

First Supplement to Memorandum 2014-27

**Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: New Developments and Recent Communications**

The Commission<sup>1</sup> has received the following new comments relating to its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

	<i>Exhibit p.</i>
• Howard Fields (6/10/14) .....	1
• Jack Goetz & Jennifer Kalfsbeek-Goetz (6/10/14) .....	3
• Jack Goetz & Jennifer Kalfsbeek-Goetz, <i>Serving the Public: The Case for Formally Professionalizing Court-Connected and Litigated Case Mediation</i> .....	4
• Ron Makarem (6/10/14) .....	24
• Nancy Milton (6/9/14) .....	25

Those materials are discussed briefly below.

COMMENT THAT STRESSES THE IMPORTANCE OF PROTECTING MEDIATION COMMUNICATIONS

Nancy Milton, a mediator with over 20 years of experience, “believe[s] strongly in the power of the Mediation Confidentiality provision in our Evidence Code.”<sup>2</sup> She says that “[t]his provision needs to remain an ironclad one that protects the parties.”<sup>3</sup>

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Exhibit p. 25.

3. *Id.*

COMMENTS THAT STRESS THE IMPORTANCE  
OF PROVIDING A MEANS TO ADDRESS MISCONDUCT

The other three new comments take a different perspective, urging the Commission to revise the statute protecting mediation communications.

Howard Fields writes that since 1981, the majority of his practice “has involved the representation of attorneys in claims brought against them.”<sup>4</sup> He has “represented hundreds of lawyers and law firms and ... also handled a fair number of cases against lawyers brought by clients who have been injured by the malpractice of their lawyers.”<sup>5</sup> In his opinion, California should revise its statute governing mediation communications because “[c]lients need protection from errant lawyers.”<sup>6</sup> He explains:

Unfortunately, I have come across cases where lawyers have ... literally lied to their clients, threatened their clients, bullied their clients and beat them into submission to sign documents. I have been involved in one case where not only was the client lied to, the attorney himself signed a comprehensive “mediator’s proposal” that the client did not even learn about until he was threatened with a lawsuit by his own lawyer two months later when the lawyer demanded that the client sign a lengthy settlement agreement. The agreement favored the lawyer (who had numerous fee agreements, some of which were presumptively fraudulent) more than it did the client. Based on *Cassel v. Superior Court* nothing that this lawyer said or did can ever be used against him.<sup>7</sup>

Jack Goetz and Jennifer Kalfsbeek-Goetz, who serve on the faculty at California State University Northridge, voice somewhat similar concerns about mediators.<sup>8</sup> Citing an article they co-wrote, they say:

Research consistently demonstrates that there is no reason to believe mediators are less prone to engage in misconduct than practitioners in other fields.... Sadly, mediators as a field have done very little to justify the umbrella confidentiality currently granted in most states, failing to monitor their own practitioners or requiring them to adhere to an ethics code or fulfill educational or training requirements demanded by other formalized professions...some of which have earned confidentiality privileges under state and federal evidentiary codes.

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4. Exhibit p. 1.

5. *Id.*

6. *Id.* at 2.

7. *Id.* at 1.

8. Exhibit p. 3.

The argument that the public interest in settling legal disputes is enough to bar any evidence of mediator misconduct and ultimately, ignore it, seems incredibly self-serving to mediators (who have not earned their practitioner qualifications through any recognized criterion) and incredibly insensitive to members of the public who may have been injured by mediation practitioners. Allowing a professional misconduct exception would not seriously reduce the supply of mediators in a crowded field for which the barriers to entry are extremely low, but would likely raise the quality of the practice and encourage the more serious practitioners to get better.<sup>9</sup>

They provided a copy of their article, but the staff has not yet reviewed it.<sup>10</sup> We will do so when time permits.

Finally, the Commission received a communication from Ron Makarem, who represented the unsuccessful party in *Cassel v. Superior Court*.<sup>11</sup> He notes that the attorney-client privilege already has an exception for professional misconduct, and suggests that the Legislature should create a similar exception to the statute protecting mediation communications.<sup>12</sup>

As an alternative, Mr. Makarem suggests that “clarification can be provided to the phrase in the statute ‘in preparation or furtherance of mediation.’”<sup>13</sup> He “believe[s] that the Supreme Court went too far in including conversations that occur only by client and attorney (i.e., attorney-client privileged communications) within the sphere of conversations that will be considered ‘in preparation or in furtherance of mediation.’”<sup>14</sup>

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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9. *Id.*

10. See Exhibit pp. 4-23.

11. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d (2011).

12. Exhibit p. 24.

13. *Id.*

14. *Id.*

## EMAIL FROM HOWARD FIELDS (6/10/14)

### Re: Relationship Between Mediation Confidentiality and Attorney Malpractice

Dear Ms. Gaal,

I understand that the Study K-2 will be discussed at a meeting on Thursday. Please bring this email to the participants' attention.

I am writing to express concerns regarding California Evidence Code section 1119 as interpreted by the California Supreme Court in the case of *Cassel v. Superior Court* (2011) 51 Cal.4<sup>th</sup> 113. There is good cause for an amendment to the statute because of how it has been interpreted by the Supreme Court which effectively immunizes attorneys who are able to lie, cheat and steal from their clients and then hide behind the "mediation privilege" for protection. That is something that certainly was never intended by the Legislature.

Since 1981 the majority of my practice has involved the representation of attorneys in claims brought against them. I have represented hundreds of lawyers and law firms and have also handled a fair number of cases against lawyers brought by clients who have been injured by the malpractice of their lawyers. I have participated in countless settlement conferences and mediations and have also sat as a settlement officer in many court supervised settlement programs. I am currently on a panel of mediators myself.

Unfortunately, I have come across cases where lawyers have I literally lied to their clients, threatened their clients, bullied their clients, harassed their clients and beat them into submission to sign documents. I have been involved in one case where not only was the client lied to, the attorney himself signed a comprehensive "mediator's proposal" that the client did not even learn about until he was threatened with a lawsuit by his own lawyer two months later when the lawyer demanded that the client sign a lengthy settlement agreement. The agreement favored the lawyer (who had numerous fee agreements, some of which were presumptively fraudulent) more than it did the client. Based on *Cassel v. Superior Court* nothing that this lawyer said or did can ever be used against him.

This type of egregious conduct by lawyers occurs far more than we would like to believe.

Justice Chin, in the concurring opinion in *Cassel v. Superior Court* appropriately observed:

The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive.<sup>13</sup> Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a *criminal* prosecution against the attorney

[citation]. This is a high price to pay to preserve total confidentiality in the mediation process

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This case does not present the question of what happens if every participant in the mediation except the attorney waives confidentiality. Could the attorney even then prevent disclosure so as to be immune from a malpractice action? I can imagine no valid policy reason for the Legislature to shield attorneys even in that situation. I doubt greatly that one of the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability. Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend. That question will have to await another case. But the Legislature might also want to consider this point.

The commission has received input from mediators. They do not need protection. Clients need protection from errant lawyers.

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**EMAIL FROM JACK GOETZ & JENNIFER KALFSBEEK-GOETZ (6/10/14)**

**Re: Mediator Confidentiality and Misconduct**

We largely agree with the previously published comments attributed to Ms. Yeend that urge the Commission to follow the lead of jurisdictions and statutes such as the UMA that recognize a professional misconduct exception to protection of mediation communications. Research consistently demonstrates that there is no reason to believe mediators are less prone to engage in misconduct than practitioners in other fields. (See the attached article which references many of the appropriate sources). Sadly, mediators as a field have done very little to justify the umbrella confidentiality currently granted in most states, failing to monitor their own practitioners or requiring them to adhere to an ethics code or fulfill educational or training requirements demanded by other formalized professions...some of which have earned confidentiality privileges under state and federal evidentiary codes.

The argument that the public interest in settling legal disputes is enough to bar any evidence of mediator misconduct and ultimately, ignore it, seems incredibly self-serving to mediators (who have not earned their practitioner qualifications through any recognized criterion) and incredibly insensitive to members of the public who may have been injured by mediation practitioners. Allowing a professional misconduct exception would not seriously reduce the supply of mediators in a crowded field for which the barriers to entry are extremely low, but would likely raise the quality of the practice and encourage the more serious practitioners to get better.

Regards,

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SERVING THE PUBLIC:  
THE CASE FOR FORMALLY PROFESSIONALIZING COURT-CONNECTED AND  
LITIGATED-CASE MEDIATION

*Jack R. Goetz, Esq., Ph.D., Jennifer Kalfsbeek, Ph.D.\**

**Introduction**

It is not illegal for someone in California to raise a sign or to place an ad claiming to be a mediator, charge fees for mediation, and engage in this largely unregulated process intending to serve the public by helping parties resolve disputes. As the ninth largest global economy, California is a sizeable and an illustrative example of how the mediation field operates within the United States as well as where the field may be moving as the occupation evolves.<sup>1</sup> Young notes, “most mediators in most states . . . can hang up a shingle without meeting any licensing or training requirements or agreeing to be bound by any ethical guidelines. Most mediators are beyond any state-sponsored sanctioning process.”<sup>2</sup> Jarrett writes that the field of mediation is borne out of the counterculture movements of the 1960’s and 1970’s, a rejection of a formalistic, legal system that resolves disagreements in a prescribed manner.<sup>3</sup> Thus, the field continues to have an occupational preference for no regulation, with perhaps a sentiment that if mediator regulation became the norm, mediation would lose its creative spirit.<sup>4</sup> For this reason, the mediation community in the United States is debating the need to formally professionalize mediation.

This article posits that the field of mediation can better serve the public by developing a system of public accountability that would elevate itself to a formal, professional status. What’s more, the proverbial train may have already left the station in disputes that are resolved in a public forum: court-connected and litigated cases. Client expectations and the statutes protecting confidentiality in mediation anticipate professionals, and the mediation practice therein has rapidly evolved towards professionalization. These public-forum litigated case mediators are often regulated under local court or state rules, which also require some mediation training, thus putting them ahead of the rest of the field of mediation with regard to professionalization. However, the final steps that are required by other professions, with the inclusion of a common ethical code and a qualifying exam, are still not standard for mediators. Without establishing some of the fundamental elements that are at the core of professions, including agreement on what constitutes mediator education or training and willingness of the field to keep out other

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\* Dr. Goetz is the academic lead of the Mediation and Conflict Resolution program at California State University–Northridge, serves on the executive committee for the Los Angeles County Bar Association: Attorney Client Mediation and Arbitration Services, and also serves as co-chair of the Southern California Mediation Association Committee on Voluntary Mediator Certification. Dr. Kalfsbeek is the Assistant Dean of the College of Extended Learning, specializing in professional and graduate education, at California State University–Northridge, and has served as a sociology and psychology professor for 18 years.

<sup>1</sup> Legislative Analyst’s Office, California’s Nonpartisan Fiscal and Policy Advisor *2013 Cal Facts*, available at [http://www.lao.ca.gov/reports/2013/calfacts/calfacts\\_010213.aspx](http://www.lao.ca.gov/reports/2013/calfacts/calfacts_010213.aspx) (last visited Aug. 22, 2013).

<sup>2</sup> Paula M. Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field* 21 OHIO ST. J. DISP. RESOL. 721 (2006).

<sup>3</sup> Brian Jarrett, *The Future of Mediation: A Sociological Perspective*, 2009/1 OHIO ST. J. DISP. RESOL. 49 (2009).

<sup>4</sup> Jean R. Sternlight, “Live Free” or Regulate? 19 A.B.A. DISP. RESOL. MAG. (2013), available at [http://www.americanbar.org/publications/dispute\\_resolution\\_magazine/2013/spring/-live-free--or-regulate-.html](http://www.americanbar.org/publications/dispute_resolution_magazine/2013/spring/-live-free--or-regulate-.html)

would-be practitioners who do not meet a common standard, mediation has failed to live up to the standard of the other professions and therefore undercuts its value for the community. Ultimately, in the absence of establishing a professional standard, the fundamental judgment and enforcement of what constitutes a “mediator” in public forum litigated cases is deferred to local courts, providing unevenness in application. For example, in Los Angeles, one of the largest counties in the world, budget pressures ultimately led to the demise of the court-connected mediation panel,<sup>5</sup> reputedly the largest court-connected panel in the United States.

This article attempts to answer the long debated issue about whether mediation is a profession, but leaves plenty for future research. It does not attempt to answer the political question regarding which governmental or non-governmental body should professionalize mediators. It does not attempt to define, other than by demonstrating what has been required to date in mediation and other occupations, what should be the ultimate standard for mediation professionalization. This article will however, look at the sociological view of professions, review the current discussion and treatment of the mediation field, and analyze what it might take to move mediation as a whole, and then court-connected and litigated-case mediation, to profession status. Finally, with special focus on court-connected and litigated-case mediation, this article will conclude by reviewing some of benefits and detriments of converting an occupation to one that is a recognized profession.

### **Defining Mediation and Court-Connected and Litigated-Case Types**

Mediation is a process in which a third party, called a “neutral,” assists disputants in creating their own solution to a conflict.<sup>6</sup> Mediators do not make rulings in matters, but they facilitate problem solving between disputants. While some mediators are also attorneys, many are not. Additionally, mediation is sometimes confused with arbitration; however, arbitration involves a hearing in which the arbitrator is charged with hearing evidence and making a court-like ruling.

Mediators utilize the principle of party self-determination, facilitating negotiations between the parties until an agreed upon final settlement is reached. If the mediator is involved in a dispute that has already been filed as a lawsuit, it is referred to as litigated-case mediation; if the mediator receives the mediation assignment under the auspices of a court process or the court has made the mediator’s name available to the parties, it is considered a court-connected case. As noted previously, the mediation community in California and beyond is currently debating the need to formally professionalize the practice of mediation.

### **Behaving “Professionally” versus Being a Recognized Professional**

It is common for members of occupations to ask themselves if they should become a formalized “profession.” This occupationally defining question can lead to complex discussions

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<sup>5</sup> Los Angeles Superior Court, Public Information Office *Los Angeles Superior Court Eliminates Alternative Dispute Resolution Services*, available at <http://www.lasuperiorcourt.org/courtnews/Uploads/14201332216264013NRADRclosure.htm> (last visited June 16, 2013).

<sup>6</sup> Karl A. Slakieu, *When Push Comes to Shove: A Practical Guide to Mediating Disputes* (1996).



among colleagues. A person behaving in a manner that is respectful and appropriate among occupational peers is often said to be acting *professionally*. Yet not all occupations are “professions.” Sociologist Craig McEwan notes on mediator professionalism that the “effort to offer professionalism without professionalization suggests multiple meanings of these concepts.”<sup>7</sup> Clearly, the notion of “profession” is widely used yet not commonly understood.

Pavalko’s seminal text notes that defining “profession” is complex because we use the word “profession” in varying ways. Pavalko notes three ways in which “profession” is commonly understood: 1) profession as full-time activity, 2) profession as competence, and 3) *the professions*.<sup>8</sup> The former two notions refer to common colloquial ways in which people refer to being professional; the latter refers to what it means to be a formally recognized profession, with the rights and restrictions attached to this status. Mediation’s occupational status is linked to the understanding of these distinctions.

One is oftentimes considered “professional,” or engaging in a “profession,” when referring to their “full-time performance of an activity for pay in contrast to engaging in the activity on a part-time basis, as a recreational activity, or without pay.”<sup>9</sup> An athlete or actor who moves from amateur status to working for pay will oftentimes separate themselves from amateurs by referring to themselves as “professional athletes” and “professional actors.”<sup>10</sup> The term “professional,” in these instances, denotes making a living at doing the specified activity. It is also the case that one may wish to convey their specialized skill in an area, or their competence and proficiency in performing a specific set of tasks, by stating that they are a “professional.” This is done to instill confidence in consumers. When someone publicizes that they are a professional carpenter, they are conveying that they are highly skilled at the carpentry trade; “businesses that advertise in this way are attempting to capitalize on popular understandings of the meaning of the term ‘professional’ and turn them to their own commercial advantage.”<sup>11</sup>

These colloquial notions of being “professional” blur the distinction between occupations in which people can earn a living and those that have earned the status that is derived from being part of a formalized profession. Occupations that are formalized “professions” possess characteristics that transcend the fact that one can earn a living in the performance of that occupation. In meeting these additional standards, members of the professions enjoy privileges and the status reserved for occupations that have set qualifications; most importantly, the public they serve can trust that their providers meet a set of standards that are established and overseen by the experts in that field.

### **The Professions: A Detailed Explanation**

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<sup>7</sup> Craig McEwan, *Giving Meaning to Mediator Professionalism*, SPRING A.B.A. DISP. RESOL. MAG. 3 (2005).

<sup>8</sup> R. Pavalko, *Sociology of Occupations and Professions*, (1988).

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

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

## Professionalizing Mediation

In order to be a formally recognized profession, an occupation must possess five sociologically defining characteristics of professions as listed below and described in the sections to follow.<sup>12 13 14 15</sup>

1. Service to the Public
2. Code of Ethics
3. Self-Regulation
4. Specialized Education
5. Authority

This article will look at a number of professions that are recognized in the United States and throughout the globe, from physicians to social workers, all of which meet this sociologically defining test. Many occupational groups meet some of the characteristics of professions, and because of the definitional blurring that occurs between the word “professional” or acting “professionally” in contrast to being a member of a profession, it may seem that more occupations are professions than what is the case.

### **Mediation is not a Profession Yet**

Detailed in the sections to follow is an explanation of each of the characteristics of the sociological definition for professions and a perspective as to whether mediation meets the characteristic. Table 1 provides a summary of these sections by assessing six established professions, the general field of mediation, and court-connected mediation, against the five criteria for professions. The test reveals that mediation as a whole does not possess all of the characteristics of a profession. However, court-connected mediation is closer to meeting the characteristics and could lead the field into professionalization by setting out to fully meet the final characteristics.

### **Service to the public: Mediation meets this criterion.**

Most professionals become practitioners because they wish to serve society. Others are members of professions that, at least in part, are considered necessary for society’s greater good. Therefore, service to the public is one of the more distinct characteristics of professional practitioners, like nurses and teachers who “have concern for others that go beyond their self-interest of personal comfort.”<sup>16</sup> Most professional work groups, such as physicians, social workers, and psychologists, seek to underscore the “ideal of service” to society as their primary objective.<sup>17</sup>

Service to the public is critical to professions because “the work of the professions is seen as strongly related to the realization of [societal] values.”<sup>18</sup> Values are widely held notions

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<sup>12</sup> D. Kendall, *Sociology in Our Times* (9<sup>th</sup> ed. 2013).

<sup>13</sup> MacDonald 1995.

<sup>14</sup> Pavalko *supra*.

<sup>15</sup> D. Rossides, *Professions and Disciplines: Functional and Conflict Perspectives* (1998).

<sup>16</sup> Kendall, *supra* at 392.

<sup>17</sup> Pavalko, *supra* at 23.

<sup>18</sup> Pavalko, *supra* at 21.

regarding what is good or bad, right or wrong, desirable or undesirable within a society.<sup>19</sup> Values provide us with the principles and the subjective lens from which we evaluate behaviors, events, objects, etc.<sup>20</sup> Common values held in the United States include: justice, liberty, personal safety and security, and the belief that individuals should have access to lifelong health and happiness.

Conversely, some occupational groups have become professions because their formal professional status requires that practitioners engage in their work with an eye towards serving the public. This group of professionals, including public accountants and architects, may not have chosen their occupation because they were compelled to serve the greater good, but they cannot legitimately engage in their fields unless they learn to abide by professional standards that require them to uphold accountability to the public and public safety.

Mediation meets the criterion of service to the public because it seeks to facilitate an agreement between consenting parties in disagreement. Mediation supports the values of peace, justice and cooperation. The societal benefits of this value-laden action include reducing litigation costs for private parties and the courts, fostering peaceful communities, and providing service to individuals and entities that otherwise might not have access to these services.

### **Code of ethics: Mediation does not currently meet this criterion.**

Codes of ethics are sanctioned norms, or expected behaviors and practices that are articulated by regulating bodies. While some occupations and work groups possess codes of ethics, all professions possess a code of ethics by which all members of the profession are required to obey.<sup>21</sup> Because professions self-regulate, professionals can be held accountable for their actions and required to adhere to their professional code of ethics or risk losing their professional status. While all professions possess a code of ethics, professionals are not necessarily more honorable than non-professionals. However, because professional regulating bodies oversee their members, and sanction their codes, professions can assure the public that they will uphold their codes and, if a professional member breaks a code, their actions are punishable. Possessing a code of ethics also reinforces the “service to the public” value of professions as it serves as a promise of responsibility to society.<sup>22</sup>

Many organizations have developed codes of ethics for mediators (Model Standards of Conduct for Mediators, American Bar Association, 2005; International Mediation Institute, 2013; California Dispute Resolution Council, 2013). Court-connected panels have regulatory systems that often include a code of ethics. Jarrett writes, “a review of a sample of thirty mediator ethics codes from prominent mediator organizations revealed that these codes have almost all reproduced the neutrality and/or impartiality ethics in their definition of mediation.”<sup>23</sup> Despite the proliferation of, and commonalities between, the various codes, there is no universal regulatory system that exists to enforce them for the mediation field except on a fluctuating

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<sup>19</sup> R. Williams, *American Society: A Sociological Interpretation* (3d ed. 1970).

<sup>20</sup> Kendall, *supra*.

<sup>21</sup> Pavalko, *supra*.

<sup>22</sup> Pavalko, *supra*.

<sup>23</sup> Jarrett, *supra* at 63.

region-by-region basis. Should mediation self-regulate, those regulations would include the creation and enforcement of a common code of ethics.

**Self-regulation: court-connected panels are close to meeting this criterion, mediation overall lacks self-regulation.**

An occupational group is not a profession without self-regulation, in part because, without regulation, an occupational group cannot fully, and ethically, serve the public. “All professions have licensing, accreditation, and/or regulatory associations that set professional standards and that require members to adhere to a code of ethics as a form of public accountancy.”<sup>24</sup> The argument that mediation should not be regulated is therefore an argument that mediation is not a profession.

Three facets of professions underscore the necessary inclusion of self-regulation as a key characteristic of all professions: **autonomy** of practice; a **qualifying examination**; and a professional **oversight body**. Some occupations include some of these “self-regulation” facets, which can lead people to believe that an occupational group is fully self-regulating. Recognized “professions” however meet all three facets of self-regulation.

First, a distinctive feature of professional work is that professionals typically engage in their work independent of direct supervision. A “professional” is expected to rely on their own judgment in selecting the correct approach to a task or the best technique to use when solving a problem.<sup>25</sup> Professional groups possess “the freedom and power to regulate their own work behavior and working conditions.”<sup>26</sup> With this privilege of autonomy comes the responsibility to self-regulate. To act autonomously, without regulatory oversight, may eventually lead to an abuse of power and possible discrediting of an occupation altogether. Mediators act autonomously when they work with clients. According to McEwan and Freidson, members of professions “control their own work” on a day-to-day working basis as well as on a professional-level scale.<sup>27 28</sup> Coben chronicles how mediators rely on their best judgment or self-imposed restraint to honor the mediation principle of self-determination as they influence the parties towards settlement.<sup>29</sup> Therefore, mediation meets the characteristic of autonomy. Herein lies the dilemma; mediators act autonomously, yet if they abuse this power, there are no common, formal remedies in place for wronged parties because mediation is not yet fully regulated. In fact, Young chronicles the inability of disputants to successfully sue mediators, even in situations in which allegedly substandard mediation practices are utilized that injure disputants.<sup>30</sup>

Second, all professions possess a qualifying examination that *certifies* or *licenses* one as a *credentialed* practitioner. Common nomenclature on this topic can be confusing. Some occupational groups such as physicians and dentists require their members to be “certified” by passing a certification examination that is overseen by their private, professional association in

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<sup>24</sup> Kendall *supra*.

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

<sup>26</sup> Pavalko *supra* at 25.

<sup>27</sup> McEwen *supra*

<sup>28</sup> E. Freidson, *Professionalism Reborn, Theory, Prophecy, and Policy* at 173 (1994).

<sup>29</sup> J. Coben, *Mediation's Dirty Little Secret: Straight Talk about Mediator Manipulation and Deception*, 2 J. DISP. RESOL. ON EMP. 4 (2000).

<sup>30</sup> Young *supra*.

addition to being licensed by their states to practice.<sup>31</sup> Others, such as nurses and social workers, expect their practitioners to become “licensed” by passing a state-sanctioned examination that qualifies them to practice in a state.<sup>32 33</sup> Other groups still, including teachers and attorneys, speak of an overarching examination, or credentialing test, which sets the bar for entry to become a practicing member of the profession before they obtain a state license to practice.<sup>34 35</sup>

A professional may be certified by their professional body and licensed by their state to practice, or they may pass a licensing exam in their state which qualifies them to practice. Therefore, some professions require certification and licensing and others may require just private certification or state licensure. The key distinction between licensing and certification is that “licensing is a mandatory credentialing process established by a state government board. Certification is a voluntary credentialing process by a non-governmental, private professional association. In some cases, professional certification is a requirement for employment, even when a state license is not necessary.”<sup>36</sup> Regardless of the terminology used, or the type of qualification that is applied to the profession (a state-mandated license or not), a qualifying exam of some type – like the bar examination for attorneys, the Medical Board Certification Examination for physicians and dentists, and the Social Work Licensing Exam – is a required facet of self-regulation for all recognized professions. A license, certification, or other qualifying examination serves as a screening device. The objective of these qualifying examinations is to protect the interests of the public by assuring that practitioners hold an agreed-upon level of knowledge and skill, and by filtering out those with substandard levels of knowledge and skill. In its February, 1997 report on teaching professionalization, the National Center for Educational Statistics states: “Professions require credentials. That is, nearly all professions require completion of an officially sanctioned or accredited training program and passage of examinations in order to obtain certification, a credential or a licensure to practice.”<sup>37</sup> However, the field of mediation does not yet require its practitioners to pass a qualifying examination to work as “mediators.”

The third and final facet of self-regulation is the existence of a profession-specific oversight body. To pass a qualifying exam alone only establishes that one can work as a member of the occupation, and it sets a bar-for-entry to practice; however, it does not assure compliance to any occupational codes of practice or a common code of ethics. To be fully self-regulated, an occupation must also include a governing or oversight body that assures adherence to the codes

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<sup>31</sup> American Board of Medical Specialties, *What Board Certification Means*, available at [http://www.abms.org/About\\_Board\\_Certification/means.aspx](http://www.abms.org/About_Board_Certification/means.aspx) (last visited Nov. 19, 2013).

<sup>32</sup> American Nurses Association, *Career and Credentialing*, available at <http://www.nursingworld.org/MainMenuCategories/CertificationandAccreditation> (last visited July 17, 2013).

<sup>33</sup> Association of Social Work Boards, *The DSM-5 and the ASWB Social Work Licensing Exams*, available at <http://www.aswb.org/announcements/the-dsm-5-and-the-aswb-social-work-licensing-exams/> (last visited Nov. 17, 2013).

<sup>34</sup> American Bar Association, *ABA Mission and Goals*, available at [http://www.americanbar.org/about\\_the\\_aba/aba-mission-goals.html](http://www.americanbar.org/about_the_aba/aba-mission-goals.html) (last visited July 2, 2013).

<sup>35</sup> American Teachers Association -- National Education Association, *NEA's Vision, Mission and Values*, available at <http://www.nea.org/home/19583.htm> (last visited July 17, 2013).

<sup>36</sup> World Education Services, *Professional Licensing and Certification in the U.S.*, available at <http://www.wes.org/info/licensing.asp> (last visited Aug. 20, 2013).

<sup>37</sup> National Center for Educational Statistics, *Teacher Professionalization and Teacher Commitment: A Multilevel Analysis*, available at <http://nces.ed.gov/pubs/97069.pdf> (last visited June 16, 2013).

and approved practices of the work group. To regulate is to serve the greater good of the public, because through the process of self-regulation, a common code of ethics is adopted, a formal bar-for-entry is established, and an oversight body is created to monitor the actions of the professionals and to enforce adherence to the professional codes. Typically, the last step in becoming a formalized profession is self-regulation, because regulation requires the establishment of a qualifying exam, adoption of a common code of ethics, adoption of a professional oversight body of peer professionals, and lastly, the establishment of a standard for specialized education – the fourth characteristic of professions. As of the time of this writing, no recognized oversight body that monitors mediators existed. However, courts often maintain a complaint process;<sup>38</sup> therefore, court mediation panels are closer to meeting the definition of a profession under the self-regulation standard than the rest of mediation.

**Specialized education: mediation as a whole does not meet this criterion; court-connected mediation panels may meet this criterion.**

Because members of professions are expected to make autonomous judgments, pass a qualifying examination, and adopt and embody a professional code of ethics, professionals are characterized by the successful attainment of a specialized education. While it is recognized that all occupational work involves the acquisition of skills and knowledge, professional work requires: 1) education that focuses on an **abstract and complex knowledge-base**, 2) **practical training**, and 3) **continuing education** throughout one’s participation as a professional. In order to accomplish the specialized educational goals of a profession, professions today require members to attain a degree in **higher education**.

Rossides writes that professions are largely defined by the specific academic education required for competence.<sup>39</sup> Specialized training in higher education is one of the key qualifiers for professions.<sup>40</sup> Medical doctors, licensed social workers, and attorneys need graduate level degrees to meet the educational standards of their professions. Accountants and teachers need baccalaureate degrees to qualify. Nurses need a minimum of an associate’s degree. Mediation, because it is largely unregulated in the United States, does not have a common degree or specified education level that is expected in the field, with the possible exception of some court-connected panels. However, the variation in court-connected panels is extreme. Some courts in Minnesota, Oregon, and Maine require no degree at all.<sup>41 42 43</sup> Some courts in California and Virginia require a bachelor’s degree.<sup>44 45</sup> Others still, in Georgia and California, require a law

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<sup>38</sup> Young *supra*.

<sup>39</sup> Rossides *supra*.

<sup>40</sup> Kendall *supra*.

<sup>41</sup> Minnesota Supreme Court, *Minnesota General Rules of Practice for the District Courts*, available at <http://www.mncourts.gov/rules/general/GRtitleII.htm#g11413> (last visited Aug. 25, 2013).

<sup>42</sup> Oregon Mediation Association, *OMA Model Guideline for Practitioner Mediator Education, Training, and Experience*, available at <http://www.omediate.org/docs/Model%20Guidelines%20Amended%2012-15-10.pdf> (last visited Aug. 25, 2013).

<sup>43</sup> State of Maine Judicial Branch, *Becoming a Neutral*, available at [http://www.courts.state.me.us/maine\\_courts/adr/become\\_neutral.html](http://www.courts.state.me.us/maine_courts/adr/become_neutral.html) (last visited Aug. 25, 2013).

<sup>44</sup> Superior Court of California, County of San Diego, *Civil Mediation Program Guidelines*, available at [http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/CIVIL2/ADR2/MEDIATION/MEDIATIONTEXT/MEDIATOR\\_MANUAL\\_FINAL\\_APRIL\\_2013.PDF](http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/CIVIL2/ADR2/MEDIATION/MEDIATIONTEXT/MEDIATOR_MANUAL_FINAL_APRIL_2013.PDF) (last visited Aug. 25, 2013).

degree.<sup>46 47</sup> While the wisdom of requiring a law degree will be discussed in this article's concluding remarks, the court-connected mediators who have earned a higher education degree are closer to meeting the professional norm for higher education attainment for professions.

According to Pavalko, "a profession is an occupation that has developed a complex knowledge-base that serves as the basis of its members' claim to special expertise."<sup>48</sup> Pavalko also points out that with professional education, emphasis is placed on "mastering the ability to manipulate ideas, symbols, concepts and principles rather than things and physical objects."<sup>49</sup> The abstract and complex core knowledge-base that could support mediation as a profession is written into the minimum qualification standards for some state statutes and court-connected panels.

California, for example, has codified this core knowledge in the Dispute Resolution Programs Act.<sup>50</sup> DRPA authorizes public funding for dispute resolution conducted under certain conditions, including that mediators who are conducting a mediation that qualifies for funding meet a minimum of 25 hours of classroom training, including at least 10 hours of lecture and discussion on specific topics germane to mediation theory, and 10 hours of mediation role plays using simulated disputes. The abstract and complex core knowledge specified by that statute includes, communication skills and techniques, building trust, gathering facts, framing issues, empowerment tactics, effective listening and clarification skills, problem identification, identifying options, building consensus, as well as being able to manage the mediation process through settlement. DRPA, however, does not require its mediators to have a higher education degree.

While individual variances in hours devoted to acquiring and maintaining the mediation-specific abstract and complex knowledge base exist, the topics that are at the center of the DRPA statute also resonate with court-connected panel requirements elsewhere. Raines, Hedeem and Barton recently recommended a universal core training requirement of 24 hours for court-connected mediations that included training on the mediation process and fundamental skills, including listening, questioning, framing skills, and ethical practice, with additional hours depending upon the area and setting of the mediation practice.<sup>51</sup> Previously cited, Oregon and Minnesota are other examples of mediator training models largely based on similar topics enumerated by DRPA and the Raines, Hedeem and Barton study.

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<sup>45</sup> Supreme Court of Virginia, *Guidelines for the Training and Certification of Court-Referred Mediators*, available at [http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/certification\\_process/certification\\_requirements.html](http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/certification_process/certification_requirements.html) (last visited Aug. 25, 2013).

<sup>46</sup> Georgia Supreme Court, *State and Local Requirements for Court Connected Mediation in Georgia*, available at <http://www.centerforlegalsolutions.org/neutrals/requirements.general.mediation.php> (last visited Aug. 25, 2013).

<sup>47</sup> Superior Court of California, County of Orange, *Civil Mediation Program Guidelines*, available at <http://www.occourts.org/directory/civil/alternative-dispute-resolution/pdfs/civil-mediation-program-guidelines.pdf> (last visited Aug. 25, 2013).

<sup>48</sup> Pavalko *supra* at 20.

<sup>49</sup> Pavalko *supra* at 23.

<sup>50</sup> Dispute Resolution Programs Act, *Regulations* "Article 3. Grantee Operations, Training and Service Standards," available at [http://www.dca.ca.gov/publications/dpra\\_regs.shtml#article3](http://www.dca.ca.gov/publications/dpra_regs.shtml#article3) (last accessed June 30, 2013) [Hereinafter DRPA].

<sup>51</sup> S. Raines et al., *Best Practices for Mediation Training and Regulation: Preliminary Findings*, 48 FAM. CT. REV. 541 (2010).

Professions also typically expect their members to engage in practical training and continuing education. Proof of practice by way of residency training, clinical hours, or practical training hours is required of most professions including physicians, social workers, nurses, and teachers.<sup>52 53 54 55</sup> Lastly, all formal professions explored in this article require continuing education while a practitioner remains a member of their profession.

While this article was not written to be a comprehensive national or state-specific look at what the courts have required in terms of specialized education and training (see Mediation Training International Institute, 2013 for a state by state listing),<sup>56</sup> the trend with those who have looked at the issue of mediating the court-connected or litigated-case is to push the field towards professionalization in this category. Courts often define a core complex knowledge-base, and may require either an undergraduate or law degree in addition to 24-60 hours of mediation-specific training. Additionally, courts often seek mediator commitment to follow court rules; to require some prior mediation experience; to require some engagement in continued mediator training; and attempt to regulate mediators against whom complaints have been filed by litigants.

**Authority: litigated-case and court-connected mediators are assumed to meet this criterion; mediation in general does not meet the criterion.**

Because professionals possess specialized knowledge and skills that are recognized by the public to be of value, professions exist to support the greater good of a society. Combined with their power to self-regulate, professionals possess significant authority in society<sup>57</sup> If an occupational group possesses the first four characteristics of a profession, the final yet critically impacting characteristic – authority – is inherent. Power can be garnered through legitimate and illegitimate means. One can gain power over others because members of the community fear them, or believe that they must obey a person because that person or his/her perceived position has persuaded them to do so. At some point in the pre-professional history of professions, anyone in society could have held themselves out to be a “healer,” “solicitor,” or “teacher.” It is often at this point in the life cycle of a “profession” when occupational groups determine if there is a need to become a profession, for the sake of the greater good of the public. Authority is power that is accepted to be legitimate;<sup>58</sup> professionals possess the power of authority.

Non-professions that are not self-regulated do not possess the same legitimate authority in society. Without the authority that is bestowed upon professionals, an occupational work group cannot be sure that all members of the group are at least required to act in accordance within their professional code of ethics. Therefore, mediators currently possess varying degrees

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<sup>52</sup> American Medication Association, *Medication Education and Careers in Health Care*, available at <http://www.ama-assn.org/ama/pub/education-careers.page> (last visited July 17, 2012).

<sup>53</sup> American Nurses Association *supra*.

<sup>54</sup> American Teachers Association *supra*.

<sup>55</sup> National Association of Social Workers *About NASW*, available at <http://www.naswdc.org/> (last visited Aug. 17, 2013)

<sup>56</sup> Mediation Training International Institute, *State Requirements for Mediators*, available at <http://www.mediationworks.com/medcert3/staterequirements.htm> (last visited June 16, 2013).

<sup>57</sup> Kendall *supra*.

<sup>58</sup> Kendall *supra*.



## Professionalizing Mediation

of power and do not have the authority that normally characterizes a profession. The public benefits greatly from the legitimate authority provided by the status of professional occupations.

Mediation as an occupation, and court-connected mediation when considered a separate occupation, does not stack-up favorably against recognized professions on the basis of the sociological criteria established. Table 1 outlines six established professions that have been assessed based on the five characteristics of a profession including: physician, social worker, accountant, nurse, teacher, and attorney.<sup>59 60 61 62 63 64</sup> The occupational field of mediation overall, and court-connected mediation, are also aligned with the professional characteristics. While the formally recognized professions fully meet the five characteristics of professions, mediation overall meets one of the characteristics, and court-connected mediation fully meets three of the characteristics and partially meets the other two characteristics of professions.

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<sup>59</sup> American Accounting Association, *About American Accounting Association*, available at <http://aaahq.org/about.cfm> (last visited July 17, 2013).

<sup>60</sup> American Bar Association *supra*.

<sup>61</sup> American Medication Association *supra*.

<sup>62</sup> American Nurses Association *supra*.

<sup>63</sup> American Teachers Association *supra*.

<sup>64</sup> National Association of Social Workers *supra*.

**Table 1: Five Characteristics of Professions by Occupation/Profession**

	Service to the Public	Code of Ethics	Self-Regulation	Specialized Education	Authority
Registered Nurse	Yes	Yes: COE	Yes: QE, OB, Autonomy is norm	Yes: HE, CE, PT	Yes
Teacher	Yes	Yes: COE	Yes: QE, OB, Autonomy is norm	Yes: HE, CE, PT	Yes
Certified Public Accountant	Yes	Yes: COE	Yes: QE, OB, Autonomy is norm	Yes: HE, CE, no PT	Yes
Licensed Social Worker	Yes	Yes: COE Client-practitioner confidentiality	Yes: QE, OB, Autonomy is norm	Yes: HE, CE, PT	Yes
Physician	Yes	Yes: COE Client-practitioner confidentiality	Yes: QE, OB, Autonomy is norm	Yes: HE, CE, PT	Yes
Attorney	Yes	Yes: COE Client-practitioner confidentiality	Yes: QE, OB, Autonomy is norm	Yes: HE, CE, no PT	Yes
Mediator	Yes	No COE for mediators; some local codes of ethics. Client-practitioner confidentiality is granted by some statutes	No: No QE, No OB, Autonomy is norm	No commonly required HE; requirements vary  No commonly required CE or PT; requirements vary	No: Level of perceived authority varies.
Mediator: Court-connected	Yes	Partial: Some court program statutes include COE. Client-practitioner confidentiality is granted by some statutes	Partial: No QE, No common OB, Autonomy is norm	Partial: No commonly required HE; requirements vary  Yes: CE, PT	Yes: Work in courts assumes authority by public consumers

*Note.* CE = continuing education, COE = common code of ethics, HE = degree of higher education; may be a graduate or undergraduate degree. OB = oversight or regulating body, PT = practical or clinical training, QE = qualifying exam; may be a licensure, certification, credentialing or Bar exam

### **Current Statutory Treatment and Discussion on Mediation as a Profession**

Unfamiliarity with sociological standards clouds the discussion of mediation as a profession and contributes to the field's indecisiveness on the topic. As noted at the beginning of the article, Young wrote that mediation is largely unregulated in the United States, a critical component of being a profession.<sup>65</sup> Yet, Young also chronicles national disagreement about whether mediation is considered a profession. Perhaps it should not be a surprise that there would be disagreement; individuals who hold themselves out to the public as mediators are from disparate backgrounds, including attorneys and psychologists, who already qualify as professionals based upon the five characteristics noted above.

Professions within the United States are created either on a state or national level. Using the California Business and Professions Code as an example, states generally regulate two types of occupations; those for which there is a perceived need to protect the public, and those occupations that are considered professions. Mediation's lack of inclusion in that Code means that it is not in either category. Thus, amongst the occupations that are not professions but for which there is a perceived need to protect the public, the Code has regulations pertaining to funeral directors, re-possessors, and pest control operators. Levin notes the absence of complaints from consumer advocacy groups and the like in the field of mediation that would otherwise require state regulation.<sup>66</sup> Indeed, based upon mediation missing from this first type of occupation that is regulated under the Code, that may in fact be the case. However, pinning the regulation of an occupation primarily to the lack of public complaint ignores the second category of occupations regulated under that Code and other similar state codes: Professions. Accountants, doctors, attorneys, and social workers are among the professions for whom one can find a regulatory scheme under the Code; mediators are not among these.

### **Evidentiary code confidentiality protections contemplate mediators as part of a profession.**

Communications with mediators receive protection under the laws in most states as if they were members of a profession. The National Conference of Commissioners on Uniform State Laws, drafters of the Uniform Mediation Act [hereinafter UMA] that has been adopted in 11 states and is intended to be the main body of law governing mediators, remark on their website that "the UMA's prime concern is keeping mediation communications confidential."<sup>67</sup> The NCCUSL (2003, p.7,8) had previously noted that "virtually all state legislatures have recognized the necessity of protecting mediator confidentiality . . . justifications for mediator confidentiality resemble those supporting other communication privileges, such as the attorney-client privilege, the doctor-patient privilege, and various other counseling privileges."<sup>68</sup>

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<sup>65</sup> Young *supra*.

<sup>66</sup> Diane Levin, *Public Licensing and Regulation of Mediators: The Arguments For and Against*, available at <http://mediationchannel.com/2009/10/18/public-licensing-and-regulation-of-mediators-the-arguments-for-and-against/> (last accessed July 17, 2013).

<sup>67</sup> National Conference of Commissioners on Uniform State Laws, *Mediation Act Summary*, available at <http://uniformlaws.org/ActSummary.aspx?title=Mediation%20Act> (last visited Aug. 12, 2013) [Hereinafter NCCUSL].

<sup>68</sup> NCCUSL, *Uniform Mediation Act*, available at [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf) (last visited Aug. 12 2013).

Using California again as an example, the California Evidence Code sections §1115-1123<sup>69</sup> cloak what transpires in mediation with confidentiality. The CEC indicates that what is said in mediation cannot be used in litigation as evidence, and notes that other materials developed for the mediation are similarly protected. Callahan notes that, “while California’s confidentiality protections have been stated in the form of an evidence exclusion provision, California courts have construed this provision more like a privilege.”<sup>70</sup> However, with those occupations that enjoy confidentiality privileges conferred by the state and used by the drafters of the UMA to support mediation confidentiality, and with the other occupations engaged in rendering services in which confidential privileged communications take place under the CEC, such as an attorney or a doctor, the communication is one with a professional who is regulated, invariably licensed by the state and subject to license forfeiture for misuse of that license. Each professional has taken qualifying examinations in which knowledge of the ethics of the profession are tested. In stark contrast to those professions, mediators operate with the protection of the state statutes, the UMA, and the CEC without being licensed or tested on their knowledge of ethics or of any of the complex knowledge-base that forms the backbone of mediation practice.

Further complicating this issue is the fact that mediators are treated as if they are from a profession, which is the proverbial “elephant in the corner” concept of mediator manipulation. As part of customary practice, mediators manage the agenda and communications between the disputants and use the confidentiality protections so that neither party truly has full disclosure. Coben noted, “mediators themselves routinely and unabashedly engage in manipulation and deception to foster settlements, albeit under the rationale of fostering self-determination.”<sup>71</sup> Coben further states, “surely one must question if a settlement is ever truly self-determined when it is the product of manipulative tactics (no matter how well-intentioned).”<sup>72</sup> The NCCUSL (2003) justify the support for mediation confidentiality legislation nationwide and the UMA’s mediation confidentiality provision in that it promotes candor and encourages early resolution of disputes.<sup>73</sup> However, “blanket protection” for mediator confidentiality is not without its detractors; Deleissegues (2011),<sup>74</sup> citing Factor,<sup>75</sup> writes that “mediation confidentiality protects an incompetent mediator, prevents testimony regarding malpractice, and prevents third parties from learning vital information that might protect them.” While there are good and bad practitioners in every profession, mediation as a field has not yet earned the status of a profession that ordinarily justifies the public trust envisioned by the confidentiality protections.

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<sup>69</sup> California Evidence Code, *Section 1115-1128*, available at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=01001-02000&file=1115-1128> (last visited Nov. 18, 2013) [Hereinafter CEC].

<sup>70</sup> R. Callahan, *For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in which the Litigation is Pending* 12 PEPP. DISP. RESOL. L. J. 94.

<sup>71</sup> Coben *supra* at 5.

<sup>72</sup> *Id.*

<sup>73</sup> NCCUSL *supra* at 7

<sup>74</sup> C. Deleissegues, *Mediation Confidentiality: Has It Gone Too Far?* 33 U. La Verne L. Rev. 123.

<sup>75</sup> M. Factor, *The Trouble with Foxgate and Rojas: When Should Public Policy Interests Require that Mediation Confidentiality in California be Subject to Certain Common Sense Exceptions*, available at <http://www.mediate.com/articles/factorM1.cfm> (accessed June 16, 2003).

The debate regarding whether or not mediation should pursue professionalization has been previously chronicled.<sup>76 77 78 79 80</sup> This article however, has a slightly narrower focus: Given the expectations of mediation practice in litigated-cases, which has evolved differently than the rest of the field of mediation, and the movement nationwide for courts to credential their panels, mediators should be uniting on a state or national level to justify the evidentiary code protections which contemplate mediators as professionals rather than requiring each local court to invest their scarce resources in re-creating standards for mediation panels that are largely undifferentiated. Forces are already pulling litigated-case and court-connected mediation towards professionalization, and continued non-professionalization of the field only serves to deprive those forums of the proper mechanisms for litigants to resolve their cases with all of the alternatives mediation can provide.

### **Litigated-Case Mediation is Evolving towards Professionalization**

Mediation, in the context of court-connected panels, has the shortest distance to travel to become professionalized. One could argue that invoking public accountability in the form of self-regulation, a common code of ethics, and agreed upon specialized education, combined with a qualifying examination, could position court-connected mediation with other professions. Since the distinction between qualifications for a mediation practitioner in court-connected panels, in contrast to mediation practitioners in other venues, appears to have evolved gradually, county by county, state by state; there is reason to believe that this distinction is not artificial.

Jarrett sees the growth of mediation directly tied to its corporate clientele who are seeking to reduce litigation costs of increasing conflict driven by economic activity and globalization. In this pre-litigation or litigation context, the formalized ethics and impartiality of mediation serve to legitimize it as an institutionalized conflict resolution mechanism. Therefore, in the court-connected or litigated-case environment, mediation has evolved from its counterculture roots in the mid-20<sup>th</sup> century to a very legalistic and formalistic approach. “In the future, a growing divide will continue to emerge between legal and non-legal.”<sup>81</sup>

Jarrett further suggests that this divide is related to the difference in practitioner approaches that are necessary to help the parties resolve conflict in a legal dispute. According to Jarrett, the pre-dominant mediation form in litigated-case mediation is evaluative. “This method is most effective when the parties can readily identify objective standards or law that have been breached and the appropriate agreed-upon compensation within a settlement zone. Mediator knowledge in substantive aspects of the dispute is essential for this approach so that the mediator can provide the parties with an authoritative evaluation.”<sup>82</sup>

Hedeen and Coy, while noting many of the connections between non-litigated-case mediation types, including what is referred to as “community mediation,” and litigated-case mediation, foreshadow the difficulty in making the entire mediation field meet the evolved standards often present in court-connected panels by noting,

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<sup>76</sup> S. Cole, *Mediation Certification: Has the Time Come?* Spring A.B.A. DISP. RESOL MAG. 7 (2005).

<sup>77</sup> McEwen *supra*.

<sup>78</sup> Young *supra*.

<sup>79</sup> Jarrett *supra*.

<sup>80</sup> Levin *supra*.

<sup>81</sup> Jarrett *supra* at 64.

<sup>82</sup> Jarrett *supra* at 54.

it has become clear that both the length and the quality of mediation trainings received by community mediators should be increased. The trick is to do this without abandoning the field's historical reliance on ordinary citizens from all walks-of-life who volunteer their time and services and lay claim to no extraordinary training or academic degrees... The courts are understandably an administrative system that is deeply committed to credentialing. But this credentialing, which often takes the form of advanced academic degrees, may too easily disenfranchise a community's volunteer mediators.<sup>83</sup>

Whether for sociological reasons driven by mediation clients, or the court's comfort with the credentialing process, the continued pressure to professionalize the litigated-case or court-connected mediation is based upon a myriad of factors that include 1) the confidentiality protection provided by evidentiary codes that anticipate such professionalization, 2) the expectation of the users of mediation services in litigated-cases that may demand a more formal procedure than is utilized elsewhere within the mediation field, and 3) the need for public accountability to resolve disputes that ultimately have been filed in a public court system. Thus, it was no surprise that in California those factors may have been partially responsible for the introduction of a bill in the California Senate, SR 05-01-2012, a resolution on mediator regulation recently under consideration, provided in part that the State Bar would be responsible for certification and registration of mediators, and that the State Bar Court would be responsible for mediator discipline.<sup>84</sup>

Litigated-case or court-connected mediation could either professionalize by separating itself from the rest of the field of mediation, or alternatively, they could lead the field of mediation into professionalization. McEwen notes: "The impulse to establish a professional identity often arises as a way to resist or preclude alternative forms of control over the work of practitioners."<sup>85</sup> As mediators consider whether they want to professionalize their field, measures such as the one introduced by the State Bar of California provide incentive to do so rather than face the alternative of another body regulating the field. Looking at other professions, there may be other reasons as well.

### **Benefits and Detriments to Professionalization**

A brief look at other professions and the factors that may have led to their professionalization compares favorably with the current environment in mediation. For instance, Stevens, in his seminal work on American law schools,<sup>86</sup> notes on page 92, that the American Bar Association formed in 1878 to "improve" the status of lawyers, many of whom were eking out a living on the economic fringe of the lower middle class. Bar examinations were instituted to raise the prestige and level of practice. Kendall asserts that the medical profession was formed from the frustrations of medical school graduates who were poor and frustrated by an

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<sup>83</sup> T. Heden and P. Coy, *Community Mediation and the Court System: The Ties That Bind* 17 MEDIATION Q. 351 (2000).

<sup>84</sup> B. Brown, July S. CAL. MEDIATION ASS'N. NEWSL. (2012).

<sup>85</sup> McEwen *supra* at 4.

<sup>86</sup> R. Stevens, *Law School: Legal Education in America from the 1850's to 1980's* (1987).

overabundance of quasi-medical practitioners.<sup>87</sup> Del Bene noted that the nursing profession formed because “the lack of standardization of knowledge in educational preparation led to excessive stratification and indeterminism in nursing and the consequential inability of the members to generate a consensual identity.”<sup>88</sup>

In the context of discussing the potential professionalization of the field of mediation, Welsh and McAdoo note that “professions . . . are characterized by a distinct knowledge system that serves as a conceptual map binding together the members of the profession and framing the way in which they think about, reason through, and act upon problems.”<sup>89</sup> They suggest that mediators do not substantially agree that their work is based on a “systematic body of esoteric, abstract knowledge.” Thus, mediators cannot agree on the “approach, skills or ethics mediators should share.”

Critics of professionalizing mediation will sometimes cite reasons that do not necessarily apply in the litigated-case or court-connected mediation context, again begging the question of whether disputes that are in a public forum such as the court system ought to be separated from the rest of the mediation field in establishing professionalization. For example, one argument is that mediation is practiced so differently everywhere that establishing uniform standards is difficult if not impossible.

The differences among the various approaches to mediation practice, including the role that the neutral and participants play and how broadly or narrowly issues are defined, are significant. Given these ecumenical differences, establishing universally applicable and acceptable standards of mediation practice would be extremely difficult and take years to achieve if at all.”<sup>90</sup>

Nevertheless, from the litigated-case or court-connected mediation arena is such that the evaluative form and the reliance on individual caucusing with each party is very similar from mediation to mediation. As it is, in most professions, the response to the differences in the practice is to establish certifications for different areas of practice rather than to abandon the thought of professionalization. Certifications are certainly not a new idea for the field, and Cole notes that mediation may lend itself easily to certifying mediators by the legal context in which the dispute arose.<sup>91</sup>

Another oft-cited argument is that professionalizing a field ultimately reduces services to the poor because the cost of service typically rises.<sup>92</sup> Service to the disenfranchised is a complex and difficult issue, and it cannot be properly analyzed in the current climate in which those

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<sup>87</sup> Kendall *supra* at 533.

<sup>88</sup> S. Del Bene, *Professionalization of Nursing: A Historical Analysis and an Examination of the Segmentation of Nurse Practitioners*, available at [https://openlibrary.org/books/OL17865208M/PROFESSIONALIZATION\\_OF\\_NURSING\\_A\\_HISTORICAL\\_ANALYSIS\\_AND\\_AN\\_EXAMINATION\\_OF\\_THE\\_SEGMENTATION\\_OF\\_NURSE](https://openlibrary.org/books/OL17865208M/PROFESSIONALIZATION_OF_NURSING_A_HISTORICAL_ANALYSIS_AND_AN_EXAMINATION_OF_THE_SEGMENTATION_OF_NURSE) (last visited June 30, 2013).

<sup>89</sup> N. Welsh and B. McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, SPRING A.B.A. DISP. RESOL MAG. 13 (2005).

<sup>90</sup> Levin *supra*.

<sup>91</sup> Cole *supra*.

<sup>92</sup> Kendall *supra*.

mediation services are not mandated or regulated. In fact, this concern for the disenfranchised could be an argument *for* regulation, as those who are the most vulnerable in society may be the most likely to be harmed via the current practice of unregulated mediation. Social work, which meets all five characteristics of a profession, is fundamentally rooted in the profession's concern for proper and affordable care for the most vulnerable members of our society.

In many professions, the response to providing services to all segments of society is often in the form of expecting pro bono work of professionals and requiring internships of new entrants, often through universities that serve to offer professional services to the community at little or no cost. In addition, using California as a point of reference, university mediation programs can often be found mediating disputes for self-represented litigants in courthouses handling small claims or restraining order matters. California has already codified the use of public resources to offer mediation services to those without means through its DRPA (Dispute Resolutions Program Act, 2013).<sup>93</sup>

Finally, some commentators believe that mediation is too young to seek the norming process that accompanies professionalization. Doing so in mediation's infancy may curtail its creativity as a field.<sup>94</sup> This argument again serves to differentiate the litigated-case or court-connected mediation from the rest of the field because a norming process has already taken place in that context.

### **Los Angeles County: A Casualty of the Pitfalls of Non-Professionalization**

The pitfalls of not professionalizing litigated-case mediation are largely illustrated by recent events in Los Angeles County. Claiming budget shortfalls, the Los Angeles Superior Court announced the dissolution of its alternative dispute resolution [hereinafter ADR] services. See press release of March 6, 2013.<sup>95</sup> With the demise of the LASC panels, concerns were renewed about case management within the county given that the LASC ADR department was the largest of its kind in the country. With the elimination of the LASC ADR department, the Court, as a public agency, has no alternative to which it can refer parties who desire to resolve their public disputes. In contrast to other professions, members of the public cannot find licensed or certified mediators who have passed the quality or certification standards set by the state or the industry, and select a mediator that is right for them, knowing they are in good standing with the field. Once again, while Los Angeles and California may serve as case study examples, they are emblematic of a nationwide occupational status for mediation that leaves it largely unregulated and thus void of public accountability.

### **Conclusion**

Mediators who take the position that they do not want to be regulated are unavoidably taking the position that they do not want mediation to be a recognized profession. While that

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<sup>93</sup> DRPA *supra*.

<sup>94</sup> Levin, *supra*.

<sup>95</sup> Los Angeles Superior Court *Los Angeles Superior Court Eliminates Alternative Dispute Resolution Services*, available at <http://www.lasuperiorcourt.org/courtnews/Uploads/14201332216264013NRADRclosure.htm> (last visited June 16, 2013) [Hereinafter LASC].



may serve those who identify with the counterculture roots of mediation, it inevitably deprives one of the primary users of mediation – the disputants in litigated-cases – a regulated resource upon which the public can rely. As the Los Angeles Superior Court has found with the dissolution of its mediator panels with no obvious replacement in sight, there is a need to professionalize the world of litigated-case or court-connected mediation. Without that professionalization, public resources will continue to be excessively spent on the duplicative process of replicating local panels with arguably indistinguishably different criteria in order to serve an already overburdened court system.

Proponents against professionalization may have an unintended negative impact on the field in the public eyes. The lack of an established common code of ethics that can be universally adopted, in addition to not requiring specialized education and training, separates mediation from other recognized professions that otherwise generate public recognition. It is not unusual for the authors to hear judicial officers in Los Angeles note that with the demise of the LASC mediation panels, they would just reach out to local lawyers and bar associations to mediate cases, virtually reinforcing the conundrum mediators face in changing a public perception that mediation is not a distinct and unique occupation.

The inability to establish a specialized education standard for court-connected or litigated-case mediation has also affected the ability of the non-attorney mediator to have equal access to litigated cases, both by rule and by mediator selection processes implicit to those cases. Perhaps the biggest divide between court panels nationwide is whether to require a degree in higher education, and if so, what degree to require; those that require a law degree have essentially limited the mediator pool to attorneys. Additionally, Goldfein and Robbennol posit that attorneys are the primary clients for litigated-case mediation services.<sup>96</sup> Without a clear mechanism to professionalize non-lawyer mediators, the most likely scenario in a non-professionalized environment would be for the lawyer-clients to choose other attorneys as mediators because, as Jarrett notes, “lawyers can credibly claim greater knowledge and skill over the substantive, procedural, and evaluative aspects of a dispute.”<sup>97</sup> The Alternative Dispute Resolution Section of the American Bar Association Task Force on Mediator Credentialing noted in their report that “Disputants benefit from the opportunity to select mediators with training and experience in fields other than law. Credentialing programs may place value on legal and other academic training, but should not bar non-lawyers from obtaining credentials on *de jure* or *de facto* basis.”<sup>98</sup> The report therefore rejects having a law degree as a required part of the specialized education, something again that some court-connected panels have imposed in the absence of mediators professionalizing and setting the standards themselves for the field.

Levin writes that critics of professionalization often cite the principle of self-determination, embodied in all proposed mediator ethical codes, and read it to require that

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<sup>96</sup> J. Goldfein and J. Robbennol, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes toward Mediation Styles* 22 OHIO ST. J. ON DISP. RESOL. 277 (2007).

<sup>97</sup> Jarrett *supra* at 60.

<sup>98</sup> Alternative Dispute Resolution Section of the American Bar Association, *Final Report of the Task Force on Mediator Credentialing*, available at [http://www.americanbar.org/content/dam/aba/images/dispute\\_resolution/CredentialingTaskForce.pdf](http://www.americanbar.org/content/dam/aba/images/dispute_resolution/CredentialingTaskForce.pdf) (last visited July 2, 2013).

## Professionalizing Mediation

disputants have unencumbered free choices in selecting a mediator.<sup>99</sup> However, honoring that principle in conjunction with evidentiary code sections providing blanket confidentiality seems awkward at best, and perhaps at worst, misguided public policy. It would not be considered good public policy to extend the attorney-client privilege or physician-patient privilege to well-intended non-professionals who may try to help with legal or medical matters. Court-connected panels have already indicated their needs by the very similar standards that have been developed that resemble professionalization. Litigated-case mediation has evolved into a standardized practice based upon the public forum in which it operates and the expectations of the clientele. Now may be the time for those mediators to formally professionalize and meet the needs and the expectations of the public.

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<sup>99</sup> Levin *supra*.

**EMAIL FROM RON MAKAREM (6/10/14)**

Dear Ms. Gaal,

I understand that you will be meeting on Thursday. Please bring this email to the participants' attention.

I was the one of the attorneys for the Petitioner who argued the *Cassel v. Superior Court* case to the California Supreme Court.

As I see it, the legislature has already carved out a very important exception when a client sues his/her attorney. The very sacred attorney/client privilege is waived by a client once a lawsuit is filed. While mediation confidentiality is important, it is no more important than the sacred privilege of communication between a lawyer and client. I believe a similar exception should be drafted by the legislature to carve out those conversations once a lawsuit is filed.

In the alternative, however, and a more narrow amendment can occur by refining a separate definition within the statute. I think clarification can be provided to the phrase in the statute 'in preparation or furtherance of mediation.' I believe that this specific language contemplates communication that occurs as part of the 'mediation' process. As mediation is defined in the statute it describes a mediator and parties on both sides. In other words, even if it is a few days before the mediation date or a few days after the mediation date, the opposing sides may wish to discuss matters relating to mediation. Further, the mediator may want to hold a discussion with the individual parties and counsel. These conversations are 'in preparation and in furtherance of mediation'. The Supreme Court, however, chose to include conversation that do not include the mediator and do not include opposing sides when interpreting the phrase 'in preparing or furtherance of mediation.' I believe that the Supreme Court went too far in including conversations that occur only by client and attorney (i.e. attorney-client privileged communications) within the sphere of conversations that will be considered 'in preparation or in furtherance of mediation. That definition, thus, can be refined in the statute as a more narrow amendment to the statute. If that phrase is refined then conversations solely between lawyers and clients can be used in subsequent legal malpractice cases, while conversations 'within mediation' i.e. with mediators and/or opposing counsel present during/before/after mediation will stay confidential.

Those are my very quick and last moment thoughts. I am willing to provide more thought and participation into this process, if you believe I can be of any assistance.

Thank you for considering this email into your discussion.

Regards,

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**EMAIL FROM NANCY MILTON (6/9/14)**

Dear Ms. Gaal,

I understand that you are the Staff Attorney for the Law Revision Commission studying this issue. As an Attorney/Mediator who has been practicing a Mediator for over 20 years, I felt compelled to weigh in on this issue.

I believe strongly in the power of the Mediation Confidentiality provision in our Evidence Code. My clients need to speak freely in mediation and not be afraid that it will be used against them later in court if mediation fails. As a Mediator, I am there to guide my clients and provide them with a safe environment to discuss their conflicts so that they can find a resolution. No one will be willing to participate in mediation if they know that it could be used later in court. This provision needs to remain an ironclad one that protects the parties. We have a difficult enough time educating the public about the benefits of mediation as everyone thinks of litigation as their first avenue in a dispute. If we remove this protection, no one will want to mediate and many cases will end up in litigation that could be mediated which will be a burden on our court system.

If you should have any questions about my position, please do not hesitate to contact me. Thank you for your consideration.

Sincerely,

Nancy Milton  
Attorney/Mediator and Conflict Coach

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A Professional Corporation  
*Move Forward to Resolution*

Vice Chair, Elk Grove Chamber of Commerce  
Membership Chair, Laguna Sunrise Rotary Club

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