

# Regulating Mediators

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*The desire to eliminate charlatans and quacks from a given profession is more than mere rhetoric for both the practitioner and the consumer.*<sup>2</sup>

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## I. INTRODUCTION

Shortly after he was disbarred in Vermont, Gary J. Karpin arrived in Phoenix and established himself as a divorce mediator. He spent the next several years swindling hundreds of thousands of dollars from his clients before taking up residence in the Arizona penal system.

One of his unsuspecting victims was Gina Niedzwiecki. She learned about Karpin from a friend and convinced her estranged husband to try mediation.<sup>3</sup> During their first consultation, Karpin greeted them warmly, explained the mediation process, and reviewed

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3. Transcript of Record at 23, *State v. Karpin*, (Aug. 14, 2008) (No. CR2006-031057) [hereinafter *Karpin Tr.*, Aug. 14, pt. 1]; Paul Rubin, *Dr. Buzzard:*

his standard mediation agreement.<sup>4</sup> They signed it and paid him a non-refundable \$975 retainer for further sessions, which they believed would cover the entire the cost of their divorce.<sup>5</sup>

At the end of their second mediation session, Karpin asked for \$1,000; Gina paid it.<sup>6</sup> In their third session, Karpin asked for information he had already received and then asked for more money, which caused Niedzwiecki's husband to storm out of the building in a rage.<sup>7</sup> Upset and not knowing what to do, Niedzwiecki turned to Karpin who consoled and comforted her before she left.<sup>8</sup> She ultimately decided to attend the next regularly scheduled meeting with Karpin – even though her husband refused to attend any further sessions.<sup>9</sup> At this meeting, Karpin told Niedzwiecki that her divorce “was considered a contested divorce and was going to go into litigation” and, as a result, she needed to give him another \$5,000.<sup>10</sup> She gave him the money and continued meeting with him every other week for the next several months.<sup>11</sup>

During these one-on-one meetings, Niedzwiecki grew to trust Karpin completely.<sup>12</sup> He charmed her, gave her unexpected and flattering attention, and provided her with emotional support.<sup>13</sup> Before long she considered him to be one of her closest friends.<sup>14</sup> Over these several months, she made numerous payments to Karpin in \$1,000 to \$10,000 increments believing each payment was necessary to move her divorce through the court system.<sup>15</sup> And during this time Karpin

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*Mediator Gary Karpin Preyed on Vulnerable Divorcees, Falsely Claiming He's a Lawyer and Ph.D.*, PHOENIX NEW TIMES, (Jan. 27, 2005), available at <http://www.phoenixnewtimes.com/news/dr-buzzard-6397111> [hereinafter Rubin, *Dr. Buzzard*].

4. Transcript of Record at 26–27, *State v. Karpin*, (Aug. 14, 2008) (No. CR2006–031057) [hereinafter Karpin Tr., Aug. 14, pt. 2].

5. Karpin Tr., Aug. 14, pt. 1, *supra* note 3, at 35–36.

6. *Id.*

7. *Id.* at 40; Karpin Tr., Aug. 14, pt. 2, *supra* note 4, at 18–19.

8. Karpin Tr., Aug. 14, pt. 2, *supra* note 4, at 14.

9. *Id.* at 18.

10. *Id.* at 44; *Id.* at 13–14.

11. *Id.* at 36–37 (Van Wie statements to the court explaining her line of questioning of Niedzwiecki).

12. *Id.* at 20–24.

13. *Id.* at 20–21, 36–37 (arguing to the Court over an objection); Rubin, *Dr. Buzzard*, *supra* note 3.

14. Karpin Tr., Aug. 14, pt. 2, *supra* note 4, at 14, 20–24, 36–37; Rubin, *Dr. Buzzard*, *supra* note 3.

15. *See, e.g.*, Karpin Tr., Aug. 14, pt. 1, *supra* note 3, at 18–19, 27, 33, 44–46. Niedzwiecki testified that Karpin told her they were waiting for a judge to make various rulings in her case and that he had appeared in front of the judge eight times on her behalf. Karpin Tr., Aug. 14, pt. 2, *supra* note 4, at 29, 47.

signaled that he wanted more than money; he repeatedly told her, “Let’s get you single so we can take this to the next level.”<sup>16</sup>

Although he claimed to be providing Niedzwiecki mediation services, Karpin was giving her legal advice and acting as her lawyer, even though he was not licensed to practice law in Arizona.<sup>17</sup> Three months after their initial appointment, the Niedzwieckis had a basic understanding on most of the terms of their divorce,<sup>18</sup> but Karpin convinced Gina to reconsider her decisions on child custody, child support, and financials.<sup>19</sup> As their meetings continued, Karpin proposed numerous alternatives that were so contradictory that she lost track of them.<sup>20</sup>

In one of their last meetings, Karpin reportedly had Niedzwiecki practice her “court testimony,” which focused on intimate details of her sex life.<sup>21</sup> A few days later, Karpin told her that she did not have to testify, and within a week the Superior Court mailed her divorce decree to her house.<sup>22</sup> By this time, 15 months had passed since her first mediation session and she had paid Karpin a total of \$87,767.<sup>23</sup> Upon learning of the finalized decree, Karpin asked Niedzwiecki to come by his office for one last meeting. During the meeting he presented her with a \$25,000 final bill, which he described as a bargain because he had “got them down” from \$36,000.<sup>24</sup> She wrote him a \$9,000 check, but later stopped payment on it.<sup>25</sup> Upon attempting to deposit the check, Karpin left Niedzwiecki numerous voicemail

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16. *Id.* at 36–37 (arguing to the Court over an objection); Rubin, *Dr. Buzzard*, *supra* note 3.

17. Transcript of Record at 81, *State v. Karpin*, (Oct. 6, 2008) (No. CR2006–031057) [hereinafter *Karpin Tr.*, Oct. 6, pt. 2] (Van Wie Closing Argument) (stating “This is not a trial about the unauthorized practice of law. Clearly [Karpin] engaged in the unauthorized practice of law.” . . . . “That doesn’t make it mediation. What it was, was legal work. He was practicing legal work, just calling it something else.”) Furthermore, all of the court documents that Karpin filed on Niedzwiecki’s behalf were filed as if she were representing herself. *Karpin Tr.*, Aug. 14, pt. 1, *supra* note 3, at 27–30 (indicating that Karpin filed all of her court papers for her, but did so as if she were unrepresented).

18. *Karpin Tr.*, Aug. 14, pt. 2, *supra* note 4, at 19–20, 23.

19. *Id.* at 25–26.

20. *Id.* at 30–32 (describing changes Karpin claimed a judge was suggesting), 35–36.

21. *Id.* at 58–61.

22. *Id.* at 62–63, 66.

23. *Karpin Tr.*, Aug. 14, pt. 1, *supra* note 3, at 25, 30.

24. Transcript of Record at 54–55, *State v. Karpin*, (Sept. 2, 2008) (No. CR2006–031057) [hereinafter *Karpin Tr.*, Sept. 2]; *Karpin Tr.*, Aug. 14, pt. 2, *supra* note 4, at 66–67.

25. *Karpin Tr.*, Aug. 14, pt. 2, *supra* note 4, at 71–75.

messages, ranging from furious threats of legal action to warm apologies for his earlier nasty messages.<sup>26</sup> Subsequently, Niedzwiecki asked multiple times for documentation supporting the charges she had incurred, but Karpin claimed a janitor had thrown them all away.<sup>27</sup>

Not knowing where to turn, Niedzwiecki sought assistance from the Arizona State Bar which referred her case to the Maricopa County Attorney's Office.<sup>28</sup> The ensuing investigation led the authorities to believe that Karpin had pocketed approximately \$1 million from more than 300 victims, 40 of whom were named in the criminal charges brought against him.<sup>29</sup> Karpin was subsequently indicted for, and convicted of, theft by material means and for fraudulent schemes and artifices.<sup>30</sup>

How could Karpin con so many people out of so much money before he was prosecuted? Where were the mechanisms to monitor mediators' conduct and discipline or remove mediators from practice for engaging in such acts? In an age where occupational regulation is commonplace, why did the state have to level criminal charges before anything could be done to stop him from engaging in such appalling acts? These are simple questions, but the answers are complicated.

Mediation<sup>31</sup> has seen tremendous growth over the last thirty years, moving from an unconventional means of conflict resolution to a common step in the traditional litigation process.<sup>32</sup> This growth has

26. *Id.* at 75–77; Rubin, *Dr. Buzzard*, *supra* note 3.

27. Karpin Tr., Aug. 14, pt. 2, *supra* note 4, at 80–81; Karpin Tr., Sept. 2, *supra* note 24 at 58–59, 61–63. Niedzwiecki testified that Karpin told her that he had climbed into the dumpster searching for her files. *Id.*

28. Karpin Tr., Aug. 14, pt. 2, *supra* note 4, at 75.

29. Press Release, Maricopa County Attorney's Office, Victims of Gary Jay Karpin to Receive Restitution Payments (June 13, 2012), <http://www.maricopacounty-attorney.org/newsroom/news-releases/2012/2012-06-13-Victims-of-Gary-Karpin-to-Receive-Restitution-Payments.html> [hereinafter Press Release, County Attorney]; Indictment, *Arizona v. Karpin*, (2006) (No. CR2006–031057) [hereinafter Karpin Indictment]; Tena Starr, *Former Orleans County Prosecutor in Jail in Arizona*, THE CHRONICLE, June 20, 2012, <http://bartonchronicle.com/tag/gary-karpin/> (quoting an official in the Maricopa County Attorney's Office stating “Karpin earned ‘in the neighborhood of \$1 million in ill gotten [sic] gains.’”).

30. Karpin Indictment, *supra* note 29; *State v. Karpin*, 2010 WL 4969020 at 4 (Az. Ct. App.) [hereinafter *Karpin I*]

31. Mediation is defined as a facilitated negotiation process in which an impartial third party assists disputing parties in their attempt to resolve a dispute. SARAH R. COLE, ET AL., *MEDIATION: LAW, POLICY & PRACTICE*, 2–4 (2012–13).

32. See *infra* notes 43 to 57 and accompanying text (detailing the growth of mediation).

generated periodic calls for regulation that have been largely unanswered.<sup>33</sup> Anyone in any state can hold herself out to the public as a mediator without any training or other demonstration of competence.<sup>34</sup> No state regulatory authority acts as a gatekeeper to the mediation field; no state agency can keep a person from providing mediation services; no state regulator applies professional ethical standards across the mediation field; and no state agency can discipline malintentioned or ineffective mediators in a meaningful manner to keep them from harming the public.<sup>35</sup>

This is not to say that mediators are always unregulated. Court-connected mediation programs exist in state and federal courts and serve a quasi-regulatory function. However, most of these programs are small, focusing only on mediators who mediate cases in that particular court, and only a handful of states operate a statewide court-connected mediation program out of a centralized office.<sup>36</sup> But a strategy of relying on court-connected mediation programs to regulate mediators is problematic because a large number of mediations take place outside of court-connected programs.<sup>37</sup> Even when mediators are removed from a court-approved list, there is no mechanism to discontinue their mediation practice outside the court system. This leaves the vast majority of mediators in the United States largely unregulated and subject only to market forces unless they engage in criminal activity.<sup>38</sup>

One might expect civil litigation to be an important check against incompetent and dishonest mediators, acting as a substitute

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33. DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT* 303 (2nd ed. 2012) [hereinafter "FRENKEL & STARK, THE PRACTICE OF MEDIATION"]; COLE ET AL., *supra* note 31, at 587; ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON CREDENTIALING, *REPORT ON MEDIATOR CREDENTIALING AND QUALITY ASSURANCE 22* (Draft 2002) [hereinafter ABA, *MEDIATOR CREDENTIALING*] available at [http://www.americanbar.org/content/dam/aba/migrated/dispute/taksforce\\_report\\_2003.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/taksforce_report_2003.auth_checkdam.pdf) (last visited May 25, 2016).

34. Paula M. Young, *Take It or Leave It, Lump It or Grieve It: Designing Mediation Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 725–26 (2006).

35. See FRENKEL & STARK, *THE PRACTICE OF MEDIATION*, *supra* note 33, at 303; JAY FOLBERG, ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW*, 512–13 (2nd ed. 2010) (noting surprise as a typical response for the lack of licensing of mediators); ABA, *MEDIATOR CREDENTIALING*, *supra* note 33, at 22 (noting no licensing of mediators in any jurisdiction).

36. See *infra* notes 239 to 260 and accompanying text.

37. Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN. ST. L. REV. 43, 55 (2003) [hereinafter Press, *Crossroads*].

38. See FRENKEL & STARK, *THE PRACTICE OF MEDIATION*, *supra* note 33, at 303. See also *infra* notes 71 to 103 and accompanying text (discussing recourse against mediators).

for regulation through breach of contract or professional malpractice claims.<sup>39</sup> But several states protect mediators from civil liability, and some like Florida, Indiana, and North Carolina, provide mediators with absolute immunity from civil liability.<sup>40</sup> Furthermore, establishing a mediator's duty of care to mediation clients, an essential element for a malpractice claim, is challenging because of the field's variations, and quantifying any resulting damages is extremely difficult.<sup>41</sup> For all intents and purposes, consumers engage mediators on a strict *caveat emptor* basis.<sup>42</sup>

Using Karpin's exploits as an example, this paper argues that consumer protection should be the motivating justification for regulating mediators. The rest of this article proceeds as follows. Part II sets the stage by describing the current state of the mediation field, discussing mediation's growth over the last 40 years, who mediates and the training necessary to become a mediator, and the lack of recourse options against unskilled and unscrupulous mediators. Against that backdrop, Part III puts Niedzwiecki's story in context, explaining how regulatory gaps allowed Karpin to thrive as a self-identified mediator for nearly nine years. Part IV discusses occupational regulation generally, including the policies behind it and its various forms. It also details prior attempts at regulating mediators to explain why mediators are unregulated. Part V lays out the policy reasons why mediators should be regulated and refutes the established arguments against regulation. Part VI provides a two-pronged method for regulating mediators that avoids the pitfalls of prior regulatory efforts, suggests the best form of regulation, explains how mediator competence should be assessed, and discusses what regulation means to the field as whole. Part VII ultimately contends that the time for licensing has arrived, especially for mediation to be recognized as more than a sub-field of other professions.

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39. See MORRIS M. KLEINER, STAGES OF OCCUPATIONAL REGULATION: ANALYSIS OF CASE STUDIES 1-2 (2013) [hereinafter KLEINER, STAGES OF REGULATION].

40. FLA. STAT. § 44.107 (2014); Ind. Code Ann. § 4-21.5-3.5.4; N.C. Gen. Stat. § 7A-38.1(j). See also Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107 (2004). See also *infra* notes 76 to 80 and accompanying text (describing mediator immunity).

41. See Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 153-157 (2003) [hereinafter Moffitt, *Suing Mediators*]. See *infra* notes 81 to 92 and accompanying text (describing the difficulties in suing mediators).

42. Robert Dingwall, *Does Caveat Emptor Alone Help Potential Users of Mediations?*, 9 NEGOT. J. 331, 334 (1993).

## II. THE MEDIATION FIELD: A BRIEF PRIMER

To understand both Karpin's story and the need for the regulation of mediators, a basic understanding of the current state of mediation in the United States is necessary.

### A. *History and Growth*

In the late nineteenth and early twentieth centuries, mediation was used to quell disruptive labor strife,<sup>43</sup> and became a routine part of the collective bargaining process.<sup>44</sup> The seeds of the modern mediation movement were planted when the Civil Rights Act of 1965 created the Community Relations Service (CRS), a division of the U.S. Department of Justice designed to apply labor mediation concepts to restore harmony and stability in areas plagued by racial and ethnic strife.<sup>45</sup> By the mid-1970s, the CRS's achievements led some to believe that mediation could provide a more democratic and effective alternative to the judicial system, one that could rebuild neighborhoods and communities that had lost faith in the judicial system.<sup>46</sup> Consequently, many early proponents viewed mediation as a democratizing social movement designed to transform society's methods of managing and engaging in conflict.<sup>47</sup> Others saw mediation as a more humanistic disputing process, one that recognized individual's relational capabilities to transform the manner in which they engage in

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43. See generally COLE, ET AL., *supra* note 33, at 68 (discussing the origins of mediation in the US); BARRETT, *infra* note 47, at 85–95 (describing the early days of the labor movement).

44. See generally BARRETT, *infra* note 47, at 102–06 (describing the creation of the Department of Labor and the Federal Mediation and Conciliation Service among other agencies); *Id.* at 118–21 (describing the National Labor Relations Act and the growth of collective bargaining).

45. *Community Relations Service*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/crs/index.html> (last visited Feb. 20, 2015); BARRETT, *infra* note 47, at 149.

46. COLE, ET AL., *supra* note 33, at 71–73. For example, the U.S. Department of Justice piloted neighborhood justice centers in Atlanta, Kansas City, and Los Angeles, each of which used a broad range of citizens as mediators. *Id.* at 72–73. Two of these three centers were underutilized and abandoned, and the third survived on a steady stream of court referrals. *Id.* at 73.

47. This thought is captured nicely in an early discussion of mediation: [Mediation] is also an expression of a set of positive values about how people should deal with one another. Mediation is a paradigm that can lead to a peaceful and evolutionary revolution in the way people act and think in general.

John Lande, *Mediation Paradigms and Professional Identities*, 4 MEDIATION Q. 19, 19 (1984). See also JEROME T. BARRETT, *THE HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT* xiii (1st ed. 2004).



conflict.<sup>48</sup> And still others saw it as a means for the judicial system to address public dissatisfaction with the administration of justice.<sup>49</sup> The differing purposes and goals for these three groups of mediation proponents set the stage for mediation's meteoric growth, and yet created confusion and acrimony within the field when these purposes and goals failed to align.<sup>50</sup>

The 1980s were a period of slow, but systemic mediation growth.<sup>51</sup> With a few state judiciaries like Florida and North Carolina institutionalizing mediation in civil claims<sup>52</sup> and with California requiring mediation in family cases with child custody and visitation issues,<sup>53</sup> mediation made its first inroads into the litigation system. As judges and lawyers became more familiar and comfortable with the concept, federal courts and agencies turned more and more to mediation.<sup>54</sup> Likewise, states continued their institutionalization movement, and community-based mediation centers developed to a point where a national organization was created to serve as their policy-making voice.<sup>55</sup>

With its ubiquity in the dispute resolution landscape, lawyers pushed corporate America to take mediation in-house, and by the 2000s mediation was a regular feature in the disputing culture in the

48. For best encapsulation of this theory, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO MEDIATION* (1994).

49. At the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (popularly known as the Pound Conference) Professor Frank E. Sanders proposed the "multi-door" courthouse – a location for a wide range of dispute resolution processes for potential litigants, including mediation. Frank E. Sanders, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

50. See generally, Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System*, 108 PENN. ST. L. REV. 165, 170–89 (2003) (detailing a history of dispute resolution in the legal world). For an example of this confusion, see *infra* note 351 describing the Facilitative–Evaluative Debate.

51. JAMES J. ALFINI, ET AL., *MEDIATION THEORY AND PRACTICE* 28 (2nd ed. 2006).

52. See *infra* notes 239 to 260 and accompanying text (discussing court-connected mediation).

53. See Isolda Ricci, *Court Based Mandatory Mediation: Special Considerations*, in *DIVORCE AND FAMILY MEDIATION* 397, 398 (Folberg, et.al, eds. 2004) (giving a brief history of court-connected family mediation programs).

54. See, e.g., The Civil Justice Reform Act of 1990, Public Law 101–650; the Administrative Dispute Resolution Act, Public Law (1990), Public Law 101–552; the Administrative Dispute Resolution Act of 1996, Public Law 104–320; Alternative Dispute Resolution Act of 1998, Public Law 105–315.

55. That organization is the National Association for Community Mediation (NAFCM). *Purpose*, NATIONAL ASSOCIATION FOR COMMUNITY MEDIATION, <http://www.nafcm.org/?page=Purpose> (last visited Feb. 11, 2016) [hereinafter NAFCM webpage]. See also BARRETT, *supra* note 47, at 253.

United States. Today, mediation remains the undisputed dispute resolution method of choice for litigants, courts, administrative agencies, and major corporations.<sup>56</sup>

### B. *Becoming a Mediator*

Since the mediation field is unregulated, there are no general restrictions as to who can be a mediator or who can provide mediation services, and no requirements for what one has to do to become a mediator.<sup>57</sup> To make things murkier, there is no established career path for becoming a mediator. As a result, people typically come to mediation as a secondary profession after being educated and employed in another field.<sup>58</sup> This is because having substantive knowledge in particular fields helps mediators appear competent and qualified to do their job. For example, divorce mediators come to the field from a variety of backgrounds relating to domestic relations, including psychology, mental health, social work, and counseling as well as law.<sup>59</sup> A large number of mediators come from the ranks of lawyers and judges, two careers focused on disputes and disputing,<sup>60</sup> but one need not be a lawyer to succeed as a mediator.<sup>61</sup>

Not surprisingly, there is a wide variation in the training and education of mediators. There is no standard curriculum for mediation training, although most mediation trainers agree that for the best results, mediation training should have a mix of lecture, skills practice, and reflection.<sup>62</sup> Forty-hour basic or introductory mediation

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56. See Jacqueline Nolan-Haley, *Mediation: the "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61, 66–73 (discussing mediation displacing arbitration as the most popular alternative to court adjudicated disputes).

57. MICHAEL L. MOFFITT & ANDREA KUPFER SCHNEIDER, *DISPUTE RESOLUTION: EXAMPLES & EXPLANATIONS* 64 (2008).

58. Art Hinshaw, *Mediators as Mandatory Reporters of Child Abuse: Preserving Mediation's Core Values*, 34 FLA. ST. U. L. REV. 271, 290 (2007). *But see About This Project*, ADR AS A FIRST CAREER, <http://www.adras1stcareer.blogspot.com/p/about-this-project.html> (explaining that dispute resolution jobs like mediation are typically second or third career jobs) (last visited on Feb. 12, 2016).

59. CARRIE MENKEL-MEADOW, ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 274 (2005).

60. See generally Jacqueline Nolan-Haley, *Laywers, Non-Laywers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002) (describing, among other things, mediation's close relationship to the practice of law); See also KIMBERLY K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 434 (3rd ed. 2004) (discussing court-connected mediation programs).

61. For example, community mediation programs routinely seek volunteers to act as mediators regardless of their background. NAFCM webpage, *supra* note 55, at 9 *Hallmarks of Community Mediation Programs*.

62. KOVACH, *supra* note 60, at 435–36.

training programs are widely held across the country,<sup>63</sup> but some states like Missouri require “at least 16 hours of formal training” to be a mediator in the state court system.<sup>64</sup> Upon completion of their training, mediators often casually refer to themselves as “being certified,” implying that their skills have passed muster with a certifying entity, when they simply received a certificate indicating the completion of a training program.<sup>65</sup>

Despite the lack of structure in becoming a mediator, most mediators indicate their competency using professional affiliations and mediation referral sources. Professional affiliation credentials are qualifications established by an organization to which a mediator belongs.<sup>66</sup> Some organizations do membership screening, like requiring election into the organization or completion of a certain number of mediations, but for many the only hurdle for membership is the payment of dues.<sup>67</sup> Mediation referral sources, on the other hand, are the organizations from which mediators receive disputes to mediate such as court systems, other governmental agencies, social service agencies, or mediation service provider organizations.<sup>68</sup> To receive referrals from these organizations, mediators must meet or exceed organizational standards for training, education, and experience.<sup>69</sup> As such, professional organization and mediation referral sources have the ability to influence the field in a number of ways, but their direct influence extends only to membership.

### C. *Recourse Against Mediators*

The policy reasons for public accountability for substandard professional services are quite simple:

- to provide justice to an aggrieved party,
- to punish a wrongdoer,
- to deter specific conduct deemed inappropriate,

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63. A recent Google search for “40 hour mediation training” pulled up nearly 500,000 results.

64. MO. SUP. CT. R. 17.04.

65. KOVACH, *supra* note 60, at 437.

66. MOFFITT & SCHNEIDER, *supra* note 57, at 65.

67. *Id.* A primary example of this is being a member of a state bar association’s dispute resolution section.

68. *Id.*

69. *Id.* For example, the United States Postal Service’s REDRESS mediation program (for in-house disputes) requires mediators to have: 24 hours of mediation training, 10 mediations as the lead or co-mediator (mediating with a mediator partner), and completion of a two day, 20 hour course in transformative mediation. REDRESS: MEDIATORS, UNITED STATES POSTAL SERVICE <http://about.usps.com/what-we-are-doing/redress/mediators.htm> (last visited on Feb. 16, 2016).

and to educate the public.<sup>70</sup>

Mediation consumers have four avenues through which to seek such redress: civil liability, mediation referral organizations, professional organizations, and criminal sanctions.<sup>71</sup> Nonetheless, finding meaningful recourse against mediators is extremely difficult.<sup>72</sup>

### 1. *Civil Liability*

When engaging professional services, consumers typically are able to assert after-the-fact claims for receiving substandard services. There are a number of legal theories an unhappy mediation customer can pursue: breach of contract, fraud, intentional or negligent infliction of emotional distress, and deceptive trade practices among others.<sup>73</sup> When speaking of civil liability, however, most of the focus is on professional negligence, also known as mediator malpractice.<sup>74</sup> No matter the legal theory asserted, several significant hurdles stand between making a claim against a mediator and recovery on that claim.

#### a. *Immunity*

The first and most significant hurdle for legal claims against mediators is immunity. Simply stated, immunity shields mediators from civil liability for their actions,<sup>75</sup> and is based on the common law doctrine of judicial immunity, which gives judges absolute protection from suit for exercising their judgment in their judicial capacity.<sup>76</sup> The theory is that mediators act in a quasi-judicial capacity, and therefore need the same kinds of protections against lawsuits as judges.<sup>77</sup> Some states provide mediators absolute immunity like

70. SUSAN NAUSS EXON, *ADVANCED GUIDE FOR MEDIATORS* 274 (2014).

71. See generally Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEG. L. REV. 84–86 (2003) [hereinafter Moffitt, *Ten Ways*].

72. EXON, *supra* note 70, at 273 (claiming mediation is “bereft of a structure that enables an injured party to seek relief against mediators.”); Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 148–182 (2003) (detailing difficulties in establishing legal liability and damages in civil claims) [hereinafter Moffitt, *Suing Mediators*].

73. See generally Moffitt, *Ten Ways*, *supra* note 71 (discussing ten separate mediator actions or inactions that may support contract or tort claims). See also KOVACH, *supra* note 60, at 458.

74. See, e.g., EXON, *supra* note 70, at 273–336 (devoting an entire chapter to the topic); SCHNEIDER & MOFFITT, *supra* note 57, at 68.

75. SCHNEIDER & MOFFITT, *supra* note 57, at 68; Moffitt, *Suing Mediators*, *supra* note 72, at 173.

76. EXON, *supra* note 70, at 276; Moffitt, *Suing Mediators*, *supra* note 72, at 174;

77. See *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994) (finding a mediator’s functions sufficiently comparable to a judge’s in granting quasi-judicial immunity for the mediator’s actions); SCHNEIDER & MOFFITT, *supra* note 57, at 68.

judges,<sup>78</sup> while others have established statutory qualified immunity for mediators, protecting mediators from negligence actions but not from acts like intentional torts, bad faith, and willful and wonton conduct.<sup>79</sup> In states where mediators enjoy some form of immunity from suit, civil litigation is all but futile and claimants must seek redress for substandard mediator conduct through other means.

b. *Standard of Care*

If mediators are not protected by immunity, a negligence-based claim must prove that the mediator had a duty to conform to a standard of care and that the mediator's conduct fell below that standard.<sup>80</sup> Establishing a clear standard of care for mediators is difficult because of the field's flexibility and variation.<sup>81</sup> Mediators operate under a patchwork of standards, promulgated by a range of practice associations, program administrators, and court systems that might apply to one mediator but not another.<sup>82</sup> Additionally, there are few "generally accepted" mediation practices compared to other fields.<sup>83</sup> One treatise notes this problem as follows:

One [mediator] might evaluate the merits of a legal dispute (evaluative mediation) or not (facilitative mediation). One might try to move the parties toward settlement (evaluative or facilitative mediation) or not (transformative mediation). One might ask open-ended questions or not. One might keep the parties together, or meet with them separately.<sup>84</sup>

Suffice it to say that almost anything a mediator does can be explained by one or more competing mediation theories.<sup>85</sup> Without clear and customary practices, a plaintiff would have a hard time establishing a proper mediator's standard of care, much less demonstrating a breach of that standard.<sup>86</sup>

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78. See, e.g., FLA. STAT. ANN. § 44.107; IND. CODE ANN § 4-21.5-3.5-4; N.C. GEN. STAT. § 7A-38.1(j).

79. See, e.g., AZ. REV. STAT. § 12-2232; COLO. REV. STAT. § 13-22-305(6). See also Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 RUTGERS L.J. 131, 145-47 (1999).

80. EXON, *supra* note 70, at 286; Moffitt, *Suing Mediators*, *supra* note 72, at 154.

81. EXON, *supra* note 70, at 286-87.

82. Moffitt, *Suing Mediators*, *supra* note 72, at 154-55.

83. EXON, *supra* note 70, at 286; SCHNEIDER & MOFFITT, *supra* note 57, at 69.

84. *Id.*

85. Moffitt, *Suing Mediators*, *supra* note 72, at 156.

86. EXON, *supra* note 70, at 287; SCHNEIDER & MOFFITT, *supra* note 57, at 69; Moffitt, *Suing Mediators*, *supra* note 72, at 155.

c. *Causation and Damages*

Even if a plaintiff could establish a standard of care for mediators and a breach of that standard, significant difficulties remain when it comes to establishing causation and damages.<sup>87</sup> Essentially what a claimant would have to show is that a mediator's conduct inappropriately resulted in no settlement or in a settlement harmful to one party.<sup>88</sup> Cases fail to settle for myriad reasons, and nothing prevents parties from settling a case on their own without the assistance of a mediator, particularly if a settlement were readily available.<sup>89</sup> In the unfavorable settlement situation, two problems arise. First, the fact that the complaining party consented to the terms of the agreement would make it difficult to establish that the mediator is responsible for the substance of the agreement outside of coercion or fraud.<sup>90</sup> And second, finding benchmarks for what would have happened if another mediator had been involved are purely speculative.<sup>91</sup>

2. *Mediation Referral Organizations*

Mediators who work under the auspices of mediation referral organizations are subject to the organization's mediator complaint system which is typically tied to some standards for professional conduct.<sup>92</sup> Public organizations like court-annexed mediation programs, have well-publicized grievance processes to provide a forum for mediator complaints, giving the public some oversight over mediators and protecting the legitimacy of the referring courts.<sup>93</sup> These systems vary in their procedures and level of formality,<sup>94</sup> but they all strive to provide both procedural justice to complainants and due process to mediators.<sup>95</sup> Failing to meet the standards for professional conduct, be it in a public or private mediation referral organization, risks sanctions that could range from a reprimand up to and

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87. EXON, *supra* note 70, at 287; Moffitt, *Suing Mediators*, *supra* note 72, at 176.

88. Moffitt, *Suing Mediators*, *supra* note 72, at 175.

89. *Id.* at 176.

90. *Id.* at 178, SCHNEIDER & MOFFITT, *supra* note 57, at 69.

91. Moffitt, *Suing Mediators*, *supra* note 72, at 179; SCHNEIDER & MOFFITT, *supra* note 57, at 70.

92. Moffitt, *Ten Ways*, *supra* note 71, at 85. The primary set of professional conduct standards for mediators is the Model Standards of Conduct for Mediators promulgated by the American Arbitration Association, the American Bar Association Dispute Resolution Section, and the Association for Conflict Resolution.

93. Young, *supra* note 34, at 739-40.

94. *Id.* at 789-894 (describing the mediator grievance procedures in five separate states).

95. EXON, *supra* note 70, at 323; Young, *supra* note 34, at 782-85.

including disqualification from the referral organization, thereby closing a valuable source of the mediator's business.<sup>96</sup>

### 3. *Professional Organizations*

Many mediators belong to professional mediator associations and many of these associations require their membership to adhere to certain standards of conduct or other principles establishing acceptable conduct.<sup>97</sup> If that organization has a grievance procedure, failing to live up to those standards could result in a grievance, much like with mediation referral organizations.<sup>98</sup> Sanctions may range from requiring an apology or continuing education up to and including the revocation of one's membership and public admonishment on the organization's web site.<sup>99</sup> However, a mediator may be able to avoid sanction simply by voluntarily withdrawing from the organization.

### 4. *Criminal Sanction*

Just like any individual, the criminal law applies to mediators when dealing with their clients.<sup>100</sup> Assaulting a client, forging a client's name, or stealing money from a client should result in criminal sanctions. Another area where unwitting mediators may become entangled is the unauthorized practice of law (UPL), a misdemeanor in most states.<sup>101</sup> UPL problems can stem from the following typical mediation behaviors: predicting court outcomes, advising that one settlement option appears to be more favorable than another, and writing up settlement agreements.<sup>102</sup> Non-attorney mediators and attorneys licensed in states other than the one in which they are mediating are well advised to be cognizant of the UPL laws in the jurisdiction in which they are mediating.

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96. Moffitt, *Ten Ways*, *supra* note 71, at 85; Young, *supra* note 34, at 775.

97. EXON, *supra* note 70, at 323, Moffitt, *Ten Ways*, *supra* note 71, at 85.

98. SCHNEIDER & MOFFITT, *supra* note 57, at 66.

99. *Id.*; EXON, *supra* note 70, at 323.

100. EXON, *supra* note 70, at 323.

101. *Id.* at 322–323; Moffitt, *Ten Ways*, *supra* note 71, at 95–102. Criminal penalties are rare as most UPL actions result in injunctions against further engagement in the practice of law. *Id.* at 100

102. ARIZ. SUP. CT. R. 31(d)(25) (stating that drafting a settlement agreement in mediation is the unauthorized practice of law except for court employees or volunteers); MD. R. PROC. § 17–103, Committee Note (stating a mediator who is not a Maryland lawyer should not author agreements for parties to sign); EXON, *supra* note 70, at 323; Moffitt, *Ten Ways*, *supra* note 71, at 98.

## III. KARPIN IN DEPTH

Gary Karpin's fraudulent and unethical conduct began well before he moved to Arizona and continued throughout his nearly nine-year mediation career.<sup>103</sup> Many of his mediation clients complained to various professional organizations, but these organizations were powerless to stop him.<sup>104</sup> Karpin's career finally came to an end once the Arizona State Bar referred Niedzwiecki to the Maricopa County Attorney's Office, which resulted in his prosecution and conviction.<sup>105</sup>

A. *Background*

Karpin received bachelor degrees from two small liberal arts colleges in Vermont before attending the Vermont Law School which awarded him a J.D. in 1985.<sup>106</sup> He was admitted to the Vermont Bar in 1987 and shortly thereafter became a Deputy State's Attorney in Orleans County.<sup>107</sup> In less than a year, he became a solo practitioner in Newton, Vermont.<sup>108</sup>

In 1992, the Vermont Professional Conduct Board (PCB), the entity responsible for attorney discipline in Vermont, charged Karpin with fraudulent conduct and found him to be unscrupulous with his clients.<sup>109</sup> In one case, Karpin advised his clients to seek double recovery for losses to their newly built home.<sup>110</sup> His clients followed his advice, made claims against the home builder and on their homeowners' insurance policy, and were subsequently charged with insurance fraud.<sup>111</sup> Karpin settled another case without his client's consent because he was unprepared for the impending trial and afterwards duped the client into signing a document releasing all potential claims against Karpin, including claims for malpractice and ethical

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103. See, e.g., *In re Karpin*, 647 A.2d 700 (Vt. 1993) (stripping Karpin of his license to practice law in Vermont).

104. See Rubin, *Dr. Buzzard*, *supra* note 3, at 3 (quoting a state bar official stating there was little the state bar could do).

105. See *Karpin I*, *supra* note 30.

106. *Arizona v. Karpin*, No. CR2006-031057, filed 11-12-2010; Rubin, *Dr. Buzzard*, *supra* note 3.

107. *In re Karpin*, VERMONT PROFESSIONAL CONDUCT BOARD, Decision No. 41, Nov. 6, 1992, at 3, available at <http://libraries.vermont.gov/sites/libraries/files/LawLibrary/VTLegalDecision/ProfessionalConduct/vol1/41pcb.pdf> [hereinafter PCB No. 41].

108. *Id.*; Transcript of Record at 32, *State v. Karpin*, (Oct. 1, 2008) (No. CR2006-031057) (Gary Karpin testimony).

109. PCB No. 41, *supra* note 107, at 16-17.

110. *Id.* at 3.

111. *Id.* at 4.



violations.<sup>112</sup> In yet another situation, Karpin asked his legal assistant to forge a client's signature on an affidavit and then lied to a judge saying he did not know who signed the document.<sup>113</sup> The PCB also found that he had paid his legal assistant to lie to the PCB during its investigation.<sup>114</sup> The PCB recommended disbarment, stating:

[T]he depth and breadth of [Karpin's] unethical conduct is so significant and wide-ranging that he is a threat to the public, the profession, the courts, and his clients.<sup>115</sup>

The Vermont Supreme Court agreed and disbarred Karpin on May 21, 1993.<sup>116</sup> Karpin subsequently relocated to Phoenix and took a week-long mediation training program offered through the Maricopa County Superior Court.<sup>117</sup> Almost immediately, he branded himself as a divorce mediator and began advertising his mediation services. Karpin's advertisements offered "Divorce with Dignity," highlighting his experience as a former prosecutor and claimed that he was a "Superior Court Certified" mediator.<sup>118</sup> Within three months of completing his mediation training, the Arizona State Bar received its first complaint about Karpin.<sup>119</sup>

### B. *Karpin's Modus Operandi*

Karpin's advertisements attracted customers by promising two things – an initial free consultation and reasonable rates.<sup>120</sup> During initial consultations, Karpin explained the mediation process and had his clients sign a mediation agreement that included a \$975 non-

112. *Id.* at 10–11.

113. *Id.* at 13–15.

114. *Id.* at 15.

115. *Id.* at 17.

116. *In re Karpin*, 647 A.2d 700, 714

117. Paul Rubin, *Court House Scoundrels*, PHOENIX NEW TIMES (Dec. 19, 2002, 4:00 AM), available at <http://www.phoenixnewtimes.com/2002-12-19/news/court-house-scoundrels/> [hereinafter Rubin, *Court House Scoundrels*]. Certificate of Completion of Mediation Training for Gary Karpin, MARICOPA COUNTY SUPERIOR COURT ALTERNATIVE DISPUTE RESOLUTION OFFICE, (October 19, 1996) (making Karpin eligible to mediate cases in Maricopa County's limited jurisdiction courts) (on file with author).

118. See "Divorce with Dignity" advertisements in the ARIZONA REPUBLIC, PHOENIX NEW TIMES, the SCOTTSDALE TIMES, GET OUT MAGAZINE in the EAST VALLEY TRIBUNE, the phonebook, and the SCOTTSDALE AIRPARK NEWS (2001–2004) (on file with author).

119. See Letter from Rena Selden to Frances Johansen, State Bar of Arizona Unauthorized Practice of Law Attorney (Dec. 9, 1996) (on file with author) (indicating that documents Karpin provided to Ms. Selden's client suggest he is a licensed attorney in Arizona).

120. See *id.*; Press Release, County Attorney, *supra* note 29.

refundable retainer and a waiver of all civil claims against him, including claims for engaging in the unauthorized practice of law and claims for fraud.<sup>121</sup> While he was happy to exploit anyone for financial gain,<sup>122</sup> most of Karpin's victims were women.<sup>123</sup> He consistently alienated estranged husbands in some way – by making demands for more money, unfounded accusations, or inappropriate comments – in hopes of getting them out of the way so he could gain the divorcing wife's trust and confidence.<sup>124</sup>

Karpin was a skilled listener and empathizer, and he projected a sincerely caring persona.<sup>125</sup> He would comment about how strong, brave, or attractive his women victims were before steering the conversation to their intimate life or making inappropriate advances.<sup>126</sup> For example, one former client said that Karpin told her that he was attracted to her and wanted to take her out on a date.<sup>127</sup> Her response was to ask if it was unethical for him to be involved with her, and he reportedly responded that their date “would be off the record. We could kiss . . . as a form of therapy.”<sup>128</sup> With several victims, he mentioned the possibility of the two of them having a future together – sometimes in passing, other times more directly.<sup>129</sup> Some clients

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121. Divorce with Dignity Mediation Agreement (on file with author).

122. See, e.g., John Goldyn, Unauthorized Practice of Law Reporting Form (July 31, 2005) (on file with author) (relating that he and his wife had paid over \$9,000 for over 16 mediation meetings); Statement from Timothy Smith to Mike Leavene (May 3, 2005) (on file with author) (reporting that Karpin asked both him and his wife to pay thousands of dollars) [hereinafter Smith statement]; Statement from Angel Ortega to Michael Leavene, Maricopa County Attorney's Office (May 19, 2005) (on file with author) (describing his interactions with Karpin that ultimately resulted in Ortega's divorce being filed); Statement from Roger Rizzo to Michael Leavene, Maricopa County Attorney's Office (Oct. 25, 2005) (on file with author).

123. Of the 40 victims listed in Karpin's indictment, 30 were women. Karpin Indictment, *supra* note 29.

124. Letter from Bill Ludlow, to Frances Johansen, State Bar of Arizona Unauthorized Practice of Law Attorney (Sept. 24, 2002) (on file with author) (stating that Karpin told Mrs. Ludlow that Mr. Ludlow was badmouthing her during the mediation sessions); E-mail from Timothy Smith, to Gary Karpin, (June 7, 2002) (on file with author) (recounting Karpin's conversation where Karpin “took her side”); Rubin, *Dr. Buzzard*, *supra* note 3 (quoting an Arizona State Bar official as saying, “when a young woman comes in, [whom he] becomes interested in, he becomes their advocate.”); Starr, *supra* note 29 (discussing Karpin's ability to gain women's confidence).

125. Ruth Murray statement to Frances Johansen, State Bar of Arizona Unauthorized Practice of Law Attorney, at 10 (July 29, 2004) (on file with author) [hereinafter Murray statement]; Starr, *supra* note 29 (describing how Karpin was able to get individuals to trust him).

126. Murray statement, *supra* note 125.

127. *Id.*

128. *Id.*

129. *Id.*; Statement from Tae Enum to Michael Leavene, Maricopa County Attorney's Office (Apr. 4, 2005) (on file with author) [hereinafter Enum statement]; Rubin,

welcomed the unexpected attention at a time when they were feeling very low,<sup>130</sup> but others had the opposite reaction.<sup>131</sup> All the while, he would ask these women for more money.<sup>132</sup>

Eventually, when victims refused his requests for more money, Karpin transformed into a different person: intimidating, angry, and bullying.<sup>133</sup> He regularly threatened to file defamation lawsuits<sup>134</sup> and did file one against a former male client.<sup>135</sup> Once, a lawyer requested a refund for a former client and Karpin responded by faxing a handwritten note in thick marker challenging the lawyer to “beat it out of my ass – you think you’re man enough[?]”<sup>136</sup> Typically, however, once Karpin concluded he could not get any more money from his victims, he would leave them alone.<sup>137</sup>

### C. *Official (in)Action*

Many of Karpin’s victims sought assistance when they realized he was a fraud. The Maricopa County Association of Family

*Court House Scoundrels*, *supra* note 117, at 3 (describing Rebecca Ludlow’s experience with Karpin).

130. Rubin, *Dr. Buzzard*, *supra* note 3.

131. See Enum statement, *supra* note 129.

132. See, e.g., E-mail from Timothy Smith to Gary Karpin (June 19, 2002) (on file with author); Murray statement, *supra* note 125. See also Patrick J. Beauperlant, Timeline Association with Gary Karpin, J.D., (indicating payments to Karpin of more than \$21,000 spread out for over a year) (on file with author). For one client, he initially stated he would provide his services for free, although she ended up paying him over \$3500. Murray statement, *supra* note 125.

133. Rubin, *Dr. Buzzard*, *supra* note 3; Murray statement, *supra* note 125; Statement from Timothy Smith, to Michael Leavene, Maricopa County Attorney’s Office, at 3 (May 3, 2005) (stating that when confronted with requesting \$10,000 from his wife, Karpin “got very angry with me on the phone, cussed and swore, used the f-word, and came unglued at me. . .”) (on file with author) [hereinafter Smith statement]; Enum statement, *supra* note 129 (stating that Karpin said he would sue her to get his fees). See also Transcript of Record at 27–29, *State v. Karpin*, (Aug. 18, 2008) (No. CR2006–031057) [hereinafter Karpin Tr., Aug. 18] (Frances Johansen testimony) (on file with author) (discussion with the court about objection related to the number of victims who were to testify how Karpin confronted clients who challenged him).

134. See, e.g., E-mail from Gary Karpin, to Timothy Smith (June 20, 2002) (on file with author); Facsimile from Gary Karpin, to Keith Moore (Mar. 24, 2003) (on file with author) [hereinafter Karpin facsimile]; Paul Rubin, “*Dr. Gary*” *Nailed: A County Grand Jury Indicts “Mediator” Who Was Preying on Vulnerable Divorcees*, PHOENIX NEW TIMES (July 21, 2005, 4:00 AM), <http://www.phoenixnewtimes.com/2005-07-21/news/dr-gary-nailed/> [hereinafter Rubin, “*Dr. Gary*” *Nailed*] (discussing Karpin’s threatened defamation actions against Gina Niedzwiecki and Ruth Murray).

135. *Karpin v. Ludlow*, No. CV2003–017998 (Ariz. Super. Ct. Apr. 15, 2004).

136. Karpin facsimile *supra* note 134.

137. See Smith statement, *supra* note 122, at 6.

Mediators,<sup>138</sup> the Association of Conflict Resolution,<sup>139</sup> and the Legal Document Preparer Division of the Arizona Supreme Court's Administrative Office<sup>140</sup> all investigated Karpin between 2000 and 2004. The net result was one public rebuke.<sup>141</sup> Karpin disregarded it.

Most of Karpin's victims – either directly or through legal counsel – turned to the Arizona State Bar for assistance. Karpin was no stranger to the State Bar, even before he moved to Arizona. After learning that Karpin was planning to move to Phoenix, the Vermont State Bar's Discipline Unit sent a letter to its Arizona counterpart enclosing a copy of the Vermont Supreme Court case disbaring Karpin.<sup>142</sup> Despite the warning, there was little the Arizona State Bar could do – Arizona did not, and still does not, allow for criminal or civil sanction against those engaged in the unauthorized practice of law.<sup>143</sup> Over an eight-and-a-half year span, the State Bar received 34 complaints against Karpin, but its attorney for unauthorized practice of law matters had no choice but to “tell people there was very little I could do for them. I'm talking about folks who genuinely had been hurt.”<sup>144</sup> Although the State Bar could not take direct action

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138. E-mail from Shari Capra to Art Hinshaw (Feb. 16, 2015) (on file with author); E-mail from Shannon Arriola to Art Hinshaw (Feb. 18, 2015) (on file with author) [hereinafter Capra email].

139. Letter from David Hart to Timothy Smith (July 2, 2002) (on file with author) (confirming ethics complaint to the Association of Conflict Resolution); Letter from Timothy W. Smith to Frances Johansen and Margaret Powers (June 19, 2002) (on file with author) (detailing Karpin's actions acting as a mediator in Smith's divorce case); E-mail from Danette J. Ross to Gary Karpin (June 19, 2002) (on file with author) (informing Karpin of ethics complaint against him to the Association of Conflict Resolution).

140. Letter from Linda Grau, Legal Document Preparer Program Coordinator, to Gary Karpin (Jan. 22, 2004) (requesting Karpin to cease and desist in the preparation of legal documents and to apply to become a legal document preparer) (on file with author).

141. *See id.* Karpin abandoned his membership in the Maricopa County Association of Family Mediators before its ethics procedure began. Capra email, *supra* note 138. The results of the Association of Conflict Resolution investigation are confidential, so it is unclear what came of that investigation. Letter from David Hart to Frances Johansen, State Bar of Arizona Unauthorized Practice of Law Attorney (Sept. 3, 2002) (on file with author) (stating that Timothy Smith's complaint to the Association of Conflict Resolution was going through a confidential ethics process); Letter from David Hart to Timothy W. Smith (Sept. 3, 2002) (on file with author) (stating that materials regarding the investigation into Smith's complaint against Karpin had been improperly shared with the Arizona State Bar).

142. Rubin, *Court House Scoundrels*, *supra* note 129, at 1. The letter was reported to state, “Suffice it to say out of excess of caution, I forward this decision for your reading pleasure.” *Id.* *See also* Karpin Tr., Aug. 18, *supra* note 133, at 14 (testimony of Frances Johansen).

143. *See* ARIZ. SUP. CT. R. 31; *In re Van Dox*, 152 P.3d 1183 (Ariz. 2007).

144. Rubin, *Dr. Buzzard*, *supra* note 3, at 3.

against Karpin, it referred six complaints about him to the Attorney General for prosecution under the state's consumer fraud statute.<sup>145</sup> This was not fruitful either; the Attorney General's Office refused to investigate any claims "because both staff and resources are limited."<sup>146</sup>

In 1998 the State Bar sent Karpin its first cease-and-desist letter demanding that he refrain from engaging in the unauthorized practice of law.<sup>147</sup> Karpin ignored it. In 2004, the State Bar sent Karpin another cease-and-desist letter,<sup>148</sup> and followed it with a lawsuit seeking to enjoin him from engaging in the practice of law.<sup>149</sup> Karpin counterclaimed for defamation and other assorted tort claims.<sup>150</sup> Within a year, the case settled with a consent judgment where Karpin admitted to engaging in the unauthorized practice of law and agreed to refund his fees to four clients, to engage in binding fee arbitration with six others, and to inform all of his current clients of the consent order.<sup>151</sup> In exchange for those concessions, the State Bar withheld issuing a press release about the case, but affirmed that its files about Karpin would be publicly available and that it would answer any questions about the matter honestly.<sup>152</sup>

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145. Karpin Tr., Aug. 18, *supra* note 133, at 41 (testimony of Frances Johansen (stating the State Bar had no enforcement power on unauthorized practice of law matters during the relevant time period); *Regulation of Non-Lawyers*, STATE BAR OF ARIZONA, <http://www.azbar.org/lawyerconcerns/non-lawyers> (last visited Feb. 19, 2014) (describing the following actions that the State Bar takes against those who engage in the unauthorized practice of law—attempting to enter a cease and desist agreement, seeking a civil injunction to order the non-lawyer to refrain from engaging in the unauthorized practice of law, and referral of the case to the Arizona Attorney General's Office for investigation into any violations of the consumer fraud statute).

146. Complaints Filed Against Gary Karpin with the State Bar of Arizona and the Attorney General's Office, prepared by Frances Johansen (on file with author) (indicating which complaints the State Bar forwarded to the Arizona Attorney General's Office); *See also* Rubin, *Court House Scoundrels*, *supra* note 129, at 2 (quoting Johansen about referring UPL claims to the Attorney General's Office "That's where it usually ends. Nothing seems to happen to anyone. We can't seem to get the government interested in this problem. . .").

147. Letter from Lynda Shely, State Bar Ethics Counsel, to Gary Karpin (May 22, 1998) (on file with author).

148. Letter from Frances Johansen, State Bar of Arizona Unauthorized Practice of Law Attorney, to Gary Karpin (Feb. 19, 2004) (on file with author).

149. State Bar of Ariz. v. Karpin, No. CV2004-007080 (Ariz. Super. Ct. filed Apr. 19, 2004).

150. Karpin originally filed his assorted tort claims against the state bar's UPL attorney and its director as a separate lawsuit. *See* Karpin v. Johansen and Van Wyc Bar of Arizona, No. CV2004-007401 (Ariz. Super. Ct. Apr. 19, 2004).

151. Order Re: Consent to Cease and Desist Agreement, No. CV2004-007080 (June 13, 2005).

152. Joint Consent to Cease and Desist Agreement, State Bar of Arizona v. Karpin, No. CV2004-007080 (May 10, 2005).

#### D. *Prosecution and Conviction*

In early 2005, Gina Niedzwiecki approached the State Bar with extensive documentation about her involvement with Karpin, thanks to her prolific note-taking.<sup>153</sup> This time, the State Bar forwarded her complaint about Karpin to the Maricopa County Attorney's Office for investigation.<sup>154</sup> A grand jury indicted him and he was arrested on July 11, 2005.<sup>155</sup>

Three years later, Karpin went to trial on 25 counts of theft by means of material misrepresentation and one count of fraudulent schemes and artifices.<sup>156</sup> The prosecution's strategy was to use mediation as the backdrop for Karpin's criminal conduct<sup>157</sup> and did not focus on whether Karpin had engaged in the unauthorized practice of law.<sup>158</sup> All of the victims who testified against Karpin had similar stories. They thought he was a lawyer because his business cards and newspaper ads included phrases like "JD" and "former prosecutors," [sic] and his office prominently displayed his law school degree and other certificates on the wall.<sup>159</sup> All of them testified that they would not have hired him to mediate their respective divorces had they known he was not licensed to practice law in Arizona.<sup>160</sup>

Karpin's defenses consisted of blaming his victims for falling into his trap,<sup>161</sup> claiming that his actions were harmless,<sup>162</sup> and arguing

153. Niedzwiecki was a meticulous note taker to help her with memory issues related to multiple sclerosis. Karpin Tr., Aug. 14, pt. 1, *supra* note 3, at 21–22, 38.

154. Rubin, "Dr. Gary" Nailed, *supra* note 134; Karpin I, *supra* note 30, at 3; Paul Rubin, *Divorce with Indignity*, PHOENIX NEW TIMES (Oct. 13, 2005, 4:00 AM), <http://www.phoenixnewtimes.com/2005-10-13/news/divorce-with-indignity/> [hereinafter Rubin, *Divorce with Indignity*].

155. Rubin, *Divorce with Indignity*, *supra* note 154; Karpin Indictment, *supra* note 29.

156. Karpin I, *supra* note 30, at 4.

157. See Karpin Tr., Oct. 6, pt. 2 *supra* note 17, at 19, 74–75 (Karpin Closing Argument) (complaining that the State produced no expert witness to discuss mediation).

158. Karpin Tr., Oct. 6, pt. 2, *supra* note 17, at 25 (Van Wie Closing Argument) (discussing unauthorized practice of law). *But see* Karpin Tr., Oct. 6, pt. 2, *supra* note 17, at 81 (Van Wie Closing Argument) (stating "That doesn't make it mediation. What it was, was legal work. He was practicing legal work, just calling it something else.").

159. Karpin I, *supra* note 30, at 2–3.

160. *Id.*

161. This argument was based on his mediation agreement in which signatories acknowledged that he was "not an attorney for divorce mediation purposes," so none of them could have rightfully thought that he was a licensed attorney in Arizona. Karpin I, *supra* note 30; Karpin Tr., Oct. 6, pt. 2 *supra* note 17, at 5–7, 26–27 (Karpin testimony); Karpin Tr., Oct. 6, pt. 2 *supra* note 17, at 4–5 (Karpin closing argument). The statement is in Karpin's Mediation Agreement, but it is buried on the third page of a four-page agreement, not bolded or underlined. See *Divorce with Dignity Mediation Agreement*, *supra* note 121.

that his actions should be addressed through civil claims for breach of contract or malpractice, not through criminal liability.<sup>163</sup> These arguments failed. The jury found Karpin guilty on 24 counts of theft by means of material misrepresentation and one count of fraudulent schemes and artifices.<sup>164</sup> He was sentenced to 15.75 years in prison and was ordered to pay restitution to his victims in the amount of \$240,448.99.<sup>165</sup> The jury verdict, the restitution award, and the denial of his post-conviction request for relief were all upheld on appeal.<sup>166</sup> He is scheduled for release from prison in November 2022.<sup>167</sup>

### E. *Other Egregious Cases*

Karpin's case is alarming and atypical, but it is not the only documented horror story of bad actors taking advantage of the mediation process.<sup>168</sup> In a child support arrears case, a consent decree was set aside when it came to light that the parties' mediator was not a mediator, but a convicted felon and friend of the ex-husband posing as a mediator.<sup>169</sup> Not only did "the mediator" convince the ex-wife to discharge her attorney, he also convinced her that the amount of child support due was significantly less than what she was seeking.<sup>170</sup> In another case, an organization claiming to be a mediation service provider was found to be engaging in the unauthorized practice of law when it sought out defendants in recently filed collection cases and offered to mediate those claims.<sup>171</sup> The organization had previously been sanctioned for engaging in the unauthorized practice of law for attempting to settle claims between their clients and their clients'

162. This argument claimed the victims were not harmed because they would have paid an attorney the same amount they paid him. *State v. Karpin*, 2011 WL 553153, at 4 (Az. Ct. App) [hereinafter *Karpin II*]; *Karpin Tr.*, Oct. 6, pt. 2 *supra* note 17, at 33, 56 (Karpin closing argument).

163. *Karpin I*, *supra* note 30, at 5; *Karpin Tr.*, Oct. 6, pt. 2, *supra* note 17, at 10, 31, 39, 55, 70, 72, 77, 87–88 (Karpin Closing Argument).

164. *Karpin II*, *supra* note 162, at 3. One count of theft was dismissed prior to trial. *Id.*

165. *Karpin II*, *supra* note 162, at 2–3; *State v. Karpin*, 2013 WL 6040376 (Az. Ct. App) [hereinafter *Karpin III*].

166. *Karpin I*, *supra* note 30; *Karpin II*, *supra* note 162; *Karpin III*, *supra* note 165.

167. *Inmate DataSearch*, ARIZONA DEPARTMENT OF CORRECTIONS, [http://www.azcorrections.gov/inmate\\_datasearch/results\\_Minh.aspx?InmateNumber=236555&LastName=KARPIN&FNMI=G&SearchType=SearchInet](http://www.azcorrections.gov/inmate_datasearch/results_Minh.aspx?InmateNumber=236555&LastName=KARPIN&FNMI=G&SearchType=SearchInet) (last visited on May 27, 2014).

168. There are few documented mediation horror stories because mediators are difficult targets for malpractice claims. *See supra* notes 73-91 and accompanying text.

169. *Everett v. Morgan*, 2009 WL 113262 \*2–3 (Tenn. Ct. App. 2009).

170. *Id.* at 2.

171. *Cincinnati Bar Ass'n. v. Jansen*, 5 N.E.3d 627, 631–32 (Ohio 2009).

creditors through the client's power of attorney.<sup>172</sup> Rather than ending its practices, it simply changed the title of its contract for services from "Limited Power of Attorney Appointment" to "Mediation Agreement."<sup>173</sup> There are also many cases where mediators get away with cringe-worthy conduct with little to no sanction.<sup>174</sup> Along with Karpin's abuses, these cases show just how easy it is to exploit the mediation process.

#### IV. OCCUPATIONAL REGULATION

Over the last 50 years, occupational regulation has grown to such an extent that nearly 40% of the U.S. labor market is subject to some form of occupational regulation.<sup>175</sup> Experts estimate that more than 800 occupations are licensed in at least one state, and approximately 50 occupations are licensed in every state.<sup>176</sup> Since occupational licensing is commonplace across a variety of professions and skilled trades, it is accepted as routine.<sup>177</sup> Yet, the vast majority of mediators—professionals who can have a dramatic impact on their client's legal, emotional, and financial well being—are unregulated.<sup>178</sup> The remainder of this section describes the policies behind occupational regulation and the various attempts to regulate mediators.

##### A. Policy Rationale and Operation

The policies supporting occupational regulation are justified by two widely accepted economic theories. The first is public interest theory, which posits that consumer protection flows from providing

172. *Id.* at 628.

173. *Id.* at 628–29.

174. *See, e.g.,* Allen v. Leal, 27 F.Supp. 2d 945 (S.D. Tex. 1998) (concerning mediator coercion causing the plaintiffs to agree to a settlement out of fear); Chodish v. Trotter and JAMS No. 30–2014–00722371 (Ca. Sup. Ct. May 5, 2014) (claiming a mediator was biased and used coercion and threats of ex-parte communication with the presiding judge to push a settlement forward). *See also* Ralph O. Williams III, *When the Mediator is the Problem: Top 10 Mediation Disasters*, *ADVOCATE* (Oct. 2009) available at <http://www.ralphwilliamsmediation.com/docs/CAALA%20Article%20Mediation%20Disasters.pdf>; Young *supra* note 34, at 722, 742; *See also* Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 *HARV. NEGOT. L. REV.* 1, 11–12 (2001) (discussing Allen v. Leal).

175. KLEINER, *STAGES OF REGULATION*, *supra* note 39, at 1, 3.

176. MORRIS M. KLEINER, *LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION* 1–2, 5 (2006) [hereinafter KLEINER, *LICENSING OCCUPATIONS*].

177. Jason Potts, *Open Occupations— Why Work Should Be Free*, 29 *ECON. AFF.* 71, 71 (2009); Law & Kim, *supra* note 2 at 725, 727.

178. *See supra* notes 35–38 and accompanying text.



consumers access to information about the services they are consuming.<sup>179</sup> Consumers of specialized services often lack information about whether a particular provider meets minimum standards of quality.<sup>180</sup> Because the invisible hand of the market can take too long to weed out poor service providers, occupational regulation fills the information gap by setting minimum standards of practice.<sup>181</sup> Furthermore, occupational regulation increases the quality of service by preventing less competent providers either from entering into or remaining in the field.<sup>182</sup> Thus, state regulation protects the public from rogue operators, incompetents, quacks, and charlatans,<sup>183</sup> and for this reason regulation has historically enjoyed broad public support.<sup>184</sup>

The second economic principle supporting regulation is capture theory, which argues that licensing is designed to benefit the service providers as a means of limiting competition.<sup>185</sup> Regulation keeps the number of service providers lower than it otherwise would be, thereby allowing service providers to charge a higher price for the regulated service.<sup>186</sup> Capture theory also suggests that service providers are motivated by protecting the profession's reputation, known as "title protection," and that licensing in and of itself can increase the overall public demand for the service in question.<sup>187</sup>

There are three basic forms of occupational regulation: registration, certification, and licensing.<sup>188</sup> Registration is the least restrictive. It requires individuals to give a governmental entity their names, contact information, and qualifications along with posting a

179. Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 REV. ECON. STUD. 843, 843 (1986).

180. Morris M. Kleiner, *A License for Protection*, 29 REGULATION 18 (2006) [hereinafter Kleiner, *License for Protection*].

181. Law & Kim, *supra* note 2, at 754.

182. Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189, 192 (2000) [hereinafter Kleiner, *Occupational Licensing*].

183. Kleiner, *License for Protection*, *supra* note 180, at 20; Potts, *supra* note 177, at 72.

184. KLEINER, LICENSING OCCUPATIONS, *supra* note 176, at 152.

185. Mario Pagliero, *What is the Objective of Professional Licensing? Evidence from the US Market for Lawyers*, 29 INT'L J. INDUS. ORG. 473, 473 (2010); KLEINER, LICENSING OCCUPATIONS, *supra* note 176, at 45–46, 48.

186. Kleiner, *Occupational Licensing*, *supra* note 182, at 192; Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328, 1338 (1979). Cf. Shapiro, *supra* note 179, at 844 (concluding that occupational licensing "raises the price for lower-quality services, but reduces the price of higher-quality services.").

187. Kleiner, *Occupational Licensing*, *supra* note 182, at 192.

188. Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 676–77 (2010).

bond or fee before practicing their occupation.<sup>189</sup> Slightly more restrictive is a certification regime which allows any person to perform the relevant service, but only those who have met the certifying agency's knowledge and skill requirements are certified, presumably giving them a reputational advantage in the marketplace.<sup>190</sup> Individuals without certification may perform the duties of the occupation, but may not claim to be certified.<sup>191</sup> The most restrictive form of regulation is licensure, which is also known as the right-to-practice.<sup>192</sup> Licensure laws typically make it unlawful to practice an occupation without first meeting the government's standards and obtaining a license.<sup>193</sup> Presently, only a few states offer certification schemes for mediators, but in the majority of jurisdictions, none of these forms of regulation are used for mediators.

## B. *Attempts to Regulate Mediators*

The idea of regulating mediators is not new; the arguments for and against regulation have played out time and again. Legislative proposals and regulatory efforts through statewide professional organizations have crumbled, and national organizations have shied away from creating credentialing systems as well. Court-connected mediation is the only place where any modicum of regulation exists.

### 1. *Legislative*

Legislation impacting the mediation processes is proposed and adopted regularly,<sup>194</sup> but legislation to regulate mediators is rarely promulgated. California has the most extensive history of attempts to regulate mediators but has never successfully done so.<sup>195</sup> In 1995, State Senator Newton R. Russell introduced a bill to create a three-part mediator credentialing system administered by a new state agency.<sup>196</sup> After the California mediation community voiced its opposition to the bill, Senator Russell agreed to allow a year's worth of

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189. Kleiner and Krueger, *supra* note 188, at 676–77.

190. *Id.* at 677.

191. KLEINER, LICENSING OCCUPATIONS, *supra* note 176, at 18.

192. *Id.*

193. *Id.*

194. COLE, ET AL., *supra* note 31 at Appx. A, *Significant Mediation Legislation by Topic and Jurisdiction*.

195. Another example occurred in 2008 when Massachusetts legislation created to regulate mediators was vetoed. David A. Hoffman, *The Future of ADR: Professionalization, Spirituality, and the Internet*, 14 DISP. RES. MAG. 6, 6 (2008).

196. S. B. 873, 1995–96 Leg. Sess. (Cal.).

consideration before resuming the bill's progress through the legislature.<sup>197</sup> Three subsequent hearings prompted him to introduce a revised bill based on a voluntary certification program<sup>198</sup> with universities and mediation organizations conducting the certification process.<sup>199</sup> Although this second bill enjoyed the widespread support of the California mediation community, it never made it out of the Senate Business and Professions Committee.<sup>200</sup>

More recently, in 2012, the Bay Area Lawyers for Individual Freedom proposed legislation to the California Conference of Bar Associations (CCBA), a group of attorneys from specialized bar sections who attempt to improve California's laws. This legislation would have established minimum qualifications for mediators including: completing 40 hours of mediation training, conducting 20 separate mediations "as a solo mediator," and holding a law degree or specialized graduate degree in a field directly related to the subject matter of the controversy being mediated, such as medicine, psychology, or engineering.<sup>201</sup> This proposal named the State Bar of California as the certifying and regulating body, and named the State Bar Court as the disciplinary tribunal.<sup>202</sup>

The CCBA rejected the proposal outright.<sup>203</sup> Two bases for its disapproval deserve mention as they highlight the difficulties surrounding the regulation of mediators. First, the California State Bar

197. Robert C. Barrett, *Mediator Certification: Should California Enact Legislation?*, 30 U.S.F. L. REV. 617, 618 (1996). See also Newton R. Russell, *Mediation: the Need and a Plan for Voluntary Certification*, 30 U.S.F. L. REV. 613, 616 (1996) (discussing the work of the Senate Select Committee on Mediation's hearings across California).

198. S. B. 1428, 1995–96 Leg. Sess. (Cal.). See Teresa V. Carey, *Credentialing for Mediators – To Be or Not To Be?* 30 U.S.F. L. REV. 635, 639 n. 13 (1996) (giving the date of hearings in San Francisco, Los Angeles, and San Diego).

199. Cal. S. B. 1428, § 464.1(a)(1).

200. Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757, 759 (1996).

201. CONFERENCE OF THE CALIFORNIA BAR ASSOCIATIONS, RES. 05–01–2012 at 6 (2012) (quoting proposed California Business and Professions Code § 6243) (hereinafter CCBA) available at <http://calconference.org/html/wp-content/Resolutions/2012/05/Final%20Resolution%20Series%205-2012.pdf>; SCMA AD HOC COMMITTEE ON VOLUNTARY MEDIATOR CERTIFICATION REPORT AND FAQ (2014), available at <http://www.scmmediation.org/wp-content/uploads/2014/09/FAQ-Jack-and-Barbara-edits-final.pdf> [hereinafter SCMA FAQ].

202. CCBA, *supra* note 201, at 6 (quoting proposed California Business and Performance Code §§ 6243 and 6244).

203. *Id.* at 1. In its comment to the CCBA about the proposal, the Orange County Bar Association noted that the proposed 20 solo mediation component could not be performed without certification, thereby "making the completion of this . . . task impossible." *Id.* at 9.

Association's Committee on Alternative Dispute Resolution argued that requiring the State Bar to regulate non-attorneys was outside its mission and, arguably, beyond its regulatory jurisdiction.<sup>204</sup> Second, the Orange County Bar Association argued that the California Supreme Court's strict interpretation of the state's mediation confidentiality statute likely means that any mediation communications forming the basis of a mediator malpractice claim would be inadmissible in court.<sup>205</sup> The proposal before the CCBA would not have amended this statute.<sup>206</sup> Thus, the proposed regulatory system would have required the State Bar to adjudicate the fitness of mediators without any real possibility of uncovering a mediator's conduct during the mediation sessions in question – a wholly untenable responsibility.

## 2. National Professional Organizations

Mediation's two national professional organizations, the American Bar Association's Dispute Resolution Section<sup>207</sup> (ABA DR Section) and the Association for Conflict Resolution<sup>208</sup> (ACR) have worked for decades to protect the integrity of the field by providing expertise, advice, and guidance to legislative, judicial, and administrative bodies in drafting mediation related policies and best practices. And while these organizations favor mediator certification over licensure, they have refused to certify mediators.

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204. *Id.* at 8, 10–11.

205. CCBA, *supra* note 201, at 9. *See, e.g.*, Cassel v. Superior Court, 244 P.3d 1080 (Cal. 2011) (holding that no exception to California's mediation confidentiality statutes existed to allow a client to bring a malpractice claim against a lawyer based on the lawyer's advice in mediation to settle the case). This conclusion is currently on appeal in Chodish v. Trotter and JAMS, *supra* note 174.

206. *See* CCBA *supra* note 201, at 2–7 (failing to propose any revisions to California's mediation confidentiality statute, Cal. Evid. State § 1119).

207. *See Section of Dispute Resolution*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/dispute\\_resolution.html](http://www.americanbar.org/groups/dispute_resolution.html) (last visited Feb. 20, 2015) (American Bar Association Dispute Resolution Section home page).

208. *See* THE ASSOCIATION FOR CONFLICT RESOLUTION (ACR), <http://www.acrnet.org/> (last visited Feb. 20, 2015) (Association for Conflict Resolution home page). The Association for Conflict Resolution was formed in 2001 through the merger of three other mediation organizations—the Society for Professionals in Dispute Resolution, the Academy of Family Mediators, and the Conflict Resolution Education Network. *The History of ACR*, ASSOCIATION FOR CONFLICT RESOLUTION, [http://www.imis100us2.com/ACR/ACR/About\\_ACR/About\\_US.aspx?WebsiteKey=a9a587d8-a6a4-4819-9752ef5d3656db55&hkey=c52a2d0dd1c34279a03ab4b98db0ffe4&New\\_ContentCollectionOrganizerCommon=3#New\\_ContentCollectionOrganizerCommon](http://www.imis100us2.com/ACR/ACR/About_ACR/About_US.aspx?WebsiteKey=a9a587d8-a6a4-4819-9752ef5d3656db55&hkey=c52a2d0dd1c34279a03ab4b98db0ffe4&New_ContentCollectionOrganizerCommon=3#New_ContentCollectionOrganizerCommon) (last visited Feb. 20, 2015).

In 1989, the Commission on Qualifications of one of ACR's predecessor organizations, the Society of Professionals in Dispute Resolution (SPIDR), adopted three central regulatory principles for mediators:

No single entity . . . should establish qualifications for [mediators];

The greater degree of choice the parties have over the dispute resolution process, program, or neutral, the less mandatory the qualification requirements should be; and

Qualification criteria should be based on performance rather than paper credentials.<sup>209</sup>

In 1995, the Commission on Qualifications confirmed the conclusions of its 1989 report and recognized that formal certification would assure practitioner competence.<sup>210</sup> It concluded that certification is only appropriate when: (1) certification standards are specific enough to serve as a basis to decertify a practitioner, (2) there is a mechanism in place for certification, (3) certification is tied to competence, and (4) the certification process is regularly reviewed and amended as needed.<sup>211</sup>

In 2002, the ABA DR Section's Task Force on Credentialing made recommendations outlining the essential components of a credentialing program and the methods for assessing mediator competency.<sup>212</sup> However, the Task Force only proposed undertaking a flexible, low-cost accreditation system for mediator training programs rather than individual mediators.<sup>213</sup> In 2004 the ACR Mediator Certification Task Force recommended establishing a voluntary two-step certification program for mediators through a separate administrative entity,<sup>214</sup> but for reasons that are unclear, ACR ended up abandoning the plan entirely.<sup>215</sup>

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209. SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION COMMISSION ON QUALIFICATIONS, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES, 11 (1989) [hereinafter SPIDR, QUALIFYING NEUTRALS].

210. SPIDR, ENSURING COMPETENCE, *infra* note 265, at 23.

211. *Id.*

212. ABA, MEDIATOR CREDENTIALING, *supra* note 33, at 4.

213. *Id.* Apparently, this happened for practical reasons: the recommendations had a greater likelihood of adoption and were compatible with existing programs and policies in courts and agencies at both the state and federal level. *Id.*

214. ASSOCIATION FOR CONFLICT RESOLUTION, ACR MEDIATOR CERTIFICATION TASK FORCE: REPORT AND RECOMMENDATIONS 1 (2004).

215. *Id.*; ASSOCIATION FOR CONFLICT RESOLUTION, MODEL STANDARDS FOR MEDIATION CERTIFICATION PROGRAMS 1 (2011); SOUTHERN CALIFORNIA MEDIATORS ASSOCIATION AD HOC COMMITTEE ON MEDIATOR REGULATION OR CERTIFICATION REPORT 2 (2013), available at <http://www.scmmediation.org/wp-content/uploads/2013/10/AHC-White-Paper1.pdf>.

In 2005, ACR and the ABA DR Section developed a survey for practicing mediators about a national certification program.<sup>216</sup> The survey was sent to members of both organizations, and a majority of respondents indicated that certification would be professionally valuable, provide value to mediation users, and would heighten the field's prestige and professionalism.<sup>217</sup> However, less than 40% of respondents thought a national certification program was necessary.<sup>218</sup> Based on these survey results, the ABA DR Section determined that a national credentialing program was not feasible.<sup>219</sup>

A 2008 ACR membership survey indicated broad support to establish a certification process.<sup>220</sup> Instead, ACR promulgated Model Standards for Mediator Certification Programs in 2011.<sup>221</sup> Along these lines, ACR's ongoing strategic plan includes developing a certification program for family mediators that would include a performance-based assessment.<sup>222</sup> In 2012, the ABA DR Section's Task Force on Mediator Credentialing adopted a policy supporting credentialing efforts and established minimum standards for any credentialing process, but limited its support to an optional system.<sup>223</sup> Since then, the ABA DR Section has not had a group study the question of occupational regulation.

### 3. *Statewide Professional Organizations*

Using frameworks developed by the ABA DR Section and ACR, numerous state-level working groups attempted to create and adopt statewide mediator certification standards. For example, in the mid-1990s, several Colorado organizations proposed a new oversight

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216. ASSOCIATION OF CONFLICT RESOLUTION AND AMERICAN BAR ASSOCIATION DISPUTE RESOLUTION SECTION, *MEDIATOR CERTIFICATION FEASIBILITY STUDY 3* (2005) (reporting that only 40% of mediators surveyed agreed with the statement that mediation covers a unique body of knowledge) [hereinafter ACR/ABA CERTIFICATION FEASIBILITY STUDY].

217. *Id.* at 2–4.

218. *Id.*

219. AMERICAN BAR ASS'N DISPUTE RESOLUTION SECTION, *TASK FORCE ON IMPROVING MEDIATOR QUALITY, FINAL REPORT 2* (2008).

220. *ACR Adopts Model Standards for Mediation Certification Programs*, INTERNATIONAL MEDIATION INSTITUTE (Oct. 12, 2011), <https://imimediation.org/index.php?cID=70&cType=news>.

221. ASSOCIATION FOR CONFLICT RESOLUTION, *MODEL STANDARDS FOR MEDIATOR CERTIFICATION PROGRAMS* (2011), available at <http://www.acrmichigan.com/docs/ACR%20Model%20Standards%20For%20Certification.pdf>. [hereinafter ACR, *Mediation Certification*].

222. *Id.* at 1. 3–4.

223. AMERICAN BAR ASS'N DISPUTE RESOLUTION SECTION, *TASK FORCE ON MEDIATOR CREDENTIALING FINAL REPORT 4–5* (2012).

group to administer a certification program,<sup>224</sup> but the proposal died after the state bar refused to endorse it.<sup>225</sup> The Oregon Mediator Competency Work Group met in the late-1990s, but failed to propose anything, in part over disagreements about the definition of mediation and what constitutes best practices.<sup>226</sup> In the early 1990s the Arizona Dispute Resolution Association's (ADRA) Credentialing Committee drafted rules for the certification of mediators, mediation trainers, and mediator evaluators; standards of conduct for mediators; a grievance procedure; and core curricula for basic and advanced civil mediation training.<sup>227</sup> Despite these advanced efforts, the program never launched because ADRA's board grew less confident in the validity of its credentialing scheme and never found funding for a full time administrator to lead the program.<sup>228</sup> More recently, in response to California's latest attempt to regulate mediators, the Southern California Mediation Association's Ad Hoc Committee on Regulation or Certification recommended a voluntary certification system; its system is still in the design stages.<sup>229</sup>

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224. ABA, *MEDIATOR CREDENTIALING*, *supra* note 33, at 29; Sally Ortner & Merrill Shields, *A Report on the Development of Qualifications and Standards of Conduct for ADR Professionals*, 26 *COLO. LAW.* 49 (Oct. 1997).

225. ABA, *MEDIATOR CREDENTIALING*, *supra* note 33, at 29, 41 (hypothesizing that representatives from some of the entities did not keep their constituents well briefed about the options explored and the tentative agreements).

226. Alice Phalan & Lisa Burk, *FINAL REPORT OF THE OREGON MEDIATOR COMPETENCY WORK GROUP 6*, 12 (Jacqueline Able & Terry Amsler eds., 1998), *available at* <http://www.omediate.org/docs/1998mediatorcompetency.pdf>; ABA, *MEDIATOR CREDENTIALING*, *supra* note 33, at 41. Rather than make any specific recommendations the working group issued a report listing pros and cons of five separate options for ensuring mediator quality. Those five options were: certificate of training completion, certificate of competence, licensure, public education, and doing nothing. *Id.* at 8–12.

227. Letter from Nancy Glasscock & Kim McCandless to Joan Tobin, President of the ADRA (Mar. 11, 1996) (on file with author); Memorandum from Bob Dauber to ADRA Credentials Committee Members and Others Interested in Mediator Certification (October 4, 1995) (on file with author).

228. E-mail from Bob Dauber to Art Hinshaw (November 4, 2014) (on file with author). ADRA's hope was that the credentialing system would be accepted by the state court system and that the court's administrative office eventually would take over the funding responsibility, but several judges were vocal opponents of the credentialing system. *Id.* Also, ADRA's board began to question the validity of its credentialing system after a couple of its members failed in their attempts to "pass" the proposed performance evaluation. *Id.*

229. *Voluntary Mediator Certification Initiative*, SOUTHERN CALIFORNIA MEDIATION ASSOCIATION, <http://www.scmmediation.org/for-the-public/mediator-certification-program/> (last visited Feb. 20, 2015).

#### 4. Courts

Some jurisdictions regulate those who conduct court-ordered mediations.<sup>230</sup> Known as either court-connected or court-annexed mediation programs, these mediation programs maintain rosters of approved mediators for judicial referral.<sup>231</sup> Every state in the country has some form of a court-connected mediation program and each state runs its program differently. A few states such as Florida,<sup>232</sup> Georgia,<sup>233</sup> Maine,<sup>234</sup> Maryland,<sup>235</sup> Minnesota,<sup>236</sup> North Carolina,<sup>237</sup> and Virginia<sup>238</sup> have well-developed and comprehensive state-wide mediation programs; other states' programs are run out of a trial courts' administrative offices or an individual judge's chambers.

The more comprehensive court-connected mediation programs were developed for a wide range of reasons,<sup>239</sup> but all recognize that a successful program requires a pool of practitioners who will protect

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230. Typically court-connected mediation exists alongside a thriving private mediation sector. See, e.g., Press, *Crossroads*, *supra* note 37, at 55 (discussing Florida);

231. See Roselle L. Wissler & Robert W. Rack, Jr., *Mediator Performance: The Usefulness of Participant Questionnaires*, 2004 J. OF DISP. RESOL. 229, 229 (2004).

232. The entity that regulates court-connected mediators in Florida is the Florida Dispute Resolution Center. *Alternative Dispute Resolution*, FLORIDA COURTS, [http://www.flcourts.org/gen\\_public/adr/brochure.shtml](http://www.flcourts.org/gen_public/adr/brochure.shtml) (last visited Feb. 20, 2015).

233. The entity that regulates court-connected mediators in Georgia is the Georgia Dispute Resolution Commission. *Georgia Commission on Dispute Resolution*, GEORGIA COMMISSION ON DISPUTE RESOLUTION, <http://www.godr.org/> (last visited Feb. 20, 2015).

234. The entity that regulates court-connected mediators in Maine is the Office of Court ADR. *Alternative Dispute Resolution (Mediation Services)*, MAINE.GOV, [http://www.courts.state.me.us/maine\\_courts/adr/index.shtml](http://www.courts.state.me.us/maine_courts/adr/index.shtml) (last visited Feb. 20, 2015).

235. The entity that regulates court-connected mediators in Maryland is the Mediation and Conflict Resolution Office. *Mediation and Conflict Resolution Office*, MARYLAND COURTS, <http://www.courts.state.md.us/macro/index.html> (last visited Feb. 20, 2015).

236. The entity that regulates court-connected mediators in Minnesota is the ADR Ethics Board. *ADR Ethics Board*, MINNESOTA JUDICIAL BRANCH, <http://www.mn.courts.gov/?page=1121> (last visited Feb. 20, 2015).

237. The entity that regulates court-connected mediators in North Carolina is the Dispute Resolution Commission. *North Carolina Dispute Resolution Commission*, THE NORTH CAROLINA COURT SYSTEM, <http://www.nccourts.org/courts/crs/councils/drc/> (last visited Feb. 20, 2015).

238. The entity that regulates court-connected mediators in Virginia is the Division of Dispute Resolution Services, *Dispute Resolution Services*, VIRGINIA'S JUDICIAL SYSTEM, <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/home.html> (last visited Feb. 20, 2015).

239. See, e.g., Sharon Press, *Crossroads*, *supra* note 37, at 45–53 (describing the historical development of court-connected mediation in Florida); ROBERT M. BELL, JOIN THE RESOLUTION: THE MARYLAND ADR COMMISSION'S PRACTICAL ACTION PLAN 4–5 (1999) (describing the need for action to create a comprehensive ADR program), available at <http://www.courts.state.md.us/macro/pdfs/jointheresolution.pdf>.



the legitimacy of the program and the integrity of the courts.<sup>240</sup> When mediation becomes an integral part of a court's civil litigation system, the court assumes responsibility for protecting the public from bad mediators.<sup>241</sup>

To meet their consumer protection objectives, these court-connected mediation programs require the following from their mediators:

- A combination of minimal mediation training and experience;<sup>242</sup>
- Continuing education requirements;<sup>243</sup>
- Ongoing regular work as a mediator;<sup>244</sup>
- A formal ethics code;<sup>245</sup> and
- A complaint and disciplinary procedure to penalize mediators engaging in misconduct, including the possibility of removal from the approved mediator list.<sup>246</sup>

240. Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?* 24 FLA. ST. U. L. REV. 903, 909–10, 915 (1997) [hereinafter Press, *Institutionalization*]; Young, *supra* note 34, at 731.

241. Press, *Institutionalization*, *supra* note 240, at 909–10, 915; Young, *supra* note 34, at 731.

242. See, e.g., FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.100 *et. seq.*; MD. R. PROC. § 17–205(a)(2, 4); VA. SUP. CT., GUIDELINES FOR THE TRAINING AND CERTIFICATION OF COURT REFERRED MEDIATORS § C(2–3), available at <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/training/tom.pdf> (last visited May 25, 2016); GA. COMM'N OF DISPUTE RESOLUTION, REQUIREMENTS FOR THE TRAINING OF NEUTRALS, § I(a), available at [http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20B%205-28-2014.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20B%205-28-2014.pdf) (last visited May 25, 2016). Note that these requirements may vary due to the kind of mediation (family, general civil, environmental, etc.) the mediator plans to conduct.

243. See, e.g., MD. R. PROC. § 17–205(a)(5), 17–304(a)(11); VA. SUP. CT., GUIDELINES, *supra* note 250, at § D(3); GA. COMM'N, REQUIREMENTS, *supra* note 250, at § 2 (Continuing Education of Neutral).

244. See, e.g., MD. R. PROC. § 17–205(a)(4), (b)(2), (c)(3), (d)(4); VA. SUP. CT., GUIDELINES, *supra* note 250, at § D(4). See also Press, *Institutionalization*, *supra* note 240, at 915 (stating, “Once a court embarks on the road of certification [of mediators], doesn't the court then retain some responsibility to ensure continuing competence?”)

245. See, e.g., FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.200 *et. seq.*; VA. SUP. CT., STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS (2011), available at <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf> (last visited May 25, 2016); N.C. SUP. CT., REVISED STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS (2014), available at <http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/StandardsConduct.pdf> (last visited May 25, 2016); GA. COMM'N OF DISPUTE RESOLUTION, ETHICAL STANDARDS FOR NEUTRALS, available at [http://godr.org/sites/default/files/Godr/mediator\\_ethics\\_information/APPENDIX%20C%20%20CHAP%201%20%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/mediator_ethics_information/APPENDIX%20C%20%20CHAP%201%20%206-18-2013.pdf) (last visited May 25, 2016).

246. See e.g., FLA. RULE 10.700 *et. seq.*; MD. R. PROC. 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> (last visited May 25, 2016); N.C. COURT SYSTEM, COMPLAINTS AGAINST MEDIATORS, COMPLAINT PROCESS

In addition, some of these programs also mandate training by specific mediation trainers, training programs, or continuing education programs.<sup>247</sup> Other programs provide their mediators with ethics advisory opinions.<sup>248</sup>

Even though limited regulation through the courts has been successful, initial reactions to the concept were negative, ranging from open hostility to begrudging acceptance.<sup>249</sup> Over time, however, this discomfort has been replaced with increased acceptance.<sup>250</sup> Courts' ability to overcome the initial antagonism to regulation may stem from the development of effective administrators, the perception that court referrals may be a good source of business, the belief that having a court-related credential is good for marketing, or, perhaps, the reluctant acknowledgment that courts have the inherent authority to control all aspects of the litigation process.<sup>251</sup> Despite the apparent success of court-connected mediation in states with comprehensive

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*available at* <http://www.nccourts.org/Courts/CRS/Councils/DRC/Complaints/Default.asp> (last visited May 25, 2016); GA. COMM'N OF DISPUTE RESOLUTION, ETHICS PROCEDURES § II *available at* [http://godr.org/sites/default/files/Godr/mediator\\_ethics\\_information/APPENDIX%20C%2C%20CHAP%202%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/mediator_ethics_information/APPENDIX%20C%2C%20CHAP%202%2C%206-18-2013.pdf) (last visited May 25, 2016).

247. See MD. R. PROC. 17–104; VA. SUP. CT., GUIDELINS FOR THE CERTIFICATION OF MEDIATION TRAINING PROGRAMS (2011) *available at* <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/training/tom.pdf> (last visited May 25, 2016); GA. COMM'N OF DISPUTE RESOLUTION, REQUIREMENTS FOR QUALIFICATION AND TRAINING §§ III, IV, & V *available at* [http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20B%205-28-2014.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20B%205-28-2014.pdf) (last visited May 25, 2016). See also, Press, *Institutionalization*, *supra* note 240, at 914.

248. See *e.g.*, FLA. RULES OF PROFESSIONAL CONDUCT FOR CERTIFIED AND COURT APPOINTED MEDIATORS R. 10.700–.880; N.C. Commission on Dispute Resolution, Summary of N.C Advisory Opinions *available at* <http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Opinions.asp> (last visited May 25, 2016); GA. COMM'N OF DISPUTE RESOLUTION, Mediator Ethics Information *available at* <http://godr.org/content/mediator-ethics-information> (last visited May 25, 2016).

249. See, *e.g.*, George Nicolau, *Ill-Considered Criteria Endanger Mediation, SPIDR President Warns*, 2 ALTERNATIVE DISP. RESOL. REP. 244, 245 (1988); Press, *Institutionalization*, *supra* note 240, at 909 (discussing “outrage” from the national mediation community when Florida adopted mediator qualification requirements to become a court-approved mediator).

250. See, *e.g.*, Press, *Institutionalization*, *supra* note 240, at 907–08; Press, *Cross-roads*, *supra* note 37, at 60.

251. See Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex. L. Rev. 1805, 1808 (1995). Meador defines a court's inherent authority as “the authority of a trial court False to control and direct the conduct of civil litigation without the express written authorization in a constitution, statute, or written rule of court.” *Id.* at 1805. See also Maureen Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 64–68 (2003).

state-wide mediation programs, there appears to be no impetus to adopt similar systems in other states.

## V. WHY MEDIATORS SHOULD BE REGULATED

Public interest theory offers the strongest argument for the regulation of mediators. Mediation is still a relatively new professional service and many consumers – both individuals and lawyers – do not have enough information about providers to evaluate a mediator’s qualifications and practice.<sup>252</sup> Furthermore, consumer protection is a necessity when there is virtually no recourse against unskilled and unsavory mediators.<sup>253</sup> Capture theory maintains that mediators’ self-interests favor regulation,<sup>254</sup> and several regulatory attempts have been headed by mediators and mediation organizations.<sup>255</sup> Nevertheless, it has been the mediators themselves who have kept regulation at bay. Although mediators have some concern for protecting the field’s reputation, historically they have not viewed regulation as an economic boon; instead, they are wary of regulation and favor a more *laissez-faire* approach.<sup>256</sup> Certainly, some mediators in this group see the mediation market itself as the most efficient regulator, but market efficiency arguments have not been the focus of the anti-regulation crowd.<sup>257</sup>

Nadja Alexander has studied the phenomenon where mediators themselves keep the field’s regulatory impulses in check and named it the diversity-consistency tension.<sup>258</sup> At its essence, the diversity-consistency tension pits concerns for the mediation process against concerns for mediation consumers. On the diversity side of this tension is a deep-seated desire that the field has to embrace, welcome, and support flexibility and innovation by accepting more styles and methods in the fold.<sup>259</sup> When the balance tilts too far towards the

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252. NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES 76 (2009).

253. See *supra* notes 73-91 and accompanying text (describing the difficulties in suing mediators).

254. See *supra* notes 183 to 185 and accompanying text.

255. See *supra* notes 233 to 238 and accompanying text.

256. See *supra* notes 200 to 215 and 233 to 238 and accompanying text (describing failed attempts to regulate mediators).

257. See *supra* notes 200 to 215 and 233 to 238 and accompanying text (describing failed attempts to regulate mediators).

258. ALEXANDER, *supra* note 252, at 75. See also Robert Dingwall, *After the Fall . . . : Capitulating to the Routine in Professional Work*, 108 Penn. St. L. Rev. 67, 75 & 82–83 (2003) (describing what public entities will want in return for recognition coupled with a lack of space for creativity).

259. ALEXANDER, *supra* note 252, at 75.

diversity side, consumers have difficulty informing themselves about the process and judging mediator quality and performance.<sup>260</sup> As a result, mediation's integrity becomes endangered.<sup>261</sup> On the consistency side of the tension is the pressure to establish and enforce uniform and reliable measures of quality in mediation practice.<sup>262</sup> When the balance tilts too far towards consistency, opportunities for innovative development is stifled, possibly resulting in the exclusion of some practices currently falling under the mediation umbrella.<sup>263</sup> To this point, the diversity side of this tension has kept the field from developing effective methods to protect consumers from incompetent and unscrupulous practitioners.<sup>264</sup>

The next two sections put the diversity-consistency tension, public interest theory, and capture theory in context by laying out the policy arguments for and against the occupational regulation of mediators. After presenting the chief arguments in favor of regulation, the primary arguments against regulation are described and refuted.

#### A. *Arguments For Regulation*

Four policy justifications comprise the chief arguments support regulating mediators: (1) protecting the public from problematic mediators, (2) providing information to the public about mediators, (3) improving mediator ability, and (4) enhancing the credibility of the profession.<sup>265</sup>

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260. *Id.* at 76.

261. *Id.*

262. *Id.*

263. *Id.* at 75–76.

264. Consumers do have traditional civil actions available to them that are not mediator specific, but they are difficult to establish or are barred by state-sponsored civil immunity. *See supra* notes 70 to 102 (discussing how winning a claim against a mediator is quite difficult); Michael L. Moffitt, *The Four Ways to Assure Mediator Quality (and Why None of Them Work)*, 24 OHIO ST. J. ON DISP. RESOL. 191, 193–99 (2009) [hereinafter Moffitt, *The Four Ways*].

265. COLE ET AL., *supra* note 31, at 578; SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION COMMISSION ON QUALIFICATIONS, ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE 17 (1995) [hereinafter SPIDR, ENSURING COMPETENCE]. *See also* Diane Levin, *Public Licensing and Regulation of Mediators: the Arguments For and Against*, THE MEDIATION CHANNEL (Oct. 18, 2009), <http://mediationchannel.com/2009/10/18/public-licensing-and-regulation-of-mediators-the-arguments-for-and-against/>.

### 1. *Public Protection*

Regulation is necessary to protect the public from bad actors, incompetent practitioners, and unqualified providers. This can be done in two primary ways. The first is to establish a barrier to entry into the field to keep any person off the street from claiming to be a mediator. Presently, the field has no entry standards whatsoever – no required demonstrations of mediation knowledge, competence, or skill. While not foolproof, demonstrations of competency can keep unqualified aspiring mediators out of the field and reassure the public that mediator practitioners have at least minimal levels of ability and knowledge. The second is to provide a means of professional discipline associated with a regulatory regime, up to and including removal from the field. In a field where civil claims against mediators are all but unavailable,<sup>266</sup> it is critical to have some form of recourse against incompetent and underhanded mediators.

### 2. *Public Information*

Even though many legal disputes are subject to mediation under contractual, statutory, or judicial auspices, many mediation users lack a basic understanding of what mediation is and have an even more tenuous understanding of the potential differences among mediators.<sup>267</sup> To make educated choices, consumers need trustworthy information about mediation and mediator quality.<sup>268</sup> At present, conducting online research or asking for referrals can be helpful, but finding comprehensive and reliable information about individual mediators can be difficult, if not impossible.<sup>269</sup> In most states, consumers have no place to learn about which mediators to seek or to avoid.<sup>270</sup> Moreover, these information problems are not limited to the

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266. See *supra* notes 72 to 103 and accompanying text (describing the difficulty in seeking recourse against mediators).

267. Weckstein, *supra* note 200, at 763. See DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL*, 261 (2011) (instructing attorneys to prepare clients for mediation by discussing mediation basics such as the difference between mediation and typical negotiation and the mediator's style).

268. See Jean R. Sternlight, "Live Free" or Regulate? Consider A, B and Their Dispute Resolution Clause Regarding Blackacre, 19 *DISP. RESOL. MAG.* 4, 5 (Spring 2013); Weckstein, *supra* note 267, at 764. See also *supra* notes 185 to 190 and accompanying text.

269. Sternlight, *supra* note 268, at 5.

270. Some court-connected mediation programs have websites that do precisely these things. See, e.g., *Alternative Dispute Resolution*, FLORIDA COURTS, <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/> (last visited Feb. 19, 2015) (Florida Dispute Resolution Center website); *North Carolina Dispute Resolution Commission*, THE NORTH CAROLINA COURT SYSTEM, <http://www.nccourts.org/>

general public. Even sophisticated repeat players often have difficulty finding reliable information about a specific mediator and how that person conducts mediation sessions.<sup>271</sup> These problems could be addressed by a well-known and easily accessible repository of information about individual mediators and mediation in general.<sup>272</sup>

### 3. *Enhanced Skill Level*

A comprehensive professional regulatory scheme would necessarily improve the practice of mediation as a whole by preventing less competent aspiring mediators from entering the field and pushing them out of the field.<sup>273</sup> For new mediators, regulation could establish entry standards based on a combination of education, mediation skills training,<sup>274</sup> experience, performance-based testing, and apprenticeship work.<sup>275</sup> Furthermore, continuing education requirements and ongoing skills assessment would prompt experienced

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courts/crs/councils/drc/ (last visited Feb. 19, 2015) (North Carolina Dispute Resolution Commission website). However, such comprehensive websites are the exception to the rule.

271. See Leonard L. Riskin, *Understanding Mediators' Orientation, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 38–48 (1996) (describing the difficulties in matching a mediator with a particular dispute); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 34–37 (2003) (indicating that lawyers, parties, and mediators often fail to recognize the number of choices about what should happen in a mediation).

272. One example of this comes from the International Mediation Institute, which posts mediator bios online that include discussions of mediation styles. See *Certified Mediators*, INTERNATIONAL MEDIATION INSTITUTE, <https://imimediation.org/certified-mediator-search> (last visited May 17, 2016).

273. Kleiner, *Occupational Regulation*, *supra* note 182, at 192. While this is a reasonable assertion, it ultimately is an empirical question, and presently there is no data to support or refute this claim. Creating a study to gather such data is beyond the scope of this article.

274. Presumably such training would be from a reputable program. For examples of unqualified mediation trainers see Art Hinshaw, *Mediation and Three Other Words*, INDISPUTABLY: THE ADR PROF BLOG (Aug. 8, 2013), <http://www.indisputably.org/?p=4950> (describing an adjunct law professor without any knowledge of mediation accepting an assignment to teach mediation); Diane Levin, *The 40 Hour Mediation Training Requirement: A Good Argument for Regulating the Private Practice of Mediation*, THE MEDIATION CHANNEL (May 5, 2010), available at <http://mediationchannel.com/2010/05/05/the-40-hour-mediation-training-a-good-argument-for-regulating-the-private-practice-of-mediation-2/> (describing university instructors who call her to ask whether they should take a mediation training program before teaching a mediation class).

275. See, e.g., ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON CREDENTIALING, REPORT ON MEDIATOR CREDENTIALING AND QUALITY ASSURANCE (2002) (discussion draft), available at [http://www.americanbar.org/content/dam/aba/migrated/dispute/taksforce\\_report\\_2003.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/taksforce_report_2003.authcheckdam.pdf); ASSOCIATION FOR CONFLICT RESOLUTION, ACR MEDIATOR CERTIFICATION TASK FORCE: REPORT AND RECOMMENDATIONS 1 (2004);

mediators to hone their skills and enhance their mediation knowledge.<sup>276</sup> A well-designed disciplinary system would act both as a means to keep mediators honest and as a deterrent against skill deterioration.<sup>277</sup>

#### 4. *Enhanced Credibility*

Adding regulatory requirements would necessarily enhance the professional standing of the field in general and of practicing mediators individually.<sup>278</sup> Regulation would give the field the state's imprimatur thereby signaling to the public that the mediation field is respectable and that credentialed mediators have achieved a sanctioned level of expertise in a professional field. In addition, regulation would enhance the field's status as a distinct professional field that is not simply a subsidiary of other regulated fields.<sup>279</sup>

### B. *Addressing the Arguments Against Regulation*

Four main policy arguments form the basis of arguments against regulating mediators: (1) market forces already ensure high mediator quality, (2) mediation is not a well-defined field, (3) regulation is contrary to the ethos of mediation, and (4) the costs associated with regulation will limit mediator diversity and access to mediation services. None of these are persuasive.

#### 1. *Market-Based Regulation*

Currently, without any barriers to entry, mediators find it very difficult to make a mediation practice financially viable.<sup>280</sup> Nationally, there is an oversupply of mediators without enough demand to create many mediation opportunities or jobs.<sup>281</sup> Most mediators self-

COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* 580 (2012–13); Sarah Rudolph Cole, *Mediator Certification: Has the Time Come?* 11 *DISP. RESOL. MAG.* 7, 10 (Spring 2005).

276. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Std. IV(A)(2) (2005); See also *infra* notes 349 to 363 and accompanying text (discussing mediator assessment).

277. Young, *supra* note 34 at 785–86.

278. See, e.g., GOLANN & FOLBERG, *supra* note 267, at 406.

279. Nancy Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, 11 *DISP. RES. MAG.* 13, 13–14, (Spring 2005); Craig McEwan, *Giving Meaning to Mediator Professionalism*, 11 *DISP. RES. MAG.* 3, 3–4 (Spring 2005); JOINT MODEL STANDARDS, STD. VI(A)(5).

280. See generally Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 *ALB. L. REV.* 257, 261 (2009).

281. *Id.* at 269–71.

report they are not able to support themselves solely through mediation practice, and the vast majority of mediation providers return to their prior careers within two years.<sup>282</sup> Some believe that the market already weeds out ineffective mediators and argue regulation is unnecessary because only effective practitioners can build and maintain mediation practices.<sup>283</sup>

Market forces are not enough. Although they may foster mediator quality in some segments of the field,<sup>284</sup> Gary Karpin's exploits evidence the market's difficulty in weeding out even the most unscrupulous of mediators. And, of course, several stories suggest that there are more problematic mediators than the field would like to admit.<sup>285</sup> In addition, private methods of market regulation – like social media – are not enough. Social media reviews, even moderated ones, are rife with errors and ripe for abuse.<sup>286</sup>

## 2. *Mediation's Ethos*

One of the hallmarks of mediation is its flexibility.<sup>287</sup> It is practiced in a wide range of settings with practitioners emphasizing different and competing methodologies.<sup>288</sup> Regulation brings the

282. *Id.* at 263–64; JEFFREY KRIVIS & NAOMI LUCKS, HOW TO MAKE MONEY AS A MEDIATOR (AND CREATE VALUE FOR EVERYONE): 30 TOP MEDIATORS SHARE SECRETS TO BUILDING A SUCCESSFUL PRACTICE 13 (2006) (stating that it takes about five years to make a practice sustainable).

283. See FOLBERG, ET AL., *supra* note 35, at 406; SPIDR, ENSURING COMPETENCE, *supra* note 265 at 7 (1995) (listing typical discussion points about ADR practitioner qualifications including “The market place is fine. . .”); ABA, MEDIATOR CREDENTIALING, *supra* note 33, at 35.

284. Kathleen Bryan and Mara Weinstein, *The Case Against Misdirected Regulation of ADR*, 19 DISP. RES. MAG. 8, 9–10 (Spring 2013) (discussing mediators in high dollar commercial disputes).

285. See *supra* notes 169 to 175 and accompanying text (discussing mediation horror stories). See also Moffitt, *The Four Ways*, *supra* note 264, at 210–12 (expressing skepticism about the reputational marketplace for mediators).

286. Upwards of 15% of all online reviews are thought to be fake. See e.g. Michael Luca and Georgios Zervas, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud* (May 1, 2015) Harvard Business School NOM Unit Working Paper No. 14–006, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2293164](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293164); Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling A Web of Deceit*, 47 AM. BUS. L.J. 415, 415 (2010).

287. FRENKEL & STARK, THE PRACTICE OF MEDIATION, *supra* note 33, at 13; Press, *Institutionalization*, *supra* note 240, at 908–10.

288. See SPIDR, ENSURING COMPETENCE, *supra* note 265, at 18 (stating “The field of dispute resolution practice is as varied and broad as the range of human relationships.”); ACR MEDIATOR CERTIFICATION TASK FORCE, *supra* note 214, Preamble (mentioning facilitative, law-centered, transformative, evaluative, and managerial mediation styles being used in various legal and non-legal disputes).



potential for a “one-size-fits-all” standard of practice, which could result in certain styles or practices being favored at the expense of others.<sup>289</sup> This concern is a direct reaction to the legal system’s perceived or actual attempts to colonize mediation, turning it into a subsection of the legal profession which is focused primarily on evaluating the merits of legal claims.<sup>290</sup> This argument fails to recognize that regulation by a broad cross-section of the field offers the best chance at holding these forces at bay. Such regulators are likely to recognize the importance of other professional backgrounds and the skills they bring to enhance the mediation field, particularly with the emotional toll of conflict.<sup>291</sup> Further, any concerns about a regulatory board’s staff should be alleviated by the experience of states that already regulate segments of the mediation field. Staff members in those states have been thoughtfully concerned about regulation’s impacts on the field’s flexibility and varying styles of practice.<sup>292</sup> There

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289. See generally Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. Rev. 723 (1996) (arguing that any mediation credentialing system must reflect the “true breadth and scope of the mediation field” rather than a particular ideological belief about what constitutes mediation). See also Dwight Golann, *A New Policy on Mediator Credentialing*, 19 DISP. RESOL. MAG. 38, 38 (Spring 2013) (stating that the field does not want a single “correct” method of mediating to be imposed by a regulating entity).

290. See generally Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 13 (2012) (arguing that as family mediation becomes dominated by lawyers, mediation’s potential as a dispute resolution process lessens because lawyer mediators focus more on the lawyers’ needs at the expense of the divorcing spouses’ needs). See also Douglas N. Frenkel & James H. Stark, *Improving Lawyers’ Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1, 17 (2015) [hereinafter Frenkel & Stark, *Improving Lawyers’ Judgment*]; (stating that disputants expect mediators to be able to provide “legally accurate feedback” in cases involving legal rights and responsibilities.); ABA TASK FORCE ON IMPROVING MEDIATION QUALITY, FINAL REPORT, 14 (2008) available at <http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForceMediation.authcheckdam.pdf> (last visited June 6, 2016) (indicating that in commercial mediation cases 95% of attorneys wanted mediators to provide a strengths and weakness analysis of the presenting case).

291. See, e.g., Frenkel & Stark, *Improving Lawyers’ Judgment*, *supra* note 290, at 18 (noting that mediators need to navigate psychological barriers in conflict, understand and address the emotional contents of a dispute, and developing an oppositional or doubting stance to enable disputants to see their conflict, objectives, and risks in new ways).

292. Two excellent examples are Sharon Press and Geetha Ravindra. Press, the former Director of the Florida Dispute Resolution Center, has written extensively about the issues related to the impact of regulation and institutionalization on mediation practice. Sharon Press, Mitchell–Hamline Law School, faculty profile at <http://mitchellhamline.edu/biographies/person/sharon-b-press/>. Ravindra, the former Director of the Virginia Supreme Court’s Dispute Resolution Services is now a mediator

is no reason to think that this experience would not be replicated in other states.

### 3. *Definitional Problems*

While related to the practice of law, social work, counseling, and other professions, mediation has a separate purpose from those professions.<sup>293</sup> However, the question of whether mediation is a sufficiently distinct occupation to be a separate profession is far from settled.<sup>294</sup> The fundamental attributes of a profession are a clear definition of the profession, a core body of knowledge, and a settled ethical framework.<sup>295</sup> Mediation struggles with all three of these attributes.

Without question, a clear definition of the regulated activity is essential to any regulatory scheme.<sup>296</sup> To date, defining mediation appears much more complicated than it should be, largely because of quibbling within the field as to whether certain practices constitute mediation.<sup>297</sup> There are already several commonly accepted non-controversial definitions from which to choose.<sup>298</sup> Furthermore, mediation is already a defined and codified term in every state in the

for the International Monetary Fund and is a former President of the ABA's DR Section. See, ADR as First Career, Geetha Ravindra at <http://adras1stcareer.blogspot.com/2014/10/geetha-ravindra.html>.

293. FRENKEL & STARK, *THE PRACTICE OF MEDIATION*, *supra* note 33, at 2; Hinshaw, *supra* note 58, at 290–93 (describing mediation as a secondary profession).

294. See, e.g., Golann, *supra* note 289, at 38 (stating “We want to see mediation recognized as a true profession. . .”); Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, 11 *DISP. RESOL. MAG.* 13, 13 (Spring 2005) (stating that the mediation field is in the process of professionalization); Press, *Crossroads*, *supra* note 37 (stating that given the number of mediations occurring and the number of mediators, mediation is being treating as a profession).

295. *In Depth: What Makes a Profession?*, HARVARD BUSINESS SCHOOL, <https://web.archive.org/web/20150429014611/http://www.hbs.edu/centennial/im/inquiry/sections/1/c/> (last visited June 6, 2016). See also RUDI VOLTI, *AN INTRODUCTION TO THE SOCIOLOGY OF WORK AND OCCUPATIONS* 105 (2008); Nancy A. Welsh, *Institutionalization and Professionalization*, in *THE HANDBOOK FOR DISPUTE RESOLUTION*, 494 (Michael L. Moffitt and Robert C. Bordone, eds., 2005)

296. Michael Moffitt, *Schmediation and the Dimensions of Definition*, 10 *HARV. NEGOT. L. REV.* 69, 72 (2005) [hereinafter Moffitt, *Schmediation*]

297. *Id.* at 70–73 (describing difficulties defining mediation). See also Peter S. Adler, *Expectation and Regret: A Look Back at How Mediation Has Fared in the United States*, 2013 *ALASKA J. DISP. RESOL.* 1, 1–2 [hereinafter Adler, *Expectation and Regret*]. (arguing that defining mediation “is an endless self-indulgence” and a “bottomless pit of pontificating” based on which mediation theories one employs).

298. See *infra* note 334 and accompanying text (giving the definition of mediation contained in the Uniform Mediation Act); *supra* note 31 (defining mediation for use in this paper).

United States through mediation confidentiality statutes.<sup>299</sup> But these definitions exhibit the subtle difference between defining mediation in general and defining what should be a regulated practice. For example, they do not clearly distinguish mediation practice from other fields; as a result too many professions can rightfully claim mediation as part and parcel of the services their professions provide.<sup>300</sup> Furthermore, these definitional issues fuel internal debates of what processes should be considered mediation and which practices are consistent with mediation's function<sup>301</sup> which, in turn, reveal fundamental disagreements about what mediation's core competencies are or should be.<sup>302</sup> Finally, the Joint Model Standards of Conduct for Mediators appear to create a shared ethical structure, but some argue that the Standards are internally contradictory and create as many problems as they solve.<sup>303</sup> As a result, mediation practitioners routinely ignore them, or are completely unaware of them, leaving the field with little in the way of common ethical guidance.<sup>304</sup> Mediation's definitional difficulties are the largest hurdle to regulating the

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299. See *infra* note 328 (discussing mediation confidentiality statutes, all of which define mediation).

300. Hinshaw, *supra* note 58, at 290–93.

301. A striking example of this recently occurred within the ABA Section of Dispute Resolution Task Force on Mediator Credentialing. In an article discussing the Task Force's work, the chair stated:

[M]ost members believed there is a lack of consensus within the field about . . . what processes should be considered "mediation," even within a specific subject area (although some members believed the field has, or could, do so for particular schools or styles of mediation).

Golann, *supra* note 289, at 39 n.2 (Spring 2013). See also *supra* notes 47 to 50 and accompanying text (identifying three mediation themes that lead to different purposes for mediation).

302. Welsh & McAdoo, *supra* note 279, at 13 (stating "[I]t should come as no surprise that there is no consensus regarding the approach, skills, or ethics mediators should share."). See also Juliana Birkhoff, et al., *Points of View: Is Mediation Really A Profession?* 8 DISP. RESOL. MAG. 10, 11–12 (Fall 2001) (highlighting a discussion between two well-respected people in the mediation field who disagree about the core knowledge for mediators); ACR/ABA, *MEDIATOR CERTIFICATION FEASIBILITY STUDY*, *supra* note 216, at 1.

303. See generally Susan Naus Exon, *How Can a Mediator Be Both Impartial and Fair: How the Joint Model Standards Create Chaos for Mediators*, 2006 J. DISP. RESOL. 388 (2006); Michael Moffitt, *Wrong Model Again: Why the Devil Is Not in the Details of the New Model Standards of Conduct for Mediators*, 12 DISP. RESOL. MAG. 31 (Spring 2006).

304. Welsh & McAdoo, *supra* note 279, at 13 (stating that the Model Standards exist "but many practicing mediators seem unaware of them or any other discrete set of norms.").

field and require a novel regulatory approach described in detail later in this article.<sup>305</sup>

#### 4. *Unintended Negative Consequences*

The final argument against regulating mediators is that a regulatory scheme increases the transaction costs associated with mediation services and this will have many unintended and unpredictable adverse consequences. One potential negative impact could be that additional costs and qualifications will decrease the racial diversity in the pool of mediators.<sup>306</sup> Despite mediation organizations' efforts at diversification, most mediators are white men.<sup>307</sup> Additionally, increased professional costs could exclude capable but financially challenged potential practitioners who may not be able to pass the costs along to consumers.<sup>308</sup> Or, as practitioners pass the costs to consumers, lower-income consumers may be priced out of the market.<sup>309</sup>

Diversity and affordability are deep structural problems. Racial and gender diversity among practitioners, or the lack thereof, is regularly recognized as a concern and focus for the mediation field.<sup>310</sup> And yet, the field's attempts to increase practitioner diversity have not been particularly successful.<sup>311</sup> This appears to be the result of a confluence of factors: the lack of diversity in mediation's feeder professions, the field's lack of visibility in diverse communities, and the

305. See *infra* notes 321-336 (describing in depth how to resolve mediation's definitional problem).

306. *Id.*; ABA, MEDIATOR CREDENTIALING, *supra* note 33, at 16.

307. Sharon Press, *Court-Connected Mediation and Minorities: Has Any Progress Been Made?* 19 DISP. RESOL. MAG. 36, 37, 39 (Summer 2013) [hereinafter "Press, *Has Any Progress Been Made?*"].

308. SPIDR, ENSURING COMPETENCE, *supra* note 265, at 17.

309. See COLE ET AL., *supra* note 31, at 8; SPIDR, ENSURING COMPETENCE, *supra* note 265, at 17. See also Potts, *supra* note 177, at 73; Kleiner, *License for Protection*, *supra* note 180, at 19.

310. See, e.g., F. Peter Phillips, *Diversity in ADR, More Difficult to Accomplish than First Thought*, 15 DISP. RESOL. MAG. 14 (Spring 2009). Also, the ABA Dispute Resolution Section and ACR both attest to strong institutional commitments to diversity. See *Standing Committee on Diversity*, AMERICAN BAR ASSOCIATION <http://apps.americanbar.org/dch/committee.cfm?com=DR014700> (last visited Feb. 20, 2015); *National Task Force on Diversity in ADR*, CPR, <http://www.cpradr.org/PracticeAreas/NationalTaskForceonDiversityinADR.aspx> (last visited Feb. 20, 2015). Additionally, two major mediation provider organizations, CPR and JAMS, also assert strong institutional commitments to diversity. See *id.*; *We Embrace Diversity*, JAMS, <http://www.jamsadr.com/diversity/> (last visited Feb. 20, 2015) (JAMS Diversity Statement).

311. See, e.g., Beth Trent, et al., *The Dismal State of Diversity: Mapping a Chart for Change*, 21 DISP. RESOL. MAG. 21, 21 (Fall 2014) (asking the ADR field to "acknowledge our collective failure" to achieve diversity); Press, *Has Any Progress Been Made?*, *supra* note 305, at 37, 39 (answering the question of whether progress has

traditional method of mediator selection – personal experience and recommendations.<sup>312</sup> This last factor may mean that diversity initiatives are most successful when instituted at the local level.<sup>313</sup> Regulation, in and of itself, is unlikely to address all of these factors, but it could push the field toward increased diversity by creating a more structured method of entry into the field, raising the field’s visibility in a broader swath of communities, and providing a platform to spearhead diversity initiatives. For example, a regulatory body may be able to better identify and recruit diverse individuals who would make good mediators,<sup>314</sup> it may be better situated to reach out to the civil rights community to recruit potential mediators,<sup>315</sup> and it may be better able to bring diversity concerns to the forefront of those who select mediators.<sup>316</sup>

Although the cost of regulation would likely flow through to consumers, it seems unlikely that these costs would be prohibitive. Assuming that an annual licensing fee would be \$600 per year<sup>317</sup> and a mediator conducted only one mediation per month, the resulting pass-through cost would be \$50 per mediation or \$25 per disputant,<sup>318</sup> an amount unlikely to price someone out of the mediation market.

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been made on the diversity front with a “qualified yes”); Sharon Press, *Court Connected Mediation and Minorities: A Report Card*, 39 CAP. U. L. REV. 819, 842 (2011) (grading mediator diversity efforts as “a good start but a long way to go”); Marvin Johnson & Homer C. La Rue, *The Gated Community: Risk Aversion, Race, and the Lack of Diversity in Mediation at the Top Ranks*, 15 DISP. RESOL. MAG. 17 (Spring 2009) (describing their difficulties in creating opportunities for top mediators of color).

312. Trent, et al., *supra* note 311, at 22; Johnson & La Rue, *supra* note 311, at 18.

313. Trent, et al., *supra* note 311, at 22; Johnson & La Rue, *supra* note 311, at 18.

314. See Trent, et al., *supra* note 311, at 21–22.

315. I thank Lynn P. Cohen for this suggestion.

316. Trent, et al., *supra* note 311, at 21–22.

317. Using state bar dues as a guide, this number is on the high side. Arizona’s annual state bar membership fees are \$490 per year. *Annual Membership Fees & Deadlines*, ARIZONA STATE BAR, <http://www.azbar.org/membership/feesdeadlines/> (last visited May 20, 2016). Michigan’s annual state bar membership fees are \$285 per year. *Dues Frequently Asked Questions*, STATE BAR OF MICHIGAN, <http://www.michbar.org/generalinfo/duesfaq#1> (last visited May 20, 2016). Oregon’s annual state bar membership fees are \$557 per year. *Membership Fees FAQ*, OREGON STATE BAR, <https://www.osbar.org/fees/feefaq.html#Cost> (last visited May 20, 2016). Texas’ annual state bar membership fees are \$235 per year for lawyers licensed more than five years. *State Bar of Texas Dues Schedule*, STATE BAR OF TEXAS, [https://www.texasbar.com/AM/Template.cfm?Section=Dues\\_and\\_Other\\_Fees1&Template=/CM/HTMLDisplay.cfm&ContentID=28988](https://www.texasbar.com/AM/Template.cfm?Section=Dues_and_Other_Fees1&Template=/CM/HTMLDisplay.cfm&ContentID=28988) (last visited May 20, 2016).

318. The simple math: \$600 divided by 12 mediations equals \$50 per mediation. If there are two parties splitting the \$50 fee, \$50 divided by 2 is \$25 per disputant. If there are more disputants splitting fees, this number would be less.

VI. ANSWERING FOUR CRITICAL QUESTIONS: CREATING  
THE REGULATORY SCHEME

Outside of court-connected mediation, every attempt at regulating mediators has been a fruitless endeavor. Yet, creating a workable regulatory framework for the mediation field in its entirety is well within reach. Not only can longstanding statewide court-connected mediation programs serve as robust models for solving fundamental regulatory questions, but dispute system design processes can and should be used to ensure that each state's regulatory system has a structure and process that is both informed by and reflective of its culture and needs.<sup>319</sup> The devil is not in the details. Instead, the problem lies in fundamental mediation questions: a structural question about the activity to be regulated, a procedural question about the form of regulation that should be used, an enduring question of assessing mediator competence, and an existential question about the impact of regulation on the field's collective identity.

A. *What Is the Regulated Activity?*

Regulatory structures are based on one fundamental definition, that of the activity being regulated. That definition determines who receives the benefits of regulation and who does not.<sup>320</sup> Although defining the regulated practice is fairly easy and noncontroversial for most regulated occupations, that is not the case for mediation.<sup>321</sup>

In his work discussing the definition of mediation, Michael Moffitt has rightly criticized various mediation definitions for being too narrow or too broad and has even suggested avoiding the "definitional trap" if at all possible.<sup>322</sup> Traditional notions of line drawing around an occupation's boundaries to the exclusion of existing professions do not apply to mediation.<sup>323</sup> Mediation's feeder-professions –

319. See generally NANCY H. ROGERS, ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (2013). See also ALEXANDER, *supra* note 252, at 92 (stating that "participation in determining regulatory measures . . . supports aspirations to achieve best practices in the regulated market.").

320. Moffitt, *Schmediation*, *supra* note 296, at 94–97; Moffitt, *The Four Ways*, *supra* note 264, at 205.

321. See *supra* note 234 and accompanying text (describing Oregon's failed statewide attempts to regulate mediation) and notes 296 to 300 (describing the difficulty in defining mediation).

322. Moffitt, *Schmediation*, *supra* note 296, at 93.

323. *Id.* at 101.

In the United States this matter of precisely defining mediation is an endless self-indulgence and entertainment when the different tribes, clans and races of mediation gather together for their annual conferences. It is also a bottomless pit of pontificating.

law, counseling, social work, and psychology – can rightfully claim mediation as being associated with their respective professional services, some more directly than others.<sup>324</sup> Thus, sidestepping the definitional trap while still drawing a line around the relevant portion of mediation practice is the key to regulation. The most sensible method of doing this is by determining what is to be regulated using a two pronged approach: regulating mediators who either (a) seek to use mediation’s state-granted benefits or (b) receive monies for conducting mediation services.

The state could restrict access to state-granted benefits – mediation confidentiality, civil immunity, and case referrals – to those mediators who agree to subject themselves to state regulation. This regulatory method is analogous to governmental funding for nongovernmental organizations – upon receipt of federal funds, the recipient agrees to certain engage in or to refrain from engaging in certain activities.<sup>325</sup>

Mediation confidentiality statutes provide a sound basis for the benefits prong.<sup>326</sup> Mediation confidentiality laws are all but sacrosanct,<sup>327</sup> and each state provides strong testamentary privileges for

Adler, *supra* note 297, at 1–2.

324. For example, in answering the question of whether a disbarred lawyer could act as a mediator, the Supreme Court of Massachusetts noted the ability of mediators to switch professional roles and engage in the practice of law during the course of mediation. *In Re Bott*, 969 N.E. 2d 155, 161–62 (Mass. 2012) (holding that “In the context of bar discipline cases mediation may constitute legal work such that an individual may engage in it only in certain circumstances and under specified conditions.”). See also JOINT MODEL STANDARDS, § VI(A) (warning mediators that mixing the role of mediator and another profession is problematic and advising them to distinguish between such roles); Hinshaw, *supra* note 58, at 290–93 (describing family mediation as a secondary profession in that mediation services fall under the umbrella of services that several professions provide).

325. There are many examples of this kind of a regulatory scheme on the federal level, but an easy one is Title IX to the Higher Education Act of 1965. 20 U.S.C. §§ 1681–1688 (2014). An overly simplistic explanation of how Title IX works is that no person can be discriminated against on the basis of sex by any university receiving federal monies, as a condition of the university’s receipt of those funds. Beth B. Burke, *To Preclude or Not to Preclude?: Section 1983 Claims Surviving Title IX’s Onslaught*, 78 WASH. U. L. REV. 1487, 1492–93 (2000).

326. See Moffit, *The Four Ways*, *supra* note 264, at 215.

327. See Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 243–44 (2002) (discussing the lack of controversy about the need for confidentiality in mediation); Weston, *Confidentiality’s Constitutionality*, *supra* note 251, at 32–33 (discussing the belief that confidentiality is vital to mediation). *Contra* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986).

mediation communications.<sup>328</sup> Thus, regulation would be based upon a popular and well-defined existing framework. However, requiring regulation in order to receive the benefit of confidentiality protection only works if mediation confidentiality privileges were not be available through other means such as contracts, court rules, or the common law.<sup>329</sup> Essentially this would create a market-based approach to regulation. Mediation users who value confidentiality protection would hire only regulated mediators, and mediators who value the ability to provide confidentiality protection would agree to be regulated.<sup>330</sup> Presumably this method would capture the mediators who should be regulated while leaving those professions that engage in quasi-mediation services out of the regulatory framework. The state of Massachusetts already does a limited form of this with its mediation confidentiality statute. Only those mediators who have completed 30 hours of mediation training can provide their clients with mediation confidentiality protection.<sup>331</sup> Furthermore, other state benefits like civil immunity and case referrals could follow confidentiality protection and only be available to regulated mediators.

The primary drawback to this approach is that it does not achieve optimal levels of consumer protection because mediators who opt out of the confidentiality market could still mediate and take advantage of the public. That is where the second prong comes in.

The regulatory scheme's second prong, regulating those who receive monies for providing mediation services, would focus on a more traditional line-drawing regulatory approach. This prong would focus on capturing in the regulatory scheme those who (a) hold themselves out as mediators, (b) provide mediation services, and (c) receive monies for their services.

Mediation regulation should reach only those individuals who self-identify as mediators.<sup>332</sup> Professionals providing services under

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328. Each state and the District of Columbia have broad based mediation confidentiality statutes already in place. *See e.g.*, ARIZ. REV. STAT. ANN. § 12-2238 (2014); 710 ILL. COMP. STAT 35/8 (2014); MINN. STAT. § 595.02 (2015); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2013). *See also* UNIFORM MEDIATION ACT, Prefatory Note, 11 (noting that in 2001 all states had some form of mediation confidentiality effectuated through more than 250 different state statutes).

329. FRENKEL & STARK, *THE PRACTICE OF MEDIATION*, *supra* note 33, at 322-324; COLE ET AL., *supra* note 31, at 391-98; Folb v. Motion Picture Indus. Pension & Health Plans, 16 F.Supp.2d 1164, 1181 (C.D. Cal. 1998).

330. *See* Moffit, *The Four Ways*, *supra* note 264, at 215-16.

331. MASS. GEN. LAWS, CH. 233 § 23c.

332. This concept draws on Professor Riskin's decision to include the mediation approaches of all self-identified mediators in his seminal article describing what mediators do. *See* Riskin, *Understanding Mediators' Orientations*, *supra* note 271, at



the umbrella of other regulated professions that could loosely be considered mediation – marriage counselors, parenting coordinators, and judges engaging in settlement conferences – should not be caught in the regulatory scheme. Self-identification as a mediator could be done through word-of-mouth, advertising, signing a mediation services contract, or any other means to imply that one is engaging in mediation.<sup>333</sup>

This prong also requires common, straightforward, and workable definitions of “mediation” and “mediator.” Such a definition for mediation resides in the Uniform Mediation Act (UMA), which is typical of most state mediation confidentiality statutes. It defines mediation as “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”<sup>334</sup> The UMA also defines mediator, but this definition – “an individual who conducts a mediation”<sup>335</sup> – is not as helpful. It ensures that those who provide mediation services would be regulated, but it is too broad and could lead to absurd regulatory results. Parents attempting to resolve their children’s quarrels, for example, would be considered mediators. The requirement of receiving monies provides the mechanism to narrow that group down.<sup>336</sup>

The indirect receipt of money should satisfy this requirement as well. On the off chance that a grant-funded mediation program offering free mediation services does not require its mediators to be regulated, the receipt of funds indirectly benefits the organization’s mediators, thereby subjecting them to regulation.<sup>337</sup> No matter the source of money, this element should be easy to establish.

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13 (defending his decision to include what were then controversial practices in his description of mediation practices).

333. For example, a facilitator who was not subject to mediator regulation could run afoul of this by stating, suggesting, or hinting that mediation confidentiality protections apply to conversations he is facilitating.

334. UNIFORM MEDIATION ACT § 2(1). The Uniform Mediation Act has been adopted by 11 states (Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington) and the District of Columbia as the mediation confidentiality statute in these jurisdictions. *Acts: Mediation Acts*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act> (last visited Feb. 20, 2015).

335. UNIFORM MEDIATION ACT § 2(3).

336. This would include mediators who provide mediations at no cost to mediation participants, but receive paychecks from courts or other entities to provide mediation services.

337. Peer mediation programs, where children of middle school and high school age mediate their classmates’ disputes, should specifically be exempted from regulation

Using the innovative approach of a two-pronged regulatory method should be broad enough to capture all mediation activity that should be regulated without being overreaching. Plus, it would drive mediators to seek regulation because only regulated mediators would have access to the tremendous benefits mediators receive under state law.

### B. *What Form of Regulation?*

The next fundamental question is what form of regulation should be used? The answer depends on the goals of regulation. Here, the primary goal is to protect the public by creating standards for entering and staying in the field, by providing information about the quality of practitioners, and by disciplining substandard practitioners. A secondary benefit is that regulation creates title protection, preserving the field's reputation and integrity.

Registration, the simple listing of one's address and posting a bond or fee,<sup>338</sup> provides little information about the registrant and creates no standards or methods for quality control. As a result, it fails to protect either the public or the field's reputation and should be eliminated from consideration. Certification requires individuals to meet minimum standards of competency, but allows non-certified individuals to engage in the regulated activity, and losing one's certification does not restrain one's ability to provide services in the field.<sup>339</sup> Thus, like registration, it provides only a limited measure of public protection. Because it is not an absolute barrier to entry into the field, a certification system defeats regulation's primary goal of public protection.

Licensure makes it unlawful to engage in the regulated profession without meeting the requirements necessary to earn a license.<sup>340</sup> Because licenses can be revoked for unethical, unprofessional, or criminal conduct, licensure provides a method of recourse against mediators. Moreover, disciplinary information can be disseminated to the public through various sources, including the regulating entity's website, to educate the public as to which mediators could be problematic. Licensure is the only form of regulation that satisfies the regulatory goals of consumer protection and title protection.

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338. See *supra* note 189 and accompanying text.

339. See *supra* notes 190 to 191 and accompanying text.

340. See *supra* notes 192 to 193 and accompanying text.

### C. *How Should Mediator Competence Be Assessed?*

As part of its consumer protection mandate, a mediation regulatory agency will have the responsibility to prevent incompetent providers from entering into or remaining in the mediation field.<sup>341</sup> There are several common methods for assessing mediator quality – education and training, experience, written exams, settlement rates, performance-based assessments, and user assessments and complaints.<sup>342</sup> Presently, the general consensus is not to rely on a single assessment method of quality assessment, but to use several methods in combination.<sup>343</sup> Of these methods, the field has been most consistently concerned with the assessment of mediator skills.

The most exacting and in-depth work in this area was through the Test Design Project (TDP), an effort to build upon SPIDR's efforts<sup>344</sup> "to design better selection, training and evaluation tools" for mediation provider organizations.<sup>345</sup> The TDP's director, Christopher Honeyman, wrote a series of articles describing his and the TDP's progress<sup>346</sup> before issuing its final report.<sup>347</sup> Most importantly, the TDP designed a flexible skills assessment instrument based on seven

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341. Wissler & Rack, *supra* note 231, at 230; Press, *Institutionalization*, *supra* note 240, at 915 (stating, "Once a court embarks on the road of certification [of mediators], doesn't the court then retain some responsibility to ensure continuing competence?").

342. Wissler & Rack, *supra* note 231, at 232–239.

343. *Id.* at 232. *See also supra* notes 251 to 255 (citing several state court requirements to become court-connected mediators).

344. SPIDR conducted the foundational work in this area, delineating seven skills for neutrals generally and another seventeen skills necessary for mediators specifically. The skills for neutrals generally were: the ability to actively listen, the ability to analyze problems including identifying and separating issues and framing them for resolution/decision-making, the ability use clear, neutral language in speaking and writing, a sensitivity to strongly felt values of disputants, the ability to deal with complex factual materials, presence and persistence, the ability to separate one's own personal values from the issues under consideration, and the ability to understand power imbalances. SPIDR, *QUALIFYING NEUTRALS*, *supra* note 209, at 17. The skills identified for mediators specifically included the ability to: understand the negotiation process and the role of advocacy, earn trust and maintain acceptability, convert parties positions into needs and interests, screen out non-mediable issues, help parties invent creative options, help the parties identify principles and criteria to help guide their decision-making, help parties assess their non-settlement alternatives, help parties make their own informed choices, and help parties assess whether an agreement can be implemented. *Id.* at 17–18.

345. *Test Design Project*, *CONVENOR CONFLICT MANAGEMENT*, <http://www.convenor.com/test-design-project.html> (last visited April 1, 2016)

346. Christopher Honeyman, *Five Elements of Mediation*, 4 *NEG. J.* 149 (April 1988); Christopher Honeyman, *On Evaluating Mediators*, 6 *NEG. J.* 23 (January 1990); Christopher Honeyman, *A Consensus on Mediators' Qualifications*, 9 *NEG. J.* 295 (October 1993).

primary mediator tasks: gathering background information, facilitating communication, communicating information to others, analyzing information, facilitating agreement, managing cases, and documenting information.<sup>348</sup> Each task consists of several mediation skills or abilities<sup>349</sup> that help the assessor determine how well each task has been accomplished.<sup>350</sup> And the assessment is wisely neutral when it comes to mediator styles, a problem which derailed prior assessment schemes.<sup>351</sup> Furthermore, the TDP instrument can easily be used in both simulation exercises and real mediations allowing it to be used to evaluate mediator performance at both entry level and on-going assessment stages.<sup>352</sup>

Skill assessment is paramount to a regulatory scheme premised on consumer protection as it is the best method to evaluate mediator competence.<sup>353</sup> Skill assessment of entry-level mediators is all but a given. Ongoing competence assessments, on the other hand, currently suffers from benign neglect with minimal attention paid to ongoing mediator quality assurance.<sup>354</sup> Periodic skill assessments for licensed mediators should be an essential element of the mediation regulatory system.

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347. *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>.

348. *Id.* at 17.

349. It also identified sixteen mediator skills and abilities, labeled “knowledge, skills, abilities, and other attributes” were: reasoning, analyzing, problem solving, reading comprehension, writing, oral communication, nonverbal communication, interviewing, emotional stability/maturity, sensitivity, integrity, recognizing values, impartiality, organizing, following procedures, commitment. *Id.* at 18.

350. *Id.* at 19–28.

351. For nearly ten years, mediation’s intellectual community argued whether mediators should be allowed to evaluate the merits of disputants’ legal claims. The Facilitative–Evaluative Debate, as it became known, was started in reaction to an article organizing a schema around various mediator tasks. See Riskin, *Understanding Mediators’ Orientations*, *supra* note 271; Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997). While this debate still resonates within segments of the field, it formally came to an end when there was little reaction to Professor Riskin’s revision of his organizational schema. See Riskin, *Decisionmaking in Mediation*, *supra* note 271.

352. *Test Design Project*, *supra* note 345, at 19–28.

353. Wissler & Rack, *supra* note 231, at 234–35; *Test Design Project*, *supra* note 345 at 7; Honeyman, *On Evaluating Mediators*, *supra* note 245, at 23–24.

354. Wissler & Rack, *supra* note 231, at 231–32, 238–39.

D. *What Does Regulation Mean for the Field's Identity?*

In the 1980s, as the judiciary began experimenting with mediation and other forms of dispute resolution, many of mediation's proponents expected their movement to transform civil litigation, moving the legal system's emphasis from lawyers to clients.<sup>355</sup> But by the early 1990s, those who viewed mediation as a social movement began to feel their movement was being co-opted by a litigation system that was distorting mediation into a technocratic method of solving legal disputes.<sup>356</sup> Some intellectual leaders continued to push mediation as a truly alternative method of achieving justice, but others began to temper their goals to a simple hope that mediation could lead to better lawyering.<sup>357</sup> Others simply acknowledged that mediators "really are simply practitioners of a useful skill which ought to be sold . . . like other useful skills."<sup>358</sup>

Accepting more tempered goals has been difficult for some segments of the field as evidenced by resistance to institutionalization<sup>359</sup> and debates about whether evaluating legal claims should be considered mediation.<sup>360</sup> Moreover, a lament of missed opportunity echoes through the field's old-guard,<sup>361</sup> who now see mediation's ideals of social transformation as no more than "a wonderful, but occasional

355. Nancy Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value*, 19 OHIO ST. J. DISP. RES. 573, 577 (2004). In fact, the "mediation movement" was widely viewed as being anti-judicial system. See Grace E. D'Alo, *Reflections of Pennsylvania's ADR Community: Paradise, Pragmatism, and Progress*, 108 PENN. ST. L. REV. 309, 310 (2003) (quoting Deborah Hensler stating: "I see the ADR movement as having a strong anti-law, anti-institution, self-empowerment, and populist ideology at its birth. . ."). See also COLE, ET AL., *supra* note 31, at 71-72, 73-74. See also Adler, *Expectation and Regret*, *supra* note 297, at 3-4 (discussing how the courts and lawyers have eroded the premises and core values of the early mediation movement).

356. 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, 309 (1994); Adler, *Expectation and Regret*, *supra* note 297, at 3-4.

357. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 58-60 (1982); Alfini, et al., *supra* note 356, at 325 (commentary of Professor Riskin viewing mediation as having the potential for changing the way lawyers practice law by encouraging them "to think broadly" and "in terms of underlying interests.").

358. Alfini, et al., *supra* note 356, at 310 (quoting noted jurisprudence scholar Austin Sarat).

359. See *supra* note 258 and accompanying text. See also James J. Alfini, *Trash-ing, Bashing, and Hashing It Out: Is This the End of Good Mediation?*, 19 FLA. ST. U. L. REV. 47, 47-48 (1991).

360. See *supra* note 351 (describing the Facilitative-Evaluative debate).

361. See, e.g., Adler, *Expectations and Regret*, *supra* note 297. In preparation for a speaking engagement in England, Peter Adler interviewed twenty-five "veterans who helped develop mediation" in the U.S. *Id.* at 2. Several themes emerged, one of which he called "the Decline and Decay of True Mediation" and described as follows:

side effect” in litigation.<sup>362</sup> For many, regulation will signal the death of mediation’s soul as mediation is completely absorbed into the litigation process.<sup>363</sup>

Such fatalistic thinking ignores the fact that mediation is, fundamentally, a process that provides numerous approaches to conflict resolution focusing on the needs, well-being, and interests of the people participating in the mediation. Mediators regularly show this concern by acknowledging and engaging the emotional aspects of conflict and appealing to individuals’ self-determination, informed decision-making, and improved communication.<sup>364</sup> Mediation’s “useful skill-set” has, in part, led to the field’s growth. In fact, if organized as prescribed in this article, the regulating entity could explicitly recognize that non-legal professions have the requisite skills to be successful mediators, particularly those professions that deal with the emotions embedded in conflict.

But like doctors and bedside manner, some mediators are good at engaging with the emotional side of conflict and others are not.<sup>365</sup> It is this latter group of people who may be causing some to fear of regulation. If a regulatory body were populated with individuals who lacked or did not value bedside manner, such skills could be devalued in favor of skills related to evaluating the merits of legal claims.<sup>366</sup> However, this concern is not well-taken. Case evaluation is not a competency necessary for entry into any established court-connected

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The essence of the first story line is this: mediation has changed in response to bureaucratic imperatives and the workings of the marketplace. It isn’t all bad, but most of those I spoke with think it has degenerated and gotten worse.

*Id.* at 3.

362. Alfini, et al., *supra* note 356, at 315 (comments of Professor Riskin).

363. See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 874–76 (2008) (describing litigation’s repeat players finding value in mediation as a litigation-focused reality testing process).

364. See Alfini, et al., *supra* note 356, at 310 (Professor Bush noting that these concepts helped originate the mediation field) and 315 (Professor Riskin arguing that mediation should be structured to “allow for the human dimension.”).

365. See *In re Cornelio*, No. 12–177, (Ariz. Comm’n Jud. Conduct 2013), available at <http://www.azcourts.gov/portals/137/reports/2012/12–177.pdf> (censuring a judge for treating litigants poorly during judicial settlement conferences); COMMITTEE ON ETHICS OF THE GEORGIA DISPUTE RESOLUTION COMMISSION, OPINION 2002–1 available at <http://www.godr.org/files/Formal%20Opinion%202002–1%203–23–04TP.pdf> (disciplining a mediator for making inappropriate comments speculating about why a woman was attracted to her spouse).

366. See Riskin & Welsh, *supra* note 363, at 874–76, 896–97. See also *supra* note 351 (describing the Facilitative–Evaluative debate).

mediation program,<sup>367</sup> the place where such evaluative skills are presumably most valued. And, even though segments of the market may favor mediators with strong case evaluation skills,<sup>368</sup> case evaluators who are unable to connect on a human level with their clients often fail to get cases settled.<sup>369</sup>

## VII. CONCLUSION

Gary Karpin has shown that mediation can be exploited in ways few ever imagined. Yet, his story has received little publicity, even within Arizona's tight-knit mediation community.<sup>370</sup> Using Karpin's abuses as a jumping off point, this paper argues that the occupational regulation of mediators is necessary to protect both the public and the mediation field.

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367. For example, the Florida Rules for Certified and Court-Appointed Mediators specifically states:

A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. False A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

FLORIDA RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS, R. 10.370 (2014), available at <http://www.flcourts.org/core/fileparse.php/422/urlt/RulesBookletOctober2014.pdf>.

368. See, e.g., Frenkel & Stark, *Improving Lawyers' Judgment*, supra note 290, at 17; ABA TASK FORCE ON IMPROVING MEDIATION QUALITY, supra note 290, at 14.

369. See generally Jeff Kichaven, *For Professional Mediators, It's About More than Assessing the Case's Value*, 24 ALTERNATIVES TO THE HIGH COST OF LITIGATION 129 (2008) (arguing that good mediators help lawyers and clients move past a case's value to "higher levels of understanding and clearer points of decision" such as the emotional, financial, and other barriers to settlement); Frenkel & Stark, *Improving Lawyers' Judgment*, supra note 290, at 17-22 (arguing that mediators need to know "how disputants contribute to and experience conflict, what matters to them in disputing, and how strong conflict and pervasive cognitive and motivational biases affect parties' negotiating behavior and decision making."); See also TERESA G. CAMPBELL & SHARON L. PIZZUTI, THE EFFECTIVENESS OF CASE EVALUATION AND MEDIATION IN MICHIGAN CIRCUIT COURTS: REPORT TO THE STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN SUPREME COURT, 53-55 (2011) (finding that attorneys and clients favored mediation over neutral evaluation as a dispute resolution process), available at <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts.pdf>.

370. This author participated in two mediation continuing education programs detailing Karpin's story – at the 2011 statewide Arizona AFCC meeting and another in 2013 for the State Bar's Dispute Resolution Section. At the AFCC program, only one person in a room of approximately 50 people knew of Karpin's exploits. At the State Bar program, only three of approximately 25 attendees knew of his actions.

Of course, relying exclusively on his exploits as a basis for regulation is challenging. His is a case of egregious behavior, far exceeding that in any other documented cases,<sup>371</sup> and the typical abuses in which mediators engage are minor in comparison.<sup>372</sup> Some may argue that regulation in response to Karpin is simply an overreaction to an isolated case that falls into the “bad cases make bad law” category. Others may argue that regulation will not solve the rogue mediator problem as every regulated profession still has problematic practitioners. The proponents of these arguments misunderstand the lessons that Karpin teaches us: first, that mediation consumers are vulnerable to charlatans who use the process as a means to take advantage of others, and second, that it is far more difficult than it should be to push those individuals out of the field. The long-term reality is that ineffective and unscrupulous mediators will continue to cause difficulties for their clients and the field as long as there is no readily available way to identify them and require them to correct their conduct or exit the field.

Despite the field’s vulnerability and ever increasing visibility, efforts at regulating mediators have fallen flat because the public is not clamoring for mediators to be regulated and mediators are not galvanized on the issue of regulation. Mediators’ *laissez-faire* attitude toward regulation is understandable as the push and pull of the diversity-consistency tension has left the field wary of regulatory attempts. Complicating matters is the fact that mediation does not easily fit into the existing occupational regulatory framework.

Of course there may be other explanations for mediators’ resistance to regulation. Many practitioners are already licensed in another field and may view more occupational regulation as unnecessary. Maybe they see themselves as libertarians fearful of

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371. See *supra* notes 169 to 175 and accompanying text (discussing other egregious cases).

372. For example, the last three cases resulting in sanctions imposed on Florida mediators include: lawyer’s failure to disclose prior disbarment in another state on mediator application, violating the Florida Lawyer Assistance program contract, and the improper transfer of funds from an Interest on Lawyer Trust Account (IOLTA) to a firm’s operating account; sending letters to homeowners subject to foreclosure about mediation that gave misimpressions of how the state’s home foreclosure mediation program worked; law firm employee referring mediations to a brother-in-law without disclosing the brother-in-law’s relationship to the law firm. See *Sanctions—Imposed*, FLORIDA COURTS, <http://www.flcourts.org/resourcesandservices/alternativedisputeresolution/informationconsumers/discipline-proceedings-sanctions/sanctions-imposed.stml> (last visited Feb. 20, 2015) (noting: Keith Alan Manson, Florida Mediator Qualification Board, QCC2013–057; William Todd Lax, Florida Mediator Qualification Board, MQB2013–005; Florida Mediator Qualification Board, Karen A. Watson, QCC2012–014).



governmental intervention of any sort. Maybe mediators do not have the stamina to return to legislators time and time again until licensure is adopted. Maybe they fear that regulation will suffocate their favored mediation style or method. Maybe they want to maintain the field's legacy of flexibility and inclusiveness to ensure its ability to evolve. Maybe they find nothing wrong with the status quo and adhere to the adage that "if it's not broke, don't fix it." Whatever the case may be, it is simply dumb luck that more con artists have not donned the cloak of mediation.

It is worrisome that the field feels little or no need to protect mediation's integrity through regulation, but more troubling is the fact that consumer protection is of little concern to regulation's opponents. This is especially so because the mediation field prides itself on its ability to understand and address other peoples' concerns. Instead of taking an external empathetic approach to regulation, the field has focused inwards making the perfect the enemy of the good, thereby refusing to acknowledge the innate problems with a *caveat emptor* regime of practitioner quality control. Simply ignoring consumer protection concerns closely resembles the inertia associated with perceived inconvenience and blind traditionalism rather than a principled argument against regulation. Sadly, with no external pressures to force the field's hand, it is unlikely that mediators will be regulated any time soon. The field's unease with regulation suggests that mediators want to have their cake and eat it too – they desire the privileges of professionalization but wish to do so without accepting its responsibilities.

