE OF ETHICS FOR PROF. ACCT. (INT'L FED'N ACCT. 2006), <https://www.ifac.org/system/files/publications/files/ifac-code-of-ethics-for.pdf> [<https://perma.cc/4CL8-JJBW>].

44. CODE OF ETHICS (NAT'L ASS'N SOC. WORKERS 2008), <https://www.socialworkers.org/pubs/code/default.asp> [<https://perma.cc/SE4L-DUT4>].

45. CODE OF ETHICS FOR THE CERTIFIED REGISTERED NURSE ANESTHETIST (AM. ASS'N NURSE ANESTHETISTS 2005).

46. CODE OF ETHICS (AM. ACAD. AUDIOLOGY 2016), <http://www.audiology.org/publications-resources/document-library/code-ethics> [<https://perma.cc/5UUZ-H2QH>].

47. CODE OF ETHICS AND STANDARDS OF PRAC. (NAT'L ASS'N REALTORS 2017), <https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics> [<https://perma.cc/EP6F-9ELW>].

48. Other examples include actuaries (CODE OF PROF. CONDUCT (AM. ACAD. ACTUARIES 2001), [http://www.actuary.org/files/code\\_of\\_conduct.8.1.pdf](http://www.actuary.org/files/code_of_conduct.8.1.pdf) [<https://perma.cc/DG55-CRK8>]); cosmetologists (CODE OF ETHICAL PRAC. (PROF'L BEAUTY ASS'N), <https://probeauty.org/pledge/>

codes as, at least in part, driven by self-interest,<sup>49</sup> most codes have elements that reflect bedrock norms of the professions they seek to regulate. Examples include the following:

- Establish norms of the profession.<sup>50</sup>
- Establish rules or guidelines that describe acts that reflect or violate these norms.<sup>51</sup>
- Require confidentiality.<sup>52</sup>
- Require avoidance of conflicts of interest.<sup>53</sup>
- Require competence.<sup>54</sup>

Another crucial characteristic of codes is that they address how to identify and discipline practitioners who violate professional rules and norms. In so doing, they provide a mechanism to censure a practitioner or exclude a practitioner from continuing to practice the profession.<sup>55</sup>

[<https://perma.cc/KB6J-5XX9>]); and automobile technicians (CODE OF ETHICS (AUTOMOTIVE SERVICE ASS'N), <http://asashop.org/about/our-story/code-of-ethics/> [<https://perma.cc/M2UN-M6TE>]). In addition, due to the mandate of the Sarbanes-Oxley bill, private organizations often adopt individual codes. See Joshua A. Newbert, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253 (2005).

49. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 48 (1986) (noting critique of professional codes of ethics as “the products of grasping and selfish motivations, based on anticompetitive or class-based animus”); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 654 (1981) (“[E]thical rules contribute to market control” by lawyers.); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 164 (1998) (Professional associations and ethical norms “are both historically and structurally disposed toward more than occasional narrow self-interest.”).

50. IAN FRECKELTON, *Enforcement of Ethics*, in *CODES OF ETHICS AND THE PROFESSIONS* 131 (Margaret Coady & Sidney Bloch eds., 1996).

51. *Id.*

52. The origin of a professional duty of confidentiality extends back at least to the original text of the Hippocratic Oath from 5th Century BCE. The original text is as follows: “[W]hat I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread about, I will keep to myself holding such things shameful to be spoken about.” Bernard Friedland, *HIV Confidentiality and the Right to Warn—The Health Care Provider’s Dilemma*, 80 MASS. L. REV. 3 (1995).

53. LOANE SKENE, *A Legal Perspective on Codes of Ethics*, in *CODES OF ETHICS AND THE PROFESSIONS*, 125–26 (Margaret Coady & Sidney Bloch eds., 1996).

54. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2016).

55. FRECKELTON, *supra* note 50, at 130, 135. For a comparison of the enforcement of ethical codes for a number of professions in Canada, see Shankar A. Yelaja & Colleen MacMillan, *Enforcement of Professional Ethics: A Comparative Study of Medicine, Nursing, Psychology and Social Work in Ontario*, Research Paper Series No. 8464 (Wilfrid Laurier University 1983). Engaging in the unauthorized practice of a profession is often a crime. Grace M. Giesel, *Corporations Practicing Law through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 165 (2000) (“[M]any states have statutes making the unauthorized practice of law a crime.”); Michael H. Cohen, *Holistic Health Care: Including Alternative and Complementary Medicine in Insurance and Regulatory Schemes*, 38 ARIZ. L. REV.

There are numerous examples: CPAs,<sup>56</sup> physicians,<sup>57</sup> psychologists,<sup>58</sup> and, of course, lawyers.<sup>59</sup>

While not all codes contain all of the enumerated elements, some have all and all have some.

## 2. Mediation Codes in the Absence of Professional Identity

Mediation codes are both consistent with and differ from most other codes in important ways. While there is a sense that a mediator need not leave other professional expertise at the door of the mediation room,<sup>60</sup> a mediator, when acting as a mediator, *is* a mediator, and not, say, a lawyer or accountant.<sup>61</sup> This brings home yet another dimension of the complexity of the role of mediators: in addition to a lack of a consensus about what mediation is, there is a lack of consensus about what expertise a mediator should have.<sup>62</sup> Put another way, codes typically embody a set of norms established through professional consensus; consensus, however, has eluded the community of mediators due to, as

83, 90 (1996) ("Each state . . . makes the unlicensed practice of medicine a crime.").

56. George J. Benston, *The Regulation of Accountants and Public Accounting Before and After Enron*, 52 EMORY L. J. 1325, 1345 (2003) (noting that discipline of accountants can be undertaken by state accounting boards, the Securities and Exchange Commission, and the American Institute of CPAs).

57. Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. HEALTH CARE L. & POL'Y 285 (2010).

58. *Professional Licensing, Certification & Discipline*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 423 (1996); Barbara A. Van Horne, *Psychology Licensing Board Disciplinary Actions: The Realities*, 35 PROF'L PSYCHOL.: RES. & PRAC. 170 (2004).

59. See Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 217 (2002). The American Bar Association has also issued standards that focus specifically on the disciplinary process. ABA STANDARDS FOR IMPOSING LAW. SANCTIONS (AM. BAR ASS'N 1992); ABA MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT (AM. BAR ASS'N 2002).

60. "A mediator may provide information that the mediator is qualified by training or experience to provide, but only if the mediator can do so consistent with these standards." MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI (AM. BAR ASS'N 2005). The Standards go on to say that when a mediator assumes the role of another professional, the sometimes mediator "assumes different duties and responsibilities . . . governed by other standards." *Id.*

61. The Model Standard of Conduct for Mediators offers words of warning about intermingling professional roles: "The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another professional is problematic and thus, a mediator should distinguish between the roles." *Id.*

62. Debates about "qualifications" reflect disagreements about the requisite expertise, experience, and education a mediator must or should have in order to mediate. Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 BYU L. REV. 687 (1997) ("One of the most controversial issues in the . . . [ADR] field concerns mediator qualifications.").

discussed, the diverse professions from which mediators emerge.<sup>63</sup>

This lack of consensus has generated a set of ethics codes for mediators characterized by vagueness.<sup>64</sup> This is true even internationally; one international group of ADR experts concluded that in mediation, “only general principles for the regulation of dispute resolution are desirable”<sup>65</sup>—a conclusion that transforms necessity into desirability. Not surprisingly, the preeminent effort at a general code in the United States governing the practice of mediation—the Model Standards of Conduct for Mediators—has been roundly criticized as being too vague to be meaningful<sup>66</sup> or even, as one commentator has put it, “largely ignored.”<sup>67</sup>

#### D. One Area of Consensus: Confidentiality

While ethics codes in mediation are usually vague, there is one principle that is not: confidentiality.

Ethics codes, often in conjunction with other law, establish almost ironclad confidentiality protections.<sup>68</sup> There are legitimate and important policy reasons why this is the case. Without confidentiality, participants are less likely to fully engage in the mediation process, thereby compromising its benefits.<sup>69</sup> There is also the risk that mediation will become a means for “free discovery,” thus transforming mediation into an adjunct to adjudication.<sup>70</sup> Yet another reason is that confidentiality protects mediators from being subpoenaed or sued for

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63. See *supra* text accompanying notes 10–14.

64. Andrea C. Yang, *Ethics Codes for Mediator Conduct: Necessary but Still Insufficient*, 22 GEO. J. LEGAL ETHICS 1229, 1237 (2009) (“Most criticism of the *Model Standards*” has focused “on the substantive provisions’ vagueness.”).

65. FELIX STEFFEK ET AL., *Guide for Regulating Dispute Resolution (GRDR): Principles, in REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS* 5 (Felix Steffek & Hannes Unberath eds., 2013).

66. See Yang, *supra* note 64.

67. Hinshaw, *Regulating Mediators*, *supra* note 6, at 205 (Mediators “routinely ignore” or “are completely unaware” of the Model Standards.).

68. A substantial number of states extend qualified or absolute immunity to mediators. NAT’L STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS No. 14.0 (CENTER FOR DISPUTE SETTLEMENT, INST. OF JUD. ADMIN.) (reviewing state law on mediator immunity).

69. Eileen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 245 (2002) (Confidentiality encourages “forthright participation” by mediation participants.).

70. Daniel Marcus & Jeffrey M. Senger, *ADR and the Federal Government: Not Such Strange Bedfellows After All*, 66 MO. L. REV. 709, 717 (2001) (quoting a lawyer who saw a benefit of mediation as “[giving] us free discovery and insight into the plaintiff’s position”).

malpractice.<sup>71</sup> While this has an element of self-interest, there is a legitimate concern that fewer professionals will become mediators if there is a meaningful risk that they will be forced to testify in court or sued by a party who questions their competence or ethics. Impeding the growth of mediation would not be a helpful trend, especially given the need for committed mediators for low-income litigants.<sup>72</sup>

Confidentiality, however, also has troubling consequences. It can be, as one commentator has put it, “secret justice without accountability” because there is little means to assess the quality of a given mediator or mediation.<sup>73</sup> In contrast, other professionals’ malfeasance can, at least sometimes, see the light of day. For example, most judicial proceedings are public, and thus subject to scrutiny.<sup>74</sup> Doctors, lawyers, and accountants often produce a visible work product and interact with others in performing services. A lawyer can miss a statute of limitations, a doctor can fail to diagnose medical conditions, and an accountant can file erroneous documents to state agencies. Such interactions pierce confidentiality through “public” results, and thus operate as an independent means to identify wrongdoing. These professionals, then, can be and are subject to professional discipline or civil liability.<sup>75</sup>

Mediators, in contrast, are largely not subject to external scrutiny.<sup>76</sup> While some states with court-annexed programs do have complaint procedures,<sup>77</sup> complaint procedures are largely ineffective with pro se

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71. Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147 (2003) (tracing the rarity of lawsuits against mediators and the reasons why this is the case). For an example of a case which held that a mediator could not be subpoenaed to testify about whether a writing accurately reflected an agreement reached in mediation, see *Eisendrath v. Superior Court of Los Angeles County*, 109 Cal. App. 4th 351 (2003). For a very rare example of a court finding that a mediator can be called to testify, see *McKinlay v. McKinlay*, 648 So. 2d 806, 807, 809 (Fla. Dist. Ct. App. 1995) (Mediator must testify “about a claim that a written agreement should not be enforced due to ‘severe emotional distress,’ ‘duress,’ and ‘intimidation.’”).

72. For a discussion of the problems facing low-income litigants participating in court-annexed mediation, see *infra* text accompanying notes 135–47.

73. *MEDIATION ETHICS: CASES AND COMMENTARIES* 148 (Ellen Waldman ed., 2011) (quoting Jacqueline Nolan-Haley).

74. See Alex Brauer & Tyng Loh, *Judicial Misconduct*, 14 GEO. J. LEGAL ETHICS 963 (2001).

75. This is not to say that mediators, necessarily, are particularly less committed to excellence than other professionals, and there are incompetent, sometimes unscrupulous practitioners in all professions. See Joshua Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 468 (1991) (noting that while mediators can be “rude, insensitive, stupid and otherwise incompetent,” this is also true of physicians, judges, presidents, and schoolteachers).

76. See *infra* text accompanying notes 133–34.

77. See Hinshaw, *Regulating Mediators*, *supra* note 6, at 195–96 n.246 (collecting authorities).

participants who, among other challenges, have no base of knowledge to assess—and thereby complain about—the quality of mediators.<sup>78</sup> Moreover, given that there is no consensus about how mediation should be practiced, it is difficult to develop a standard of care below which there would be a breach.<sup>79</sup> These impediments, among others,<sup>80</sup> make it close to impossible to prevail in a malpractice suit against a mediator,<sup>81</sup> and few have even tried.<sup>82</sup>

### III. BAD MEDIATION AND ITS CONSEQUENCES

The vast majority of mediators are effective. To suggest otherwise falls into the trap of criticizing a group of practitioners based solely on bad actors, and bad actors are present in any profession.<sup>83</sup> Nevertheless, when it does happen, the consequences of bad mediation are substantial, particularly given the vulnerabilities of the population most likely to bear these consequences.<sup>84</sup> It is thus crucial, albeit a challenge, to identify bad mediation and minimize its occurrence, but it is certainly an attempt worth making. While it is difficult—perhaps impossible—to determine with specificity what “bad” mediation is, simply jettisoning any attempt to do so means that mediation becomes a free for all. This would lead a kind of mediation relativism where nothing is either good or bad.

A crucial step, then, is to decouple the “models debate” from identifying and minimizing bad mediation. This assessment should *not* be a function of whether a mediator follows a particular model or style.<sup>85</sup> This is, for sure, a critical debate, and advocates on all sides argue

78. See *infra* text accompanying notes 132–34, 144–46.

79. *Chang's Imports v. Srader*, 216 F. Supp. 2d 325, 332 (S.D.N.Y. 2002) (“There is almost no law on what the appropriate standard of care is, if any, for a mediator who helps negotiate a settlement between parties.”).

80. For example, some states extend qualified immunity to mediators. Hinshaw, *Regulating Mediators*, *supra* note 6, at 174–75.

81. Moffitt, *Suing Mediators*, *supra* note 71, at 150–53.

82. *Id.*

83. Rosenberg, *supra* note 75. Rosenberg is responding to a critique of mediation by Trina Grillo, who described troubling examples of mediation in which women were infantilized, disempowered, and otherwise damaged. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). Rosenberg, *supra* note 75, argues that Grillo’s “appalling” stories are examples of bad mediators, not a demonstration that mediation itself is bad.

84. See Grillo, *supra* note 83 (discussing how mandatory mediation can have consequences for women and minorities).

85. See *supra* text accompanying notes 19–39.

passionately that the model they adhere to is the only “real” mediation.<sup>86</sup> Nevertheless, protecting participants from bad mediation should not be a means to carry out that long-simmering debate.<sup>87</sup> To put it somewhat differently, to many, adhering to the “wrong” model means a mediator is “incompetent,” but such reasoning inhibits the ability to identify truly bad mediation. In any event, self-identification as a proponent of a particular style does not mean that that the mediator follows this style in actual mediations. Thus, for purposes of this Article, failing to adhere to a particular “model” is not in and of itself “bad.”

This Section, then, attempts to define “badness” in a way that should be acceptable to evaluators, facilitators, and transformers, and to mediators from a range of disciplines. It also attempts to do so without descending into generalities that are only acceptable because they have virtually no substantive content.

#### A. *What Is Bad Mediation?*

So what, then, is “bad” mediation? It is mediation that does harm—a recapitulation of the Hippocratic Oath in the context of mediation.<sup>88</sup> It is thus not mediation that might not be very good or could be better.<sup>89</sup> It is much worse than that. Consider, for example, the following accounts of mediators behaving badly: mediators have “trashed and bashed” to promote—if not mandate—settlement;<sup>90</sup> coerced mediation participants into agreements because of personal convenience;<sup>91</sup> offered bad or

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86. See *supra* text accompanying notes 23–24, 31–33. Lela P. Love, for instance, is a staunch proponent of facilitative mediation and offers a robust critique of evaluative mediation as ill-conceived and adversarial adjudication under the guise of mediation, but she still notes that these other models should be “accurately labeled”—an inference that other choices can be legitimate if a participant knowingly chooses them. Love, *supra* note 1, at 948.

87. See *supra* text accompanying notes 64–71. It is noteworthy that many practicing mediators are not overly dogmatic on the “styles” debate and deploy strategies associated with different styles given circumstances that might arise during a particular mediation. For a discussion of such an “eclectic” approach, see, for example Stempel, *supra* note 12.

88. For a discussion of the Hippocratic Oath, see *supra* text accompanying note 55.

89. Improving mediation is often a goal of the mediation literature, but “improving” usually presupposes a baseline of some measure of skill. The “models” debate can be seen in this light. See *supra* text accompanying notes 12–60.

90. Alfini, *Trashing, Bashing, and Hashing It Out*, *supra* note 20, at 66. Some mediators actually believe that “a little bullying is really just part of how mediation works.” *Allen v. Leal*, 27 F. Supp 2d 945, 947 (S.D. Tex. 1998).

91. One court described the following in a mediation: “[T]he mediator had repeatedly stated that that his daughter was leaving for law school, and . . . that ‘you guys have five minutes to hurry up and get out of here because that family is more important to me.’” *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1097 (Fla. Dist. Ct. App. 2001). Another allegation of



misleading legal advice;<sup>92</sup> and displayed blatant bias.<sup>93</sup> Mediators have “harangued” participants for “an hour and a half,”<sup>94</sup> and exhibited frustration by “throw[ing] papers on a table” and requesting “a strong drink.”<sup>95</sup> One family mediator told a party that she was “young enough” and “pretty enough” to get married “before the alimony runs out.”<sup>96</sup> There are also, sadly, examples of patent fraud and criminal behavior, such as the mediator who charged \$112,767 for mediating a divorce, engaged in the unauthorized practice of law (he had been disbarred in the state in which the mediation took place), and made sexual advances to one of the participants.<sup>97</sup>

These troubling examples are far outside the norm of any conception of mediation. The examples become even more troubling when there is what is called in the mediation literature a “power differential.”<sup>98</sup> Power differentials manifest in many ways: one party may have superior knowledge about circumstances underlying the conflict, have the advantage of favorable law, possess something that is in dispute,<sup>99</sup> and so on. One particularly troubling power differential is when one mediation participant is a victim of domestic violence and the other participant is

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mediation misconduct is more about reputation: one mediator urged settlement because a failure to do so “would ruin [the mediator’s] record of being always able to settle” cases. *Patterson v. Taylor*, 969 P.2d 1106, 1110 (Wash. Ct. App. 1999).

92. Yang, *supra* note 64, at 1229 (advising participants they have “zero chance of success” in litigation).

93. See, e.g., Grillo, *supra* note 83 (describing in detail a mediation in which a mediator demonstrates bias against a female mediation participant in a family mediation).

94. Yang, *supra* note 64, at 1229–30.

95. *Valchine*, 793 So. 2d at 1097. The mediator also “declared” at one point in the mediation “that’s it, I give up,” and threatened to report to the judge that one party refused to settle. *Id.*

96. Paula M. Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, The Process, and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 722 (2006).

97. Art Hinshaw describes this unfortunate circumstance in *Regulating Mediators*, *supra* note 6, at 164–67. When, at long last, one of the mediation participants refused to make a payment, the mediator left “numerous voicemail messages,” including one expressing “furious threats of legal action.” *Id.* at 166–67.

98. As is typical, the Model Standards of Conduct for Mediators is general on this point, but still notes that a “mediator *shall* take appropriate steps including, if necessary . . . terminating the mediation.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI (AM. BAR ASS’N 2005) (emphasis added). For an influential discussion of power differentials in mediation, see Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359, 1387–91.

99. One common example, albeit an odd use of the term “possession,” is when a child is in custody of one parent.

the abuser.<sup>100</sup> Mediating with an abuser may place the victim at further risk of physical harm or, more generally, revictimize the victimized.<sup>101</sup> This not only subverts the goal of “empowerment” in mediation,<sup>102</sup> but is an exemplar of bad mediation. After all, in this circumstance, the very *act* of mediating may be bad mediation because it has the potential to be destructive or even dangerous.<sup>103</sup>

For purposes of this Article, a power differential of particular concern relates to socioeconomics. Such a differential may happen, for example, in a landlord tenant dispute, where a tenant—particularly a low-income tenant—has, among other disadvantages, less knowledge of the law and of legal procedure, faces a participant who is a “repeat player” in the process,<sup>104</sup> and is almost certainly *pro se* while the landlord has a lawyer.<sup>105</sup> A power differential based on socioeconomics might also happen in a family or consumer disputes, or in foreclosure proceedings, all of which are subject to mediation.<sup>106</sup>

Bad mediation, then, is when the mediation creates an actual or potential physical or emotional harm. This risk is particularly troubling when participants in mediation are low income. Court-annexed mediation programs are the locus where most such mediations take place, and it is to these programs that this Article now turns.

### B. Court-Annexed Mediation

Courts have turned to court-connected mediation as a means to resolve disputes.<sup>107</sup> All fifty states<sup>108</sup> as well as the federal government<sup>109</sup>

100. See, e.g., Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53 (2005); 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 (2003).

101. Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L. J. 235 (2002); Murphy & Rubinson, *supra* note 100.

102. Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered and Children in Custody Mediation*, 7 MEDIATION Q. 317, 318, 321–22 (1990); Krieger, *supra* note 101, at 247. 8 CARDOZO WOMEN'S L. J. 235 (2002); Murphy & Rubinson, *supra* note 100, at 56–57.

103. There remains an intense debate about whether mediating in the presence of domestic violence is ever appropriate. The range of views extends from never to always, although increasingly commentators have concluded that the answer is “it depends.” See, e.g., Ver Steegh, *supra* note 100; Murphy & Rubinson, *supra* note 100.

104. The classic study of this idea is Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95, 97–98 (1974).

105. Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1, 17 n.52 (1997).

106. See *infra* text accompanying notes 116–22.

107. SARAH COLE, CRAIG A. MCEWEN, NANCY H. ROGERS, JAMES R. COBEN, PETER N. THOMPSON,

have some form of court-connected mediation. “Public programs” offer most of these mediations.<sup>110</sup> Such programs have been subject to scrutiny and critique.<sup>111</sup> The following two subsections generally describe court-annexed programs and summarize some of the most common critiques of many of these programs.

### 1. The Cases Low-Income People Mediate

The substance of court-annexed mediations in which low-income people mediate reflects the types of cases low-income people litigate.<sup>112</sup> These include bankruptcy,<sup>113</sup> family law,<sup>114</sup> landlord-tenant,<sup>115</sup> debt collection,<sup>116</sup> and foreclosure.<sup>117</sup> There are many of these cases,<sup>118</sup> and, as

MEDIATION: LAW, POLICY & PRACTICE Appendix A (2013–2014 ed., 2013); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2007–09 (1999).

108. *Court ADR Across the U.S.*, RESOLUTION SYSTEMS INSTITUTE’S ADR RESOURCE CENTER, <http://courtdr.org/court-adr-across-the-us/> [<https://perma.cc/2H48-F63Z>]; see also Deborah R. Hensler, *Our Court, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 *PENN. ST. L. REV.* 165, 185–88 (2003).

109. See, e.g., Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651–58 (1998) (providing that “each United States District Court shall authorize . . . the use of alternative dispute resolution processes in all civil actions”). 28 U.S.C. § 651(b)(1998).

110. Specific statistics on this point are hard to come by. What evidence there is, however, does show an extremely large number of court-annexed mediations. Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 *ALB. L. REV.* 257, 270 (2009) (“[A] large percentage of disputes, perhaps as many as half, are mediated in free public programs.”).

111. J. Brad Reich, *A Call for Intellectual Honesty: A Response to the Uniform Mediation Act’s Privilege Against Disclosure*, 2001 *J. DISP. RESOL.* 197, 226 (2001) (alluding to critiques of mediation as “second class” justice); Mordehai (Moti) Mironi, *Mediation v. Case Settlement: The Unsettling Relations between Courts and Mediation—A Case Study*, 19 *HARV. NEGOT. L. REV.* 173, 199–204 (2014); Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 *ST. JOHN’S L. REV.* 375, 380 (1999).

112. This is not to suggest that the list that follows is exclusive. For example, some cases ordinarily funded through contingent fees might not generate adequate fees to make it worthwhile for attorneys to take them, and thus individuals must proceed *pro se* because they cannot afford hourly fees. See Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 *OHIO ST. J. ON DISP. RESOL.* 659, 660–61 (2013) (describing a personal injury matter too small to generate minimal fees but would still pay, if successful, medical fees to the victim).

113. Nancy A. Welsh, *You’ve Got Your Mother’s Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 *AM. BANKR. INST. L. REV.* 427, 441 (2009).

114. King, *supra* note 111.

115. Drake Zimmerman, *Representation in ADR and Access to Justice for Legal Services Clients*, 10 *GEO. J. ON POVERTY L. & POL’Y* 181 (2003).

116. These are sometimes euphemistically called “resolution conferences.” Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 27 *LOY.*

a result, a primary goal of court-annexed mediation is docket control.<sup>119</sup> This point has been made by numerous judges,<sup>120</sup> scholars,<sup>121</sup> administrators of mediation programs,<sup>122</sup> and mediators themselves.<sup>123</sup> The impact of “freeing” court time through mediation has been the subject of empirical study<sup>124</sup> and employed as a means to assess the success of court-annexed programs.<sup>125</sup>

## 2. Mediators in Court-Annexed Programs

Both individually and systemically, the quality of mediation in court-

CONSUMER L. REV. 179, 195 (2014).

117. This has been a particularly growing area for mediation. Lydia Nussbaum, *ADR's Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1891 (2013).

118. See generally Rubinson, *Of Grids and Gatekeepers*, *supra* note 23.

119. Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, a Time of Change*, 95 MARQ. L. REV. 993, 1004–05 (2012); Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 249 (2006) (noting how court-annexed mediation “can reduce cost and delay for significant percentages of litigants”).

120. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1177 (C.D. Cal. 1998) (“[I]n an ideal world, we might prefer to allocate all necessary resources to public adjudication of civil disputes, [but] we live in a world of ever expanding court dockets and limited judicial resources.”).

121. See, e.g., Will Pryor, *What's Wrong with Mediation These Days, and How Can We Fix It?*, 32 ALTERNATIVES TO HIGH COST LITIG. 71 (“[S]ome courts have become addicted to mediation referral as a means of docket control.”); Kathleen M. Scanlon, *A Case for Judicial Accountability: When Courts Add a Settlement Detour to the Traditional Appellate “Path,”* 17 OHIO ST. J. ON DISP. RESOL. 379, 413 (2002) (Federal “circuit courts are managing their dockets in part by using court mediation programs.”); Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN. ST. L. REV. 327, 335 (2003) (“[A]s more and more courts have embraced mediation, they have done so primarily based on the promise of increased efficiency: the promise that mediation would reduce court dockets, increase settlement rates, and speed up case processing.”).

122. *How To Prevent Mediation from Running Aground—Also: Busting Myths About What Arbitrators Do*, 23 ALTERNATIVES TO HIGH COST. LITIG. 3, 7 (2005) (quoting a “senior settlement attorney” for the Fifth Circuit Court of Appeals as saying that “appeals court mediation programs exist for docket control purposes”).

123. Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAMILY CT. REV. 371, 378 (2009) (quoting a mediator in court-connected mediation who describes that the “expectations of their workplace” are to deliver settlements in a “fraction of the time required to effectively do so”).

124. Judge Charles E. Clawson, *The Use of Mediation in the 20<sup>th</sup> District*, 40 ARK. LAW. 27, 28 (2005) (calculating that “mediation assisted settlement” succeeded in freeing “12 days” to handle other cases in the court’s docket).

125. Judith V. Caprez & Micki A. Armstrong, *A Study of Domestic Mediation Outcomes With Indigent Parents*, 39 FAM. CT. REV. 415, 425 (2001) (assessing success of court-annexed mediation through the number of settlements); Engler, *supra* note 107, at 2031–32 (“Reports of high settlement rates . . . provide justification for, and added momentum to, the call for more court-connected mediation.”).

annexed programs can be high but also variable.<sup>126</sup> Although individual mediators differ in skill and sophistication, many are excellent. Nevertheless, even some mediators who are “experienced” might have long practiced mediation that would appall skilled observers whatever their mediation “style”: they might not be fully, or even partially, versed in techniques of good mediation.<sup>127</sup> Other mediators are on court rosters not due to the quality of their mediation skills, but to gain experience before building a private mediation practice or due to longstanding relationships with judges or other court personnel.<sup>128</sup> Mediators can also continue to mediate in court-annexed programs with little or no scrutiny, especially given that, as discussed above,<sup>129</sup> the confidentiality of mediation insulates mediators from observation by the court or others.<sup>130</sup>

There is another core issue that makes low-income litigants especially vulnerable to bad mediators: they cannot afford lawyers.<sup>131</sup> Without an

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126. James Alfini et al., *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307, 312 (1994) (quoting Carol Liebman that “[i]t is difficult to maintain quality when you get mediators . . . who are doing a number of [mediations] every day, with little or no supervision,” and without “the input and check of a co-mediator”).

127. See *supra* text accompanying notes 92–101 (describing examples of “bad” mediation). This problem flows into the larger questions of what qualifications a mediator should have in order to mediate. There is no consensus as to such qualifications. Timothy Lohmar, et al., Student Project, *A Survey of Domestic Mediator Qualifications and Suggestions for a Uniform Paradigm*, 1998 J. DISP. RESOL. 217; W. Lee Dobbins, *The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?*, 7 U. OF FLA. J. OF L. & PUB. POL’Y 95, 105–06 (1995).

128. Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. Rev. 1871, 1925 (1997) (referring to court mediators who “are generally untrained and placed on a court roster because of their litigation experience or activity in bench or bar activities”).

129. See *supra* text accompanying notes 77–86.

130. A good example is the difficulty in establishing mediator wrongdoing or overreach through a judicial process. For an extended discussion of a troubling mediation and challenges in seeking redress in court, see Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation*, 28 FAM. L. Q. 177 (1994); see also Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 86 (2001) (alluding to “the difficulty of protecting the confidentiality of communications and conduct occurring during a mediation session when the court must determine whether a mediator . . . engaged in undue influence.”).

131. BRIAN Z. TAMANAH, *FAILING LAW SCHOOLS* 170–71 (2012) (“Nearly a million cases . . . were rejected by legal-aid programs owing to insufficient resources.”). See also DEBORAH L. RHODE, *ACCESS TO JUSTICE* 5 (2004) (“In most family, housing, bankruptcy, and small claims courts, the majority of litigants lack representation.”). The lack of an attorney in litigation carries through to mediation as well. Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URBAN L. J. 381, 384 (2010) (“[T]he reality is that participants often do not or cannot retain counsel.”).

attorney, litigants do not know what to expect in mediation,<sup>132</sup> which, in turn, inhibits their ability to take advantage of what mediation has to offer.<sup>133</sup> Moreover, the lack of an attorney can be damaging, if not catastrophic, when there are power differentials<sup>134</sup> because lawyers can act to enhance the power of an otherwise disempowered mediation participant.<sup>135</sup> The lack of an attorney becomes even more dangerous when only one party is represented,<sup>136</sup> which is typical in the cases low-income litigants usually mediate.<sup>137</sup>

Moreover, low-income litigants have no choice about who will mediate their cases.<sup>138</sup> “Buyers” of the services of private mediators can reward mediators by referring them to others, including lawyers.<sup>139</sup> In contrast, low-income litigants have no power to choose their mediator, and thus must take what they are given.<sup>140</sup>

In addition, given their lack of mediation experience, low-income participants will rarely be able to assess, let alone communicate about, the quality of the mediation in which they participate. While some studies suggest that the quality of court-annexed mediation is no worse than non-court-annexed mediation,<sup>141</sup> identifying “bad” mediators is

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132. The National Standards for Court-Connected Mediation Programs recognizes that pro se litigants who participate in mediation “are often vulnerable to pressure to settle and to accept unfair results.” NAT’L STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS No. 14.0 § 1.4 (CENTER FOR DISPUTE SETTLEMENT, INST. OF JUD. ADMIN.).

133. Blankley, *supra* note 112, at 670–71 (2013) (noting that “pro se litigants are less likely to understand” mediation).

134. See *supra* text accompanying notes 102–10; see also Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 16 (“[P]ower differentials may mean that mediation is simply an inappropriate forum for some subset of cases in which the potential for party coercion dictates that individual rights cannot be adequately protected.”).

135. Craig McEwen, et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1339 (1995) (alluding to “the view that lawyer advocacy helps balance power in cases of abuse”).

136. Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and Its Solutions*, 45 FAM. L.Q. 45, 47 (2011).

137. As noted *supra* at 124, these are common areas where low-income litigants participate in court-annexed mediation.

138. Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 603–04 (2004) (individual litigants do not have power to choose the model a mediator adheres to).

139. *Id.*

140. STEFFEK ET AL., *supra* note 65, at 25, 53 (alluding to particular need for “ensuring the neutrality and qualification of the intermediary” when there is a lack of “initiation control” among participants).

141. For a collection of authorities reaching this conclusion, see RELIS, *supra* note 3, at 65–

much harder in the court-annexed context when disputants do not have lawyers because lawyers are in a better position to recognize bad mediation and possibly ameliorate the consequences.<sup>142</sup>

Finally, bad mediation might not be a function of the mediators at all, but of a flawed system in which they mediate. Consider the following experiences of court-connected mediators:

[M]any court-connected mediators . . . express enormous frustration at being caught between a rock and a hard place as they are asked to deliver high quality mediation services in what they know to be a fraction of the time required to effectively do so, often with cases that are not appropriate for mediation. According to one veteran court mediator who requested anonymity, “In recent years, encouraging families toward self-determination and private ordering have taken a back seat. Mediation services, which are mandated, are adversely affected because administrators move their workforce toward evaluation services.” Another mediator and court services supervisor . . . said, “The process is called mediation and we settle cases, but it certainly isn’t real mediation.”<sup>143</sup>

#### IV. ENHANCING MEDIATOR ACCOUNTABILITY

Thus far this Article has traced the challenges of defining what is “good” or “bad” in mediation, the importance of meeting that challenge, and the special risks that “bad” mediation holds for low-income mediation participants. The question, now, is how best to meet these challenges by examining current efforts to do so and proposing alternatives.

Figure 1 offers a means to structure how to approach this challenge. Note that Figure 1 is not meant to be taken literally. It is, rather, a tool to organize the discussion that follows.

#### FIGURE 1

67.

142. Most studies involve represented parties, and thus the issues identified in this Article are attenuated if not eliminated. *Id.*

143. Salem, *supra* note 123; see also Welsh, *Through the Looking Glass*, *supra* note 138, at 589 (“[C]ourt-connected mediators are unlikely to act as wholly disinterested parties who view their role as purely facilitative.”); James Alfini et al., *What Happens When Mediation Is Institutionalized?*, *supra* note 126, at 310 (quoting Robert Baruch Bush as noting how a “directive model of practice seems to be quite predominant” in court-connected contexts).

**POTENTIAL STAGES TO MINIMIZE “BAD” MEDIATION  
PRIOR TO ENTRY (QUALIFICATIONS)**

↓

POINT OF ENTRY (CERTIFICATION OR LICENSURE)

↓

DURING PRACTICE (CONTINUING EDUCATION/OBSERVATION)

↓

INVESTIGATION (DISCIPLINARY PROCESS)

*A. Qualifications*

While not all states require licensure for both “public” and “private” mediators, virtually all states establish a set of necessary qualifications for mediators who practice in certain settings.<sup>144</sup> States also impose additional requirements to mediate specific categories of cases, particularly family law,<sup>145</sup> but other types of cases as well.<sup>146</sup> Virtually all such qualifications require a defined number of hours spent in training, an academic degree, and observations or co-mediations with experienced mediators.<sup>147</sup>

The goal of qualification requirements for all professions is that fulfilling them will produce competent, ethical practitioners. This is a questionable proposition when it comes to mediation. Mediator qualifications tend to be of the “check off box” variety. For example, if an applicant has completed training requirements, holds the requisite academic degree, and fulfills observation requirements, the mediator is, by definition, deemed qualified.<sup>148</sup> Consider how problematic this is in the context of two of the most common qualifications required of mediators: hours of training and degree requirements.

As to training, virtually all states require an aspiring mediator—particularly in court-annexed programs—to take a set number of hours of mediator training.<sup>149</sup> Completion of the training is all that is required.

144. Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOL. L. REV. 327 (1998).

145. Lohmar et al., *supra* note 127.

146. Maryland, for example, has such additional qualifications for “Business and [t]echnology cases,” “[h]ealth care and malpractice claims,” and “[f]oreclosure cases.” See, e.g., MD. CODE ANN., MD Rules § 17-205 (West 2017).

147. See Marzine Harges, *supra* note 62.

148. Norma Jeanne Hill, *Qualification Requirements of Mediators*, 1998 J. DISP. RESOL. 37, 40.

149. *Id.* (“[T]raining is . . . a somewhat universal requirement before one can mediate”



Completion, however, is fundamentally distinct from an assessment of whether the trainee has even minimally mastered what is being taught. There is rarely a summative assessment of an attendee's performance.<sup>150</sup> An attendee might have mastered nothing, or even, to put it in terms of this Article, the attendee might demonstrate indicia of becoming a "bad" mediator. Indeed, studies have tended to confirm that there is no correlation between training and the quality of a mediator who was trained.<sup>151</sup> The training "box" will nevertheless be checked.

Another deficiency of training requirements relates to the quality of the training itself. Statutes often specify the required content of the trainings,<sup>152</sup> but few establish mechanisms to assess their quality.<sup>153</sup> It is possible that a training program can be taught by "bad" mediators, which increases the risk that the trainees themselves will become the same.<sup>154</sup> Such a lack of quality control is in stark contrast to other professions which adopt an accreditation process before professional schools can offer courses to fulfill requirements necessary for certification or licensure.

Moreover, most trainings and even mediation courses rarely, if ever, address the specific contexts in which mediation is actually practiced.<sup>155</sup> They thus do not cover the multiplicity of challenges faced by low-income mediation participants, such as low-wage work with variable hours and little job security, child care, and the many problems endemic to poverty.<sup>156</sup> This is troubling given the particular vulnerability of this

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and "[i]t is usually a structured program designed to impart knowledge, skills, and abilities so that a trainee will become competent in mediation.").

150. In learning theory, the two types of assessment are "formative," which enables a student to engage in self-evaluation, and "summative," which is a more formal evaluation. MARY J. ALLEN, *ASSESSING ACADEMIC PROGRAMS IN HIGHER EDUCATION* 7-9 (2004).

151. Art Hinshaw & Roselle L. Wissler, *How Do We Know That Mediation Training Works?*, 12 *DISP. RESOL. MAG.* 21 (2005) ("Studies that involve practicing mediators are more likely than not to find that no relationship exists between mediator training and mediation outcomes.").

152. Maryland, for example, requires that a "basic mediation training program" includes, among things, "information-gathering skills," "conflict management skills," and skills on how to "identify and respond to power imbalances, intimidation, and the presence and effects of domestic violence." MD. CODE ANN., MD Rules, *supra* note 146, § 17-104.

153. One jurisdiction that does examine and certify mediation training programs is Virginia. VA. SUP. CT. GUIDELINES FOR THE CERTIFICATION OF MEDIATION TRAINING PROGRAMS (2011).

154. For a detailed discussion of the nature and risks of "bad" mediation, see *supra* text accompanying notes 87-110.

155. Rubinson, *Of Grids and Gatekeepers*, *supra* note 23 at 894-97.

156. For an extended discussion of this issue, see Rubinson, *Of Grids and Gatekeepers*, *supra* note 23, at 891-92.

population to “bad” mediation.<sup>157</sup>

As to degree requirements, there is no reason to think that acquiring a high school, college, or graduate degree correlates with the skills necessary to be an effective mediator. Indeed, given that interpersonal skills are crucial to successful mediation—an “emotional intelligence” that is rarely the subject of academic assessment<sup>158</sup>—it is plausible that whatever degree an applicant has attained has little, if any, relationship to the potential of an aspiring mediator to be an effective one.<sup>159</sup> It certainly does not relate to who might be a “bad” one.

### B. Point of Entry Quality Control

Another standard element of professional quality control is passing an examination before an applicant is licensed to practice.<sup>160</sup> This is a “point of entry” assessment because passage is typically the last hurdle before a professional has authority to practice.<sup>161</sup> Most professionals have such an exam: physicians,<sup>162</sup> accountants,<sup>163</sup> psychologists,<sup>164</sup> and, of course, lawyers.<sup>165</sup> For example, aspiring lawyers may have graduated

157. See *supra* text accompanying notes 135–47.

158. Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL’Y & L. 1173, 1179 (1999) (“We value academic achievement in our culture, and yet it is such a small part of what ultimately determines success in life.”). The idea of “emotional intelligence” is the result of Howard Gardner’s influential ideas about “multiple intelligences.” HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* 35 (1993); HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 11 (1983).

159. James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLIN. L. REV. 457, 460 (1996) (“students who are empathic and diplomatic, who have well-developed intuitions about others and accurately read non-verbal cues—students, to use the current parlance, who have a high emotional intelligence, or ‘EQ’—have a decided advantage in a mediation clinic”).

160. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 25 (1983).

161. See, e.g., Anthony E. Davis, *The New York Bar Examination: A Critical Appraisal*, 48 N.Y. ST. B.J. 315, 315 (1976) (noting that the bar examination is the final hurdle before an aspiring lawyer can practice).

162. Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admission: Lessons from the Medical Profession*, 53 J. LEGAL EDUC. 340, 342–45 (2003).

163. There is a “uniform CPA Examination.” *The Uniform CPA Examination*, AMERICAN INSTITUTE OF CPAs, <http://www.aicpa.org/BecomeACPA/CPAExam/Pages/CPAExam.aspx> [<https://perma.cc/Q8HG-JRZK>].

164. For a review of psychological tests and licensing requirements by state, see *Contact a Licensing Board*, ASSOC. ST. & PROVINCIAL PSYCHOL. BOARDS, <http://www.asppb.net/?page=BdContactNewPG> [<https://perma.cc/BFA4-JH4T>].

165. Written bar examinations became a requirement in most states by the 1890s. STEVENS, *supra* note 160; see also Michael J. Thomas, *The American Lawyer’s Next Hurdle: The State-Based Bar Examination System*, 24 J. LEGAL PROF. 235, 237–39 (2000) (tracing the history

from college and an ABA accredited law school, as well as passed a “character and fitness” assessment,<sup>166</sup> yet the applicant still faces the challenge of passing the bar examination.<sup>167</sup> While some of these exams have been criticized as discriminatory<sup>168</sup> and as not fully reflecting what successful practice entails,<sup>169</sup> there has been increasing sensitivity to these issues, such as the addition of assessments that seek to better reflect actual practice skills.<sup>170</sup>

In contrast, mediators do not need to pass a summative assessment either through an exam or otherwise. In contrast to professions like law, an applicant who has taken a required number of hours of training, attained a specified degree, and fulfilled other statutory requirements is “in.” The applicant has gone through the hoops, and that is all that is required.

### C. Ongoing Quality Control

Assuming that a mediator is duly qualified at “point of entry” by fulfilling defined requirements, there are, at times, ongoing requirements to ensure a mediator remains in good standing. The most common of

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of state bar examinations).

166. The “character and fitness” review has generated substantial criticism for its inherent subjectivity and inadequacies as a predictor of future misconduct. *See generally* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 529 (1985).

167. This is a matter of continuing controversy. Bar passage rates are declining as of late. New York, for example, recently had the lowest bar passage rate in eleven years. Mark Hansen, *New York bar pass rates at their lowers point in at least 11 years*, ABA JOURNAL (Oct. 27, 2015, 2:35pm), [http://www.abajournal.com/news/article/ny\\_bar\\_pass\\_rates\\_at\\_their\\_lowest\\_in\\_11\\_years/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/ny_bar_pass_rates_at_their_lowest_in_11_years/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email) [<https://perma.cc/WZ53-DMCG>].

168. Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. L. REV. 1191, 1219–20 (1995).

169. *Id.* at 1220; Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 349–50 (2003) (describing a range of critiques of the bar examination); Clark D. Cunningham, *Rethinking the Licensing of New Attorneys—An Exploration of Alternatives to the Bar Exam: Introduction*, 20 GA. ST. U. L. REV. vii (2004).

170. An example is the “Multistate Performance Test,” which “is designed to test an examinee’s ability to use fundamental lawyering skills in a realistic situation.” *The Multistate Performance Test*, NAT’L CONF. B. EXAMINERS, <http://www.ncbex.org/about-ncbe-exams/mpt/> [<https://perma.cc/E6TT-2PFZ>] (last visited Feb. 5, 2015). Another example is “Step 2C” of the United States Medical Licensing Examination, which is a “hands-on” assessment of a “candidate’s ability to gather information from patients and communicate medical findings to them.” Barnard & Greenspan, *supra* note 162, at 345.

these requirements, as with other professions,<sup>171</sup> is for continuing professional education. Continuing education seeks to educate practitioners about current developments or specific aspects of practice.<sup>172</sup> As with pre-qualification trainings, however, the quality of such programs remains largely unexamined: there might be evaluations, but there is no assurance about what is done with them. It is, as with other requirements, a matter of “checking it off.”

Some jurisdictions recognize the shortcomings of continuing education requirements, and thus, require more.<sup>173</sup> These typically involve critique and feedback by experienced mediators of the performance of mediators either in simulations or in actual mediations.<sup>174</sup> While sophisticated models and protocols to conduct such assessments have been developed<sup>175</sup> and no doubt most observers are skilled and well-suited to the task, as with trainers or instructors in continuing education, there may be little, if any, assurance that this is the case.

#### D. Identifying and Penalizing Wrongdoing

All of the quality control mechanisms discussed thus far are preventative—that is, they are designed to develop and, with continuing education, maintain competence and avoid “bad” practice. Most professions, however, have implemented public and private mechanisms that, at least in theory, identify and impose some sort of a penalty for specific wrongdoing.<sup>176</sup> This is the most narrowly tailored form of quality control: it identifies wrongdoing that has already happened rather than seeking to prevent wrongdoing that might happen. There are a range of

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171. Rocio T. Aliaga, *Framing the Debate on Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar's Consideration of MCLE*, 8 GEO. J. LEGAL ETHICS 1145, 1153–63 (1995) (assessing the argument that MCLE leads to competent lawyers).

172. Marzine Harges, *supra* note 62, at 709 (noting that continuing education requirements are designed to “keep professional mediators abreast of the latest mediation developments”).

173. Aliaga, *supra* note 171, at 1152.

174. An extensive and sophisticated program has been developed by, among others, Robert A. Baruch Bush—one of the founders of transformative mediation. Dorothy J. Della Noce et al., *Signposts and Crossroads: A Model for Live Action Mediator Assessment*, 23 OHIO ST. J. ON DISP. RESOL. 197, 200 (2008). While the focus of this effort is, unsurprisingly, transformative mediation, the authors do recognize that “the basic concept” of the model they have developed “is applicable to other forms of practice” of mediation. *Id.* at 222.

175. See Della Noce et al., *Signposts and Crossroads*, *supra* note 174.

176. Michael J. Polelle, *Who's on First, and What's a Professional?*, 33 U. S.F. L. REV. 205, 229–30 (1999).

mechanisms that seek to serve this function in mediation. None of them work very well.

One such mechanism is a lawsuit for professional malpractice.<sup>177</sup> With mediation, while theoretically possible, data shows that lawsuits against mediators for malpractice are exceptionally rare and are virtually never successful.<sup>178</sup>

Another possible mechanism is judicial review of mediated agreements due to a claim that the agreement was due to mediator misconduct.<sup>179</sup> Courts, on very rare occasions, have issued written opinions on this point, and these opinions are procedural: they address the degree to which the virtually absolute confidentiality protections in mediation should give way when one participant alleges mediator misconduct.<sup>180</sup> Some of these allegations can be eye-opening in terms of their severity and gross violation of virtually all norms of mediation.<sup>181</sup> Nevertheless, even if a court does conclude through an evidentiary hearing that allegations of mediator wrongdoing are true, it is the litigants who experience the consequences; there are no formalized consequences to the mediator. The finding might lead to a kind of professional shaming, or, of greater consequence, a reluctance or refusal by a judge or court personnel to choose that mediator from a mediation roster should one exist. These, however, are possible consequences; they are not mandated ones.

Most importantly, a core characteristic of most professional regulation—except mediation—is a mechanism that seeks to identify and punish practitioner misconduct. While such misconduct would trigger a range of sanctions, the most severe is revocation of the ability to engage in the profession. This sanction is typically imposed for substantial misconduct: lawyers who commingle client funds,<sup>182</sup> psychologists who engage in sexual relationships with patients,<sup>183</sup> or who charge fees that

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177. *Id.* at 206 (discussing malpractice suits against “all professionals”).

178. Moffitt, *Suing Mediators*, *supra* note 71.

179. *See infra* text accompanying notes 183–88.

180. *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1099 (Fla. Dist. Ct. App. 2001) (finding that a “court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially prescribed mediation procedures”).

181. *See supra* text accompanying notes 92–101.

182. MODEL RULES OF PROF'L CONDUCT r. 1.15 (AM. BAR. ASS'N 2016).

183. ETHICAL PRINCIPLES PSYCHOLOGISTS & CODE CONDUCT r. 10.05 (AM. PSYCHOL. ASS'N 2010) (prohibiting “sexual intimacies with current therapy clients/patients”); ETHICAL PRINCIPLES PSYCHOLOGISTS & CODE CONDUCT r. 10.08 (AM. PSYCHOL. ASS'N 2010) (prohibiting sexual intimacies with former therapy clients/patients”).

are excessive or fraudulent.<sup>184</sup> Virtually all professional codes also have a “catch all” provision that prohibits general fraudulent or criminal activity,<sup>185</sup> which may or may not include wrongdoing that is apart from the provision of professional services.

In conjunction with any disciplinary process, there must be a mechanism that triggers it. One way is through complaints submitted by patients or clients. Another way is through actions that are monitored or easily discoverable by a professional authority, such as failure to attend continuing professional education programs, payment of membership fees, appropriate maintenance of back accounts, or criminal activity.<sup>186</sup>

Mediation, outside of court mediators, has no such triggering mechanism because there is no binding authority to review a complaint.<sup>187</sup> This can be startling when, for example, an attorney who is disbarred or a psychologist whose license has been suspended continues or starts to mediate.<sup>188</sup> Some states, in relation to court-annexed programs,<sup>189</sup> do have complaint procedures, some of which are quite detailed,<sup>190</sup> but they reflect little or no recognition of the challenges facing

184. MODEL RULES OF PROF'L CONDUCT r. 1.5 (AM. BAR. ASS'N 2016) (setting forth mandatory requirements regarding notice and nature of fees).

185. For example, the ABA Model Rules of Professional Conduct 8.4 prohibits conduct involving “dishonesty, fraud, deceit, or misrepresentation.” MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR. ASS'N 2016). This Rule is not limited to such actions which are undertaken as part of the provision of professional services. *Id.*

186. Lawyers, for example, must maintain “attorney trust accounts” into which the lawyer must deposit funds that are still the property of clients. MODEL RULES OF PROF'L CONDUCT r. 1.15 (AM. BAR. ASS'N 2016). Maintenance of these accounts are subject to detailed requirements. Maryland, for example, has a separate chapter in its Rule, which includes twelve separate sections, which detail the many requirements regarding such accounts. MD. CODE ANN., MD Rules, *supra* note 146 (Chapter 600 on attorney trust accounts).

187. Hinshaw, *Regulating Mediators*, *supra* note 6, at 176–77.

188. *Id.* at 164–67 (2016). For more detail regarding the conduct of this mediator, see *supra* text accompanying note 101.

189. See *e.g.*, FLA. RULE 10.700 *et. seq.*; MD. R. PROC. D. 17-205(a)(7); VA. SUP. CT., PROCEDURES FOR COMPLAINTS AGAINST CERTIFIED MEDIATORS, MEDIATION TRAINERS, AND MEDIATION MENTORS (2011) available at <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/forms/adr1004proc.pdf> [<https://perma.cc/9PBN-TGVX>]; N.C. COURT SYSTEM, COMPLAINTS AGAINST MEDIATORS, COMPLAINT PROCESS, available at <http://www.nccourts.org/Courts/CRS/Councils/DRC/Complaints/Default.asp> [<https://perma.cc/5U3F-5BCU>]; GA. COMM'N DISP. RESOL., ETHICS PROCEDURES Appendix C § II, [http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/CURRENT%20ADR%20RULES%20COMPLETE%205-28-2014.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/CURRENT%20ADR%20RULES%20COMPLETE%205-28-2014.pdf) [<https://perma.cc/KL32-L45W>] (same).

190. See, *e.g.*, FLA 10.810-10.830 (detailing a mediator complaint process); GA. COMM'N DISP. RESOL., ETHICS PROCEDURES, Appendix C § II, [http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/CURRENT%20ADR%20RU](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/CURRENT%20ADR%20RU)

low-income mediation participants. In any event, the degree to which these processes have been successful is open to question. In Minnesota, for example, which does have a detailed grievance process,<sup>191</sup> only seven mediators have been publicly reprimanded over a ten-year period.<sup>192</sup>

## V. A PROPOSAL FOR SUMMATIVE ASSESSMENT WITH TEETH

While there are challenges in identifying and minimizing “bad” mediation in court-annexed mediation, the following is a preliminary effort at a multi-layered proposal. The goal is to suggest a holistic approach that, collectively, might gain some traction in addressing an otherwise intractable problem. The most robust approaches begin with the point of entry stage – the time when anticipations of competence resolve into demonstrations of competence.

### A. Establish a Diverse Panel of Mediation Examiners

If there is to be a meaningful point-of-entry mechanism, there needs to be a meaningful assessment tool. Admittedly, a written exam might be ill-suited to this task given the fluidity and openness that is a hallmark of mediation<sup>193</sup> and the mediation community’s justifiable rejection of formalized “rules” that can be memorized and tested.<sup>194</sup> Nevertheless, there needs to be a board or roster to engage in meaningful assessment of aspiring mediators. What is particularly important is that the board should be reflective of and sensitive to the plight of low-income mediation participants. There are a number of ways to do this.

First, the board should be diverse. This is certainly true in the

LES%20COMPLETE%205-28-2014.pdf [https://perma.cc/3BE8-FZB2] (same).

191. For an overview of the Minnesota Mediation Ethics Board, see Yang, *supra* note 64, at 1245. For details about the complaint process, see MINN. JUDICIAL BRANCH, [http://www.mncourts.gov/mncourtsgov/media/assets/documents/0/public/Alternative\\_Dispute\\_Resolution/Complaint\\_flowchart.pdf](http://www.mncourts.gov/mncourtsgov/media/assets/documents/0/public/Alternative_Dispute_Resolution/Complaint_flowchart.pdf) [https://perma.cc/7XYU-QMPC].

192. MINN. JUDICIAL BRANCH, [http://www.mncourts.gov/mncourtsgov/media/scao\\_library/Sanctions\\_to\\_the\\_ADR\\_Review\\_Board\\_-\\_05-21\\_updates\\_.pdf](http://www.mncourts.gov/mncourtsgov/media/scao_library/Sanctions_to_the_ADR_Review_Board_-_05-21_updates_.pdf) [https://perma.cc/VA32-2VUN]; see also Young, *supra* note 96, at 775 (“Of the nearly 9,000 mediators regulated by the states analyzed in this article, less than 100 mediators have received any type of sanction, remedial recommendation, or intervention for conduct inconsistent with ethical standards.”).

193. Brian Jarrett, *The Future of Mediation: A Sociological Perspective* 2009 J. DISP. RESOL. 49, 57 (2009) (referring to mediation as “fluid and evolving practice”).

194. Lon Fuller called such rules “formal prescriptions laid down in advance”—a way of conceptualizing what law is. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325–26 (1971). Fuller considered such proscriptions to be an “encumbrance” in some instances, hence one of the advantages of mediation. *Id.*

traditional sense of “diversity”—gender, race, ethnicity, sexual orientation, and so on. There are other kinds of diversity, however, that are unique to mediation. One kind of diversity is to insure there are adherents of different styles of mediation in order to avoid the board becoming a locus of this debate.<sup>195</sup> The board, then, should include self-identified transformative, facilitative, and evaluative mediators. In addition, the interdisciplinary nature of mediation should be taken into account.<sup>196</sup> Perhaps most importantly, the diversity should include members who have particular expertise in mediation involving low-income mediation participants or come from a low-income background themselves.<sup>197</sup> A well-heeled business or family mediator might assume that the resources available to participants in those types of mediations—substantial time (including the availability of multiple sessions), the retention of counsel, the ability to retain different professionals (such as accountants or psychologists) to assist in the mediation—are available to all.<sup>198</sup>

The form of the board should also avoid the “capture” of the evaluation process by those who employ it—that is, judges and the judiciary. Thus, some members of the board should be independent even when the board, as might often be the case, is administratively under the aegis of the courts.<sup>199</sup> This is crucial. As noted above, the interests of the judiciary—the “speedy” and “efficient” resolution of cases—cannot sacrifice the quality of the process.<sup>200</sup> There is also the possibility that judges who, by temperament and training, often approach mediation from a litigation mindset, will not recognize mediation that is damaging

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195. See *supra* text accompanying notes 19–39.

196. See *supra* text accompanying notes 11–13.

197. An example of an organization that would be suitable is “Community Mediation” in Maryland, which provides free mediation services on a range of matters, including neighborhood, family, and school dispute. COMMUNITY MEDIATION, <http://communitymediation.org/mediation-other-services/types-of-mediation/> [<https://perma.cc/ZE26-6N59>].

198. Human cognition assumes the normativity of our own experience. JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 337–38 (Daniel Kahneman et al. eds., 1982). For another classic text that explores cognitive shortcuts, see RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980).

199. Some jurisdictions have done this, including, for example, Minnesota. Although its “ADR Ethics Board” is under the aegis of the Minnesota Judicial Branch, its fifteen-member board includes nine “non-judicial” appointees. ADR Ethics Board, January 2017, MINNESOTA JUDICIAL BRANCH, [http://www.mncourts.gov/mncourtsgov/media/scao\\_library/ADR/Roster-January-2017\\_2.pdf](http://www.mncourts.gov/mncourtsgov/media/scao_library/ADR/Roster-January-2017_2.pdf) [[https://perma.cc/268\]-6CDA](https://perma.cc/268]-6CDA)].

200. See *supra* text accompanying notes 122–29.



to participants.<sup>201</sup>

Finally, there should be panels of at least three “examiners” whose assessment can be “blind,” perhaps through viewing a video of the mediation.<sup>202</sup> Each would not know who else is doing the observing. This would help prevent the risk that the judgment of a single examiner, whose style or judgment might not match that of the candidate, would overly influence the assessment process.

#### *B. Develop Evaluation Forms for All Attendees at a Mediation*

All attendees at every mediation—participants, attorneys, and observers—should be required to complete a confidential evaluation form to be submitted to the board. The number or seriousness of negative comments can trigger further investigation. This mechanism can, if implemented appropriately, act as one means to identify bad mediators without the need for a complaint to be filed. Such a mechanism is particularly important given that many participants—especially low-income participants who see the process as “official”—might feel reluctant submitting a formal complaint even if it is deemed confidential.

In crafting such a form, it would be especially important to recognize the distinct obstacles in gathering data from unrepresented litigants. As already discussed,<sup>203</sup> litigants in court-annexed contexts might have limited or no knowledge of what mediation is or should be. One way to address this challenge is through questions that are more descriptive than evaluative. In other words, broadly framed “are you satisfied” questions might not be particularly informative. In contrast, questions about specific acts by the mediator, or how the participant viewed the mediator’s role in the mediation, would be more likely to gather relevant information.

Moreover, any form must take into account that litigants in a court-annexed process might understand little or no English or face problems with literacy. Reaching this population is more important than just some general sense of being comprehensive in gathering information. In fact,

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201. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 670 (1986) (“There is . . . no obvious match between the characteristics that make for excellent judging and the skills required for successful mediation.”). One scholar characterized the increasing numbers of judges and attorneys who mediate as “the end of good mediation.” Alfani, *Trashing, Bashing, and Hashing It Out*, *supra* note 20.

202. Della Noce et al., *Signposts and Crossroads*, *supra* note 175, at 203, 221.

203. See *supra* text accompanying notes 102–11.

these litigants might be particularly vulnerable and at risk of participating in bad mediation, so their feedback is especially important.

Finally, participants who are immigrants might fear deportation or a change in status when they do anything that might open them up to scrutiny by immigration authorities.<sup>204</sup> There is no easy answer to this, although assurances about the confidentiality of process and not asking about citizenship status might make these participants more comfortable.

### C. Construct a Robust Grievance Proceeding

A meaningful grievance process is not easily done, although some states have given it a try.<sup>205</sup> It must be developed in light of mediation being an interdisciplinary, confidential, and varied process. Some sort of disciplinary process is not only a basis for limiting who may practice a profession;<sup>206</sup> it also must be in place to investigate the possibility of bad mediation.

Having a meaningful grievance process for mediators has been the subject of inquiry, and there have been detailed and well thought-out proposals on how to establish such a process.<sup>207</sup> As with evaluation forms, it is crucial to approach crafting and implementing this process with special sensitivity to the needs and circumstances of a low-income population, including issues of language, availability for investigations, and concern among immigrants or others about becoming embroiled in "official" proceedings.

## VI. CONCLUSION

Mediation can be, and often is, a remarkably productive and effective way to resolve disputes. Risks remain, however, particularly for low-income litigants mediating in court-annexed programs. Challenges multiply in light of the lack of unified professional identity that is characteristic of other professions, the absence of meaningful ethical rules, and the rigorous confidentiality protections given to mediation

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204. See generally Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1 (2013).

205. See *supra* text accompanying notes 192–95.

206. Polelle, *supra* note 176 ("In return for providing professions with special privileges... society rightfully demands" that a profession "vigorously polic[es] its own members for fiduciary violations of express codes of ethics.").

207. For examples, see Young, *supra* note 96; Della Noce et al., *Signposts and Crossroads*, *supra* note 175; *Performance-Based Assessment: A Methodology, for use in selecting, training, and evaluating mediators*, TEST DESIGN PROJECT (1995), available at <http://www.convenor.com/uploads/2/3/4/8/23485882/method.pdf> [<https://perma.cc/8EW5-ENBN>].

proceedings.

A crucial goal, then, is to extend the benefits of mediation as widely as possible while minimizing the rare, but still real, examples of mediation that is harmful to litigants. As with any profession, “bad” practitioners will always exist. The difference is that mediation has virtually no means to identify and discipline such practitioners. Given that the work of mediators is not otherwise subject to scrutiny, with no affirmative “product” to assess and with participants who might not know what mediators are supposed to do, it is crucial to take steps to insure, as much as possible, that those most vulnerable to bad mediation will not encounter it.