

# The Irony of Mediator as Problem Maker: Mediator Misconduct Setting Aside Mediated Agreements

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I. INTRODUCTION

Across cultures and continents, mediators are viewed as problem solvers, skilled third parties who assist disputing parties in the resolution of their differences. Throughout the United States, courts regularly issue orders referring parties to attend mediation,<sup>1</sup> giving them the opportunity to fashion an agreement that meets their unique needs and interests. The mediator facilitates the parties’ communication, while honoring their self-determination and decision-making authority. However, on occasion the mediator may morph from problem solver to problem maker by undermining the parties’ self-determination or otherwise violating ethical rules, causing the

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1. “Mediation means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.” UNIF. MEDIATION ACT § 2.1 (2003). Mediation has many varied definitions. *See id.* at § 3. For example, in Florida, “mediation means a process whereby a neutral third party called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.” FLA. STAT. § 44.1011 (2016).

parties to enter into an agreement they would not otherwise have reached.

When parties seek to set aside mediated agreements by alleging mediator misconduct, they present troublingly ironic issues. First, the parties originally seeking to stay out of court to resolve their disputes, must now seek court intervention to unwind their mediated agreement. Second, the mediator, designated facilitator and protector of the process, has become the alleged wrongdoer whose unethical conduct injured one or more of the parties. Third, mediation confidentiality, designed to enable the parties to meaningfully communicate, may prohibit a party from admitting certain facts required to prove his case. If parties are denied access to the court or the opportunity to admit requisite evidence because they settled through mediation rather than negotiation, intended benefits may become serious detriments.

This Article addresses issues arising when parties seek to set aside mediated agreements based on mediator misconduct in court-ordered mediation cases. Following brief background information on party self-determination and mediation confidentiality, the Article identifies two cases raising serious allegations of mediator misconduct which yielded polar-opposite court outcomes. It then analyzes the seminal case holding mediator misconduct as a basis for setting aside a mediated agreement, and identifies other cases in which parties sought relief from mediated agreements due to mediator misconduct. Additionally, it explores the effect of mediation privileges and confidentiality law, as well as the operative ethical rules for mediators on a party's ability to set aside a mediated agreement based on mediator misconduct. Finally, the Article offers recommendations to address the possibly conflicting interests of parties seeking redress in the courts for mediator misconduct, parties seeking to enforce their mediated agreements, mediators in preserving the process along with their reputations, and the court in maintaining the integrity of its processes.

## II. BACKGROUND – CORE MEDIATION CONCEPTS OF SELF-DETERMINATION AND CONFIDENTIALITY

Mediation is unique among dispute resolution processes in the level of self-determination afforded the parties.<sup>2</sup> “Self-determination

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2. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 18–20 (2001).

is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome.”<sup>3</sup> The parties’ self-determination goes far beyond whether to accept an agreement’s contractual terms, extending to the parties’ decisions about the extent of their participation and the duration of the mediation.<sup>4</sup> “Self-determination has been identified as the fundamental core characteristic of the mediation process.”<sup>5</sup> Interference with a party’s self-determination therefore undermines the mediation process.

When evaluating allegations of mediator misconduct in court-ordered cases, courts should recognize that a mediator has the ability to dramatically influence the course of the mediation and the terms of the agreement.<sup>6</sup> The court’s review should focus on whether the complaining party exercised self-determination in agreeing to a settlement amount, not whether that amount is appropriate.<sup>7</sup>

Commentators have expressed concern that the institutionalization of mediation has led to acceptance of a diminution in party self-determination,<sup>8</sup> as well as acceptance of mediators’ directive styles, depicted by one commentator as “trashing, bashing, and hashing.”<sup>9</sup> For the involved parties, court appearances are very different from mediation sessions, in that court is typically public and adversarial, while mediation is private and consensual.<sup>10</sup> The more comfortable mediation setting combined with the mediator’s helping demeanor, may leave a party susceptible to pressure or coercion by the mediator - especially when the party’s attorney is eager to settle the case.<sup>11</sup> The increasing number of complaints about mediators in court-ordered cases in conjunction with the privacy of the process,<sup>12</sup> underscores the opacity of the mediation proceedings for non-

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3. Model Standards of Conduct for Mediators Standard I.A. (ABA, AAA & ACR 2005).

4. James J. Alfini, *Trashing, Bashing, And Hashing It Out: Is This The End Of “Good Mediation”?* 19 FLA. ST. U. L. REV. 47, 74 (1991).

5. Welsh, *supra* note 2 at 3.

6. Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 557 (2004).

7. *Id.* at 563.

8. *See* Welsh, *supra* note 2 at 3–4.

9. *See* Alfini, *supra* note 4 at 66.

10. *See* Thompson, *supra* note 6 at 530–31.

11. *Id.* at 533.

12. Welsh, *supra* note 2 at 9.

participants.<sup>13</sup> The number of complaints may merely reflect the increasing number of mediated cases,<sup>14</sup> as well as increased knowledge about mediation law and rules. However, the cases may also signal that some mediators are pressuring parties to settle.<sup>15</sup>

Courts which order parties to mediation have an obligation to continually review and consider revision of the governing rules, policies, and procedures.<sup>16</sup> Courts need to know if parties are being injured by a process that carries their imprimatur, and should address issues of unfairness raised by the parties.<sup>17</sup> However, mediation confidentiality may prohibit courts from hearing the parties' allegations of mediation wrongdoing. Accordingly, courts have the challenging concomitant obligations of preserving mediation confidentiality and protecting the legal rights of parties who suffer wrongs due to abuse of the process.

Confidentiality<sup>18</sup> is meant to strengthen the mediation process, not diminish it. If a mediator's breach of an ethical violation directly results in parties reaching an agreement, those parties should not be precluded from admitting evidence of the ethical violation simply because the agreement was reached at mediation. A limited exception to mediation confidentiality may be needed to allow the party to admit evidence to prove his case. Confidentiality, the foundation on which the process stands, is considered critical to the parties' participation,<sup>19</sup> enabling them to honestly share information and productively problem solve.<sup>20</sup> It was not meant to provide a safe haven for wrongdoers to escape discovery of their actions, with the wronged parties denied a remedy for their injury.<sup>21</sup> Many state mediation

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13. Thompson, *supra* note 6 at 532.

14. James R. Coben & Peter N. Thompson, *Disputing Irony: A Systemic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 52 (2006); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 138–39 n.1 (2000) (Courts are increasingly requiring parties to mediate their cases.).

15. Alfini, *supra* note 4 at 75.

16. Sharon Press, *Institutionalization: Savior Or Saboteur Of Mediation?*, 24 FLA. ST. U. L. REV. 903, 909 (1997).

17. Thompson, *supra* note 6 at 561–62.

18. Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 25 (2001) ("Confidentiality represents, first, a positive duty not to disclose secret communications and second, the freedom to refuse to answer questions in court.").

19. Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 35 (2001).

20. Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 NOVA L. REV. 87, 91 (2003).

21. *Amis v. Greenberg Traurig LLP*, 235 Cal. App. 4th 331, 340 (2015).

privileges, as well as the Uniform Mediation Act (UMA), delineate exceptions that would cover mediator misconduct to set aside mediated agreements.<sup>22</sup> Nonetheless, privileges often do not provide an exception for mediator misconduct to set aside mediated agreements, thereby denying parties the ability to remedy the wrong.

### III. SERIOUS ALLEGATIONS OF MEDIATOR MISCONDUCT YIELD DIFFERENT RESULTS

The following two cases exemplify the troubling allegations of mediator misconduct made by parties looking to set aside their mediated agreements. They also illustrate the courts' disparate holdings in response to the allegations.

In *Allen v. Leal*, parents in Texas alleged that a mediator misled and forced them into signing the mediated agreement terminating their civil rights action arising out of the death of their son.<sup>23</sup> Specifically, the mother advised the court that the mediator told them they would be financially ruined if they did not settle and would have to pay all of the attorney's fees and costs.<sup>24</sup> The mediation followed the filing of a lawsuit by the parents of Travis Allen, who was shot and killed by police responding to a 911 call. When police arrived, the minor was bleeding profusely and lying on the ground.<sup>25</sup> An officer subsequently shot Travis in the back, which caused his death.<sup>26</sup> Following the mediation, the President of the Houston chapter of the Association of Attorney-Mediators "was publicly quoted as saying in reference to this case: '[w]hat some people might consider a little bullying is really just part of how mediation works.'"<sup>27</sup>

In describing the mediation session in question, the Allens' attorney reported that the mediator must have said to Mr. and Mrs. Allen 40 times, "you got [ ] zero chance of success on this and your family is just going to be destroyed."<sup>28</sup> Further the attorney advised that when the Allens were presented with the written mediated agreement,

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22. See *infra* Part VIII.B. and C. (identifying some privileges providing specific exceptions for mediator misconduct or general exceptions that might cover mediator misconduct).

23. *Allen v. Leal*, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998).

24. *Id.*

25. *Allen*, 27 F. Supp. 2d at 947.

26. *Id.* at 946.

27. *Id.* at 947.

28. Welsh, *supra* note 2, at 12 (citing Transcript of Proceedings Before the Honorable David Hittner, Settlement Hearing at 36-38, Aug. 3, 1998, *Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998) (No. H-96-CV-30)).

they said “this is bad. This is wrong. We can’t do this.”<sup>29</sup> The mediator’s response, as reported by the attorney, was to continually harangue them for the next hour and one-half.<sup>30</sup> Ultimately, the Allens signed the mediated agreement.<sup>31</sup> The federal court upon hearing the parents’ allegations of mediator misconduct was “perplexed that the Allens would have agreed to settle this case (even assuming arguendo that the mediator exerted pressure on the plaintiffs to settle the case) without being certain that such a settlement was appropriate.”<sup>32</sup> Of grave concern to the court, was the “plaintiffs’ frontal attack on the mediation process itself.”<sup>33</sup> The federal court declined to exercise supplemental jurisdiction, resulting in the case going to the Texas District Court for a determination of the state breach of contract claim.<sup>34</sup> The court determined that the agreement was “an enforceable contract pursuant to Texas law.”<sup>35</sup>

In contrast, a Tennessee court set aside a party’s mediated agreement based on allegations of mediator misconduct in *Everett v. Morgan*.<sup>36</sup> The mother in a child support action alleged that she entered into an agreement based on the representations of an individual who held himself out to be a mediator connected with the court system.<sup>37</sup> She stated that the individual told her the father had contacted him to mediate her motion to hold the father in contempt for his failure to pay child support.<sup>38</sup> Unbeknownst to her at that time, the individual was the father’s friend and neither a certified mediator nor court-connected.<sup>39</sup> Further, before mediating the mother’s motion to hold the father in contempt, the “mediator” convinced mother to discharge her attorney.<sup>40</sup> At mediation without an attorney, she was told by the “mediator” that a court would not award her more than \$8,750 in back child support. Although she believed that the father owed more

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29. *Id.*

30. *Id.*

31. *Allen*, 27 F. Supp. 2d at 946.

32. *Id.* at 949.

33. *Id.*

34. *Id.*

35. *Leal v. Allen*, No. 98-53281 (D. Tex. 1999).

36. *Everett v. Morgan*, No. E2007-01491-COA-R3-CV, 2009 Tenn. Ct. App. WL 113262, at \*8 (Tenn. Ct. App. Jan.16, 2009), available at [https://1.next.westlaw.com/Document/I94855602e70211ddb5cbad29a280d47c/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Search\)](https://1.next.westlaw.com/Document/I94855602e70211ddb5cbad29a280d47c/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)).

37. *Id.* at \*1.

38. *Id.* at \*2

39. *Id.* at \*3.

40. *Id.* at \*2.

money in back support, she agreed to this amount based on the “mediator’s” representation predicting the court outcome, and believing him to be who he said he was.<sup>41</sup> The court set aside the mediated agreement on the basis of fraud.<sup>42</sup>

In both *Allen v. Leal* and *Everett v. Morgan*, the courts determined whether the mediated agreements were enforceable contracts. As such, they looked to established contract law principles when making their decisions.<sup>43</sup> While the contract analysis was favorable for the mother in *Everett* because there was patent fraud perpetrated by the mediator in conjunction with the father,<sup>44</sup> it proved unfavorable for Travis’ parents. The state court in *Allen* looked to see if the parties signed an enforceable contract pursuant to Texas law.<sup>45</sup> The federal court which declined to exercise supplemental jurisdiction had not addressed whether the parents had exercised self-determination, but rather expressed displeasure with the parents’ attack on their mediation process.<sup>46</sup> The cases are readily distinguished. The mother in *Everett* prevailed, with the case decided on the contract defense of fraud. The parents in *Allen* who had alleged mediator coercion, did not receive relief from the mediated agreement and were chastised by the federal judge. The court stated: “the conduct of the plaintiffs and their attorneys in attempting to upset a settlement of this case appears to constitute an abuse, even if unintentional, of the federal trial process.”<sup>47</sup>

#### IV. RECOGNIZING MEDIATOR MISCONDUCT AS A BASIS FOR SETTING ASIDE MEDIATED AGREEMENTS

Mediator misconduct has been recognized as a basis for setting aside a mediated agreement. In *Vitakis-Valchine v. Valchine*, the Florida court analyzing the operative mediation-specific law and rules concluded that “it would be unconscionable for a court to enforce a settlement agreement reached through coercion or any other improper tactics utilized by a court-appointed mediator.”<sup>48</sup> The facts of the case presented the court with a compelling reason to invoke its

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41. *See id.*

42. *Id.* at \*1.

43. Thompson, *supra* note 6 at 48. Mediated agreement enforcement claims tend to raise traditional contract issues. *Id.*

44. The appellate court determined that the trial court implicitly found the father was aware of his friend’s misrepresentations. *See id.* at 8.

45. *Leal*, *supra* note 35.

46. *Allen*, *supra* note 23 at 949.

47. *Id.*

48. *Vitakis-Valchine*, 793 So.2d 1094, 1099 (Fla. Dist. Ct. App. 2011).



inherent power to recognize wrongdoing by a mediator, a third party, as a basis for setting aside a mediated agreement.<sup>49</sup> Appellant alleged that she entered into a mediated marital settlement agreement with her husband “due to duress and coercion by the mediator.”<sup>50</sup> Specifically, she testified that the mediator told her the judge would order the couple’s frozen embryos destroyed, and if she were impregnated with the embryos after the divorce the judge would not order the husband to pay child support as the embryos were not “lives in being.”<sup>51</sup> Further, she testified that the mediator said she was not entitled to the husband’s pensions, and it was not worth her while to fight for them.<sup>52</sup> The wife also testified that the mediator threatened if no agreement was reached, he would report to the judge that she was at fault.<sup>53</sup> At trial, the wife advised that she believed everything the mediator told her and felt she had no alternative but to sign the mediated agreement.<sup>54</sup> The appellate court specifically held that mediator misconduct can be a basis for a court to set aside a mediated settlement agreement reached in a court-ordered mediation.<sup>55</sup> The court affirmed in part<sup>56</sup> and reversed in part, with remand to the trial court to determine “whether the mediator substantially violated the Rules for Mediators, and whether that misconduct led to the settlement agreement in this case.”<sup>57</sup>

The *Vitakis-Valchine v. Valchine* case is unique in both its holding and its thorough review of the mediator’s ethical obligations in response to the alleged mediator misconduct.<sup>58</sup> Notably, the court recognizes its own obligation to the parties, having ordered them to mediation, and acknowledges that when appointed by the court, “the mediator is no ordinary third party,” but an “agent of the court, carrying out an official court-ordered function.”<sup>59</sup> The case has received

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49. *Id.* (quoting *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978)).

50. *Id.* at 1095. (Wife also alleged duress or coercion by the husband and husband’s attorney, but those claims were dismissed and are not the subject of this opinion.)

51. *Id.* at 1097.

52. *Id.*

53. *Id.*

54. *Id.* at 1096–97. (The wife was represented by counsel at the mediation which resulted in a 23-page mediated settlement agreement.)

55. *Id.* at 1094.

56. *Id.* at 1095 (affirming the trial court’s conclusion that wife had not met her burden of proving the agreement was a result of coercion or fraud by the husband and the husband’s attorney).

57. *Id.* at 1100.

58. *See id.* at 1094, 1099.

59. *Id.* at 1099.

widespread attention having been cited over 140 times in federal<sup>60</sup> and state court cases,<sup>61</sup> appellate briefs<sup>62</sup> and secondary sources.<sup>63</sup>

Although on remand, the trial court did not find mediator misconduct to warrant overturning the mediated agreement,<sup>64</sup> the mediator was reprimanded for an ethical rule violation, independent of the lawsuit.<sup>65</sup> The Florida Mediator Qualifications Board (MQB) Hearing Panel issued a written reprimand to the mediator, finding clear and convincing support that he was in violation of the Florida Rules for Certified and Court-Appointed Mediators.<sup>66</sup> Specifically, the Panel determined that the mediator had given his personal and professional legal opinion regarding how the court would decide the case, as well as the disposition of the couple's frozen embryos, thereby violating Rule 10.090(d) regarding Professional Advice.<sup>67</sup> It also expressed concern about the lack of breaks and the length of the mediation.<sup>68</sup> The MQB Hearing Panel based its determination on the rules in effect at the time of the mediation, which occurred on August 17, 1999. The rules were amended and renumbered in 2000, and the court utilized these later rules in its analysis of the potential ethical violations.<sup>69</sup>

The appellate court's opinion reflects its understanding of and respect for the mediation process and participants, looking to the Florida Statute sanctioning court-ordered mediation and the Florida

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60. See, e.g., *Peralta v. Peralta Food, Corp.*, 506 F. Supp. 2d 1274, 1280 (S.D. Fla. 2007).

61. See, e.g., *AMS Staff Leasing, Inc. v. Taylor*, 158 So. 3d 682, 687 (Fla. Dist. Ct. App. 2015).

62. See, e.g., Brief of Plaintiff-Appellant at 50, *Willsboro Mall, LTD v. 240/242 Franklin Ave., LLC*, No. A-004598-09, 2010 WL 11234811 (N.J. Super. Ct. App. Div. July 23, 2010).

63. 1 SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* §§ 7:9–7:11 (2016–2017).

64. *Vitakis-Valchine v. Valchine (Vitakis Valchine II)*, 923 So. 2d 511 (Fla. Dist. Ct. App. 2006) (unpublished table decision).

65. FLA. MEDIATOR QUALIFICATIONS BD.: CASE 2005-002 (2006), <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-consumers/discipline-proceedings-sanctions/sanctions-imposed.stml>.

66. *Id.*

67. *Id.* The MQB cited the rule in effect at the time of the mediation, FLA. RULES FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.090(d), provided, "While a mediator may point out possible outcomes of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute."

68. FLA. MEDIATOR QUALIFICATIONS BD.: CASE 2005-002 (2006), <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-consumers/discipline-proceedings-sanctions/sanctions-imposed.stml>.

69. See *In Re Amendments to the Florida Rules for Certified and Court-Appointed Mediators*, 762 So. 2d 441 (Fla. 2000).

Rules for Certified and Court-Appointed Mediators to address the allegations. By statutory definition, mediation calls for voluntary resolution of the issues by the parties.<sup>70</sup> The mediator's role is merely to assist the parties in reaching a complete or partial agreement.<sup>71</sup> The court notes that a hallmark of mediation is empowering parties to resolve their dispute on their own terms.<sup>72</sup> The parties are not required to settle at mediation, even though they are required to attend mediation.<sup>73</sup> The mediator's ethical obligations include protecting the parties' right of self-determination, specifically, "a line is crossed and ethical standards are violated when any conduct of the mediator serves to compromise the parties' basic right to agree or not agree."<sup>74</sup> Similarly, coercion, duress or other improper influence by the mediator is expressly prohibited.<sup>75</sup> The rules also prohibit mediator misrepresentation intended to promote or encourage the parties to reach agreement,<sup>76</sup> and prohibit a mediator from offering an opinion as to how the court will rule regarding the dispute.<sup>77</sup>

Recognizing the court's obligation to the parties and the unique role of a mediator in a court-ordered case, the opinion departs from the general rule stating "a contract or settlement may not be set aside on the basis of duress or coercion unless the improper influence emanated from one of the contracting parties – the actions of a third party will not suffice."<sup>78</sup> The case clearly distinguishes between the role of a mediator in a court-ordered case and the role of other third parties.<sup>79</sup> Given that mediation is not an ordinary settlement negotiation and that it is governed by distinct law, rules of procedure, and ethical obligations owed by mediators to the parties, allegations of mediator misconduct made by parties to set aside their mediated agreements require consideration of the operative mediation-specific law and rules. The *Vitakis* court did just that and in a well-reasoned

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70. *Vitakis-Valchine*, 793 So. 2d at 1097 (citing FLA. STAT. § 44.1011 (2000)).

71. *Id.*

72. *Id.* at 1098.

73. *Id.*; see also *Avril v. Civilmar*, 605 So. 2d 988, 990 (Fla. Dist. Ct. App. 1992) ("There is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle.").

74. *Vitakis-Valchine*, 793 So.2d at 1098 (quoting FLA. RULES FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.310(a) Committee Notes).

75. *Id.* (quoting FLA. RULES FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.310(b)).

76. *Id.* at 1099 (quoting FLA. RULES FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.310(c)).

77. *Id.* (quoting FLA. RULES FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.370(c)).

78. *Id.* at 1096.

79. *Id.* at 1099.

opinion held “the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially prescribed mediation procedures.”<sup>80</sup> It opens the window for other courts to do the same, thereby permitting parties access to the court to seek relief from a mediated agreement they entered into as a direct result of substantial ethical violations by the mediator.

## V. POTENTIAL CHALLENGES FOR *VITAKIS-VALCHINE*

*Vitakis-Valchine* is limited in its scope, applying only to court-ordered mediations.<sup>81</sup> Many mediated cases are not court-ordered, with parties voluntarily choosing to mediate, often with no lawsuit having been filed or contemplated. Therefore, application of this case creates different treatment for parties premised on whether they voluntarily chose to mediate or were court-ordered to do so. Further, the case may raise concern for parties seeking to enforce their agreements, the court looking for final resolution of its cases, and mediators looking to preserve their reputations. From a mediator’s perspective, this case raises the possibility that a desperate party seeking to set aside an undesirable agreement might make unfounded allegations about a mediator’s conduct. The lawsuit may cause public humiliation for the mediator who fears a sullied reputation caused by the public allegations. The case raises the additional concern for mediators that a party may choose to allege misconduct rather than attorney malpractice to obtain relief from the mediated agreement. Commonly, relief for attorney malpractice results in monetary damages, not overturned agreements.<sup>82</sup> In contrast, had the mediated agreement in *Vitakis-Valchine* been overturned because the wife succeeded in proving mediator misconduct, she would have accomplished her goal of not having to provide her husband with the couple’s frozen embryos.<sup>83</sup>

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80. *Id.*

81. *See id.*

82. *See, e.g., St. Pierre v. Koonmen*, 863 N.E.2d 279, 282 (Ill. App. Ct. 2007) (“Malpractice damages are strictly limited to the amount the client actually lost due to malpractice, which would exclude amounts received from insurance.”); *See also* 7 Am. Jur. 2d § 226.

83. In a subsequent case, the husband filed a motion to enforce the provision of the parties’ agreement requiring the wife to give him the couple’s frozen embryos. The court granted the motion, finding that the matter was controlled by the terms of the parties’ mediated agreement. *See Vitakis v. Valchine*, 987 So. 2d 171, 171–72 (Fla. Dist. Ct. App. 2008).

Parties defending a challenge to their agreements based on mediator misconduct bear slight risk of their agreements being set aside. The party challenging the agreement may feel he faces a Sisyphean task.<sup>84</sup> When the challenging party seeks to overturn the agreement, the other party will likely be attempting to enforce the same agreement. Further, attorneys who were present at the mediation, will likely maintain that the mediator followed ethical rules or they would have intervened to protect their clients. The likelihood of a party proving that a mediator substantially violated ethical rules, directly causing the party to enter into the mediated agreement, is slim. Cases by parties looking to set aside their mediated agreements due to mediator misconduct rarely succeed and will remain difficult to prove. The body of mediation and contract law provides guidance when addressing the potential issues raised by recognition of mediator misconduct as a basis for setting aside mediated agreements.<sup>85</sup> Notably, commentators have made valuable recommendations that address these issues.<sup>86</sup> Mediation scholars and practitioners are well suited to wrestle with these challenges as mediation increasingly becomes court-connected.<sup>87</sup> While they may often not agree, their honest and insightful reflection will identify the issues and lay the foundation for problem solving.

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84. Sisyphus was condemned by the gods to continually roll a boulder up a mountain, only to have it fall down the mountain once it reached the top. Albert Camus, *The Myth of Sisyphus* (Sept. 13, 2017), <https://www.nyu.edu/classes/keefer/hell/camus.html>. The myth exemplifies the futility and hopelessness of some labor. The tragedy of the myth lies in the hero's awareness of his wretched condition. *Id.*

85. See, e.g., Restatement (Second) of Contracts § 175(2) (Am. Law Inst. 1981) ("If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.")

86. See, e.g., Sharon Press, *Mediator Ethical Breaches: Implications For Public Policy*, 6 Y.B. ON ARB. & MEDIATION 107, 112–31 (2014) (recommending use of a mediator grievance process); Welsh, *supra* note 2 at 586 (recommending three-day cooling-off period after the parties entered into the mediated agreement before the agreement would become enforceable). See also *infra* footnote 260 and accompanying text (UMA contemplating that the court will hold an *in camera* proceeding to evaluate claims for exemption from mediation privilege).

87. See, e.g., Press, *supra* note 19.

VI. MEDIATED AGREEMENTS SET ASIDE WHEN PARTIES ALLEGE  
MEDIATOR MISCONDUCT

Courts are not in the business of redrafting parties' contracts,<sup>88</sup> and seem even less inclined to set aside parties' mediated agreements due to mediator misconduct.<sup>89</sup> Nonetheless, setting aside mediated agreements based on allegations of mediator misconduct is nothing new, and on rare occasions courts have found compelling reasons to do so. In 1997 a New York court set aside a mediated agreement for the agreement's failure to comply with statutory requirements,<sup>90</sup> and in *Everett*, the court set aside a mediated agreement based on fraudulent conduct by the mediator.<sup>91</sup> In both cases, the plaintiffs had alleged wrongdoing by the mediators. Unlike the court's careful analysis of the mediator's ethical obligations to the parties in *Vitakis-Valchine*, the opinions did not identify violations of the ethical rules governing mediation as the basis for setting aside the mediated agreements.

In *Everett*, a Tennessee court cited mediator fraud as the basis for setting aside a mediated agreement concerning complainant mother's motion to hold her child's father in contempt for failure to pay child support.<sup>92</sup> The mediator's wrongdoing included misrepresenting his credentials as being connected with the court, failing to advise that he was the father's friend, advising the wife to discharge her attorney, and giving the wife legal advice predicting the court outcome.<sup>93</sup> The father asserted that the wife was not entitled to relief from the mediated agreement because the fraud had not been committed by an adverse party.<sup>94</sup> The appellate court determined that the trial court had implicitly found the father was aware of at least some of the "mediator's" misrepresentations.<sup>95</sup> Further, whether the father was engaged in fraudulent misconduct was a question of fact for the trial court.<sup>96</sup> Thus, the appellate court, finding the trial court

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88. "[C]ourts are not in the business of rewriting contracts to appease a disgruntled party unhappy with the bargain he struck." *PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 893 (7th Cir. 2004). See also Am. Jur. 2d, Contracts § 506 (providing it is not the court's province to second guess the parties' bargain.).

89. See *infra* Part VII.

90. *Jacobs v. New York Fin. Ctr. Hotel*, 1997 U.S. Dist. LEXIS 9704, at \*2 (S.D.N.Y. July 5, 1997).

91. *Everett*, *supra* note 38.

92. *Everett*, 2009 WL 113262, at \*1.

93. *Id.* at \*1.

94. *Id.* at \*8.

95. *Id.*

96. *Id.*

had not abused its discretion, affirmed the lower court's judgment setting aside the mediated agreement.<sup>97</sup>

*Everett* highlights the incongruity of applying standards to set aside contracts to the process of mediation that is governed by different rules and law. The mediator's fraud existed independent of the father's participation in the fraud. The wife, having been a victim of the fraud, deserved consideration of her injury based on the perpetrated wrongdoing. The "mediator is no ordinary third party"<sup>98</sup> and plays a critical role in the mediation with the ability to substantially affect the course and outcome of the process.<sup>99</sup> This case exemplifies the benefit of recognizing mediator misconduct as a basis to set aside a mediated agreement. Doing so allows focus on the actual wrongdoing. Had fraud not been a factor, the mediator would still have violated ethical rules, including providing legal advice, interfering with party-self-determination, and mediating a matter presenting a conflict of interest.<sup>100</sup> Despite these ethical violations by the mediator, had fraud not been among them, the mother might have been left without a remedy.

Over twenty years before the Tennessee Court of Appeals' decision, a United States District Court in New York denied enforcement of a mediated agreement addressing employment discrimination claims based on non-compliance with provisions of the Age Discrimination in Employment Act (ADEA).<sup>101</sup> Following the plaintiff's filing of age discrimination claims with the U.S. Equal Employment Opportunity Commission, the parties drafted a hand written agreement during a five-hour mediation.<sup>102</sup> The plaintiff alleged that the mediated agreement was unenforceable based on the insufficient time he had to consider the agreement, and the pressure he was under when the mediator advised that the offer by defendant was only open for the duration of the mediation session.<sup>103</sup> The court held that the plaintiff had not had enough time to consider the agreement as required by the ADEA, which specifically provides that "the individual

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97. *Id.* The appellate court also raised the mother's recovery against the father, and remanded to the trial court for a determination of attorney fees and statutory interest for the mother. *Id.* at \*9.

98. *Vitakis-Valchine v. Valchine*, 793 So.2d 1094, 1099 (Fla. Dist. Ct. App. 2001).

99. Thompson, *supra* note 6 at 557.

100. *See supra* notes 65–69.

101. *Jacobs v. New York Fin. Ctr. Hotel*, 1997 U.S. Dist. LEXIS 9704, at \*2 (S.D.N.Y. July 5, 1997).

102. *Id.*

103. *Id.* at \*4.

be given a reasonable period of time within which to consider the settlement agreement.”<sup>104</sup> As with *Everett*, the court did not specifically analyze the mediator’s statement. It based its decision on the statutory language, and did not need to go beyond finding that the plaintiff had not received the required time for review as provided in the ADEA.

## VII. MEDIATED AGREEMENTS NOT SET ASIDE BASED ON MEDIATOR MISCONDUCT

Despite the few cases setting aside mediated agreements based on mediator misconduct,<sup>105</sup> many courts have consistently declined to set aside agreements for that reason. In stark contrast to the *Vitakis-Valchine* court’s thorough analysis of the ethical rules for mediators, other courts have routinely reviewed mediated agreements as settlement agreements and applied traditional contract law in their analyses.<sup>106</sup> Commentators have noted the potential conflict between mediation’s core value of self-determination and contract law’s favoring of settlement enforcement.<sup>107</sup> Contract law principles accept some bargaining pressure brought to bear by and on the parties.<sup>108</sup> This tolerance may be inconsistent with mediation’s premise of party self-determination, if the mediator is the one pressuring the party.<sup>109</sup> The mediator has the ability to, properly or improperly, influence the course and result of the process.<sup>110</sup> The following cases are representative of allegations made by parties looking to set aside their mediated agreements due to mediator misconduct, as well as the manner in and regularity with which the courts decline to do so.

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104. *Id.* at \*3–4.

105. *Everett*, 2009 WL 113262, at \*8 (The Court of Appeals affirmed the trial court’s judgment setting aside the Agreed Decree.).

106. Coben & Thompson, *supra* note 14, at 49. Litigation regarding the enforcement of mediated agreements tends to focus on typical contract issues, including fraud, mistake, and claims of unenforceable agreements. *Id.*

107. Thompson, *supra* note 6, at 531.

108. *Id.*

109. *Id.* at 533.

110. One commentator, Nancy Welsh, suggests that because the mediator-party relationship is akin to a fiduciary relationship, undue influence is more appropriate than coercion as a defense to enforcement of a mediated agreement. Welsh, *supra* note 2, at 84–86.



A. *Courts Look to See If Parties Entered into Binding Settlement Contracts and If They Were Represented by Counsel*

Courts view mediated agreements as settlement agreements. Consequently, they do not tend to base their opinions on whether parties exercised self-determination, but rather whether they entered into binding settlement agreements. Parties, especially those represented by counsel, have failed in their attempts to set aside mediated agreements based on allegations of a mediator making false assertions<sup>111</sup> or misrepresenting the value of the claim.<sup>112</sup> A Tennessee appellate court in 2000 reversed a trial court holding, finding the record did not support setting aside the mediated agreement based on appellant's assertion that the mediator made false allegations.<sup>113</sup> The court found that appellant signed the clear and unambiguous agreement with the advice of counsel.<sup>114</sup>

Similarly, alleged misrepresentation by the mediator did not succeed as a basis for setting aside a mediated agreement in a 2002 case decided by a U.S. Court of Appeals.<sup>115</sup> The trial court's ruling was affirmed because the appellant did not show justifiable reliance.<sup>116</sup> The court found that "[a] mediator's statement regarding the predicted litigation value of a claim, where the prediction is based on a fact that can readily be verified, cannot be relied on by a counseled litigant whose counsel is present at the time the statement is made."<sup>117</sup>

In a Florida case, a party seeking to set aside a mediated agreement due to mediator misconduct prevailed at the trial level, only to see the appellate court reverse the order setting aside the agreement.<sup>118</sup> The appellee had alleged that the mediator would not let her take the mediated agreement home to study over the weekend.<sup>119</sup> The court of appeals concluded that the evidence fell short of the standard for setting aside the agreement, finding no evidence that

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111. See, e.g., *Golden v. Hood*, No. E1999-02443-COA-MR3-CV, 2000 WL 122195, at \*2 (Tenn. Ct. App. Jan. 26, 2000).

112. See, e.g., *Chitkara v. New York Tel. Co.*, 45 F. App'x 53, 54-55 (2d Cir. 2002).

113. *Golden*, 2000 WL 122195, at \*2.

114. *Id.*

115. *Chitkara*, 45 F. App'x at \*54-55.

116. *Id.*

117. *Id.* at \*55.

118. *Pierce v. Pierce*, 128 So. 3d 204, 207 (Fla. 1st DCA 2013).

119. *Id.* at 205.

the appellee had signed the mediated agreement due to fraud, misrepresentation, coercion or overreaching, and that the appellee had been ably represented by counsel during the mediation.<sup>120</sup>

B. *Confusion Regarding Mediator's Role and Untraditional Claims*

The parties' allegations may reflect their uncertainty as to the mediator's role; at times, parties assert untraditional, possibly creative, claims to seek relief from their agreements. In a 1999 State of Washington case, an appellant claimed she was coerced into signing the mediated agreement because the mediator told her she would ruin his record if she didn't sign.<sup>121</sup> The court found no evidence that was offered to support the appellant's coercion claim.<sup>122</sup> Similarly, a Virginia court found that the appellant had not offered any evidence at trial to support her assertion of "browbeating," "because the mediator stated that at all costs, the parties should avoid court and lawyers."<sup>123</sup> In a Louisiana case, appellant claimed he was tricked into signing the mediated agreement to end the lawsuit against his attorney for legal malpractice.<sup>124</sup> Specifically, the appellant alleged that the mediation process had been tainted and unfairly tilted due to a past professional partnership between the attorney mediator and counsel for the attorney he was suing.<sup>125</sup> The court determined that the appellant had not presented evidence to support his claim and found no legal basis justifying reversal of the trial court's judgment granting the Motion to Enforce the Mediated Settlement.<sup>126</sup>

Interestingly, parties have ascribed misconduct to mediator comments that courts have determined to be within the facilitative function of the mediator.<sup>127</sup> In a 2015 Florida case, the court found that the mediator had not engaged in misconduct, "but rather simply served his facilitative function of relaying Defendant's settlement offer, together with posturing, to the Plaintiff."<sup>128</sup>

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120. *Id.* at 206.

121. *In re Patterson v. Taylor*, 969 P.2d 1106, 1110 (Wash. Ct. App. 1999).

122. *Id.*

123. *Gallagher v. Gallagher*, No. 125000, 1999 WL 795683, at \*2 (Va. Cir. Ct. Aug. 18, 1999), *aff'd in part, rev'd in part and remanded*, 35 Va. App. 470 546 S.E.2d 222 (2001)

124. *Norwood v. Garber*, 29 So. 3d 735, 736 (La. Ct. App. 3d Cir. 2010).

125. *Id.*

126. *Id.* at 136–37.

127. *Rodriguez v. Hiday & Ricke, P.A.*, No. 14–CV–61509, 2015 WL 1470513, at \*4 (S.D. Fla. Mar. 31, 2015).

128. *Id.*

Certainly, not every complaint about a mediator is a reason to set aside a mediated agreement. However, parties have had disproportionately dismal success in their attempts to set aside mediated agreements due to mediator misconduct. It is unclear why. They may have done better had they pled differently or produced better evidence. They may not have had a legal basis or the facts to support their allegations. The available contractual causes of action may not have fit the alleged wrongs occurring during the mediations. Lastly, the courts may not have considered whether the mediator had substantially violated ethical rules, thereby causing the party to enter into the agreement. Parties, lawyers, mediators and judges should be thoroughly familiar with the salient differences between mediation and negotiation.<sup>129</sup> The specific attributes and promises of the mediation process need to be respected not only during the process, but also in subsequent actions to enforce or set aside mediated agreements.<sup>130</sup> Doing so protects the rights of the parties ordered to mediate by the court and demonstrates the integrity of the court system mandating use of the process.

#### VIII. THE DOUBLE-EDGED SWORD OF MEDIATION PRIVILEGES AND CONFIDENTIALITY LAW

Mediation confidentiality and privileges have proven to be a double-edged sword. While meant to allow parties to candidly communicate at mediation, they have at times prevented parties from admitting evidence needed to prove their case. In addition to requiring a viable cause of action to challenge a mediated agreement based on mediator misconduct, parties must prove their case to prevail at trial. Mediation confidentiality law, privileges and evidentiary rules will determine whether the parties will be able to introduce evidence of mediator misconduct. Approximately 80% of states that enacted general confidentiality statutes have used the privilege structure.<sup>131</sup> Privileges allow the holder of the privilege to refuse to disclose and prevent others from disclosing protected communications.<sup>132</sup> Mediation privileges generally block more than admissibility of evidence,

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129. See, e.g., Thompson, *supra* note 6, at 556–57 (noting that contract law focuses on what the parties said, while mediation should focus on what the parties want).

130. See *id.* at 556 (recognizing mediation's core values of empowerment and self-determination mean that parties control their fate.). Therefore, a mediated settlement cannot be fair unless it was a voluntary self-determined agreement. See *id.* at 553.

131. UNIF. MEDIATION ACT § 4, Comment 2(a).

132. UNIF. MEDIATION ACT § 4(b)(2) (citing Strong, *Developments in the Law – Privileged Communications*, 98 HARV. L. REV. 1450, Sec. 72 (1985)).

limiting the disclosure of mediation communications not governed by rules of evidence.<sup>133</sup> They also allow the holder of the privilege to prevent disclosure of mediation communications in other proceedings and in discovery.<sup>134</sup>

Privileges, dating back to Elizabethan England, have long been controversial.<sup>135</sup> Rather than being viewed as furthering the truth seeking function of the justice system, privileges are sometimes seen as impeding the central purpose of the legal system to further other goals.<sup>136</sup> Mediation privileges, which prevent parties from accessing the courts to seek redress because they settled at mediation, may be seen as furthering confidentiality over providing legal redress for cognizable wrongs.

#### A. *State Law Precluding Parties from Admitting Evidence of Mediation Misconduct*

In sharp contrast to a Florida court's admission of mediation communications to assert mediator misconduct,<sup>137</sup> California courts have precluded parties from admitting evidence of mediation communications in their cases, including allegations of attorney malpractice.<sup>138</sup> The mediation privileges of the two states are fundamentally divergent. In California, it is not a matter of piercing the mediation confidentiality veil, but rather penetrating the mediation armor. California's mediation privilege provides very few exceptions to its broad and expansive evidence code which provides that: "all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."<sup>139</sup>

A 2015 California case underscores the breadth of the state's mediation privilege, as well as its lack of exceptions for parties to admit evidence of wrongdoing occurring during the mediation process. In, *Amis v. Greenberg Traurig LLP*,<sup>140</sup> a former client of a law firm was

133. Cole, *supra* note 58 at § 8.12.

134. *Id.*

135. See Strong, *Developments in the Law – Privileged Communications*, 98 HARV. L. REV. 1454, 1454–55 (1985).

136. See *id.* at 1454.

137. See generally, *Vitakis-Valchine v. Valchine*, 793 So.2d 1094.

138. See *Amis*, 235 Cal. App. 4th at 333–34.

139. The code provides specific limited exceptions, including evidence that would be otherwise admissible, such as evidence subject to discovery, an agreement to mediate, and disclosure of the fact that a mediator serves or was contacted to serve. CAL. EVID. CODE § 1119(c).

140. See generally, *Amis*, 235 Cal. App. 4th 331.

unable to maintain a lawsuit alleging attorney malpractice because he was precluded from offering evidence of what happened in the mediation. The trial court entered summary judgment for the firm based on plaintiff's inability to introduce evidence to prove his case due to mediation confidentiality.<sup>141</sup> On appeal, the Second District Court of Appeal affirmed, citing a string of California cases, including a California Supreme Court case confirming "that there is no attorney malpractice exception to the mediation confidentiality statutes."<sup>142</sup> Still, the court expressed sympathy with the plaintiff's assertion that "[m]ediation confidentiality was never intended to protect attorneys from malpractice claims" and suggested that the Legislature craft the state's expansive mediation confidentiality statutes to permit consideration of countervailing public policies.<sup>143</sup>

A similarly harsh result was reached in a 2014 Wisconsin Bankruptcy case in which a deaf plaintiff sued the Archdiocese of Milwaukee for sexual abuse suffered at the hands of a priest at the school when he was a seventeen year old student there.<sup>144</sup> The plaintiff, Doe, who did not have counsel at the mediation, maintained that the Archdiocese misrepresented its ability to pay his claim, as well as the amount of money it paid to settle with other survivors of sexual abuse.<sup>145</sup> The court noted that its job was to apply the Wisconsin statute even if, as a consequence, someone such as Doe is precluded from recovering on the basis of being fraudulently induced to sign the mediated agreement.<sup>146</sup> Having determined that the mediation communications were not admissible, the court affirmed summary judgment for the Archdiocese and disallowed the plaintiff's claim.<sup>147</sup>

#### B. *Uniform Mediation Act Provides Confidentiality Exception to Set Aside Mediated Agreements*

In contrast to the categorical confidentiality of mediation communications in California and strict construction of privilege in Wisconsin, the Uniform Mediation Act (UMA) recognizes that the

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141. *See id.* at 334.

142. *Id.* at 338–39.

143. *Id.* at 339 (citing *Cassel v. Superior Court*, 51 Cal. 4th 113, 119 (2011)).

144. *Doe v. Archdiocese of Milwaukee*, 772 F.3d 437 (7th Cir. 2014).

145. *Id.* at 439.

146. *Id.* at 443.

147. *Id.* The Wisconsin court cited California law as supporting the conclusions of the Doe court. *See Rojas v. Superior Court*, 33 Cal 4th 407, 423 (Cal. 2004); *See also* 15 Cal. Rptr.3d 643 at 655 (holding the mediation privilege is not subject to a good cause exception because the only exceptions to mediation confidentiality are those expressly stated in the statute).

interests of justice may at times outweigh the importance of confidentiality to the mediation process. The UMA drafters selected privilege as the approach "to satisfy the legitimate interests and expectations of participants in mediation, the mediation process, and the larger system of justice in which it operates."<sup>148</sup>

Under the UMA, mediation communications are privileged, and neither subject to discovery nor admissible in evidence unless waived or subject to an enumerated exception.<sup>149</sup> Delineated exceptions include "a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation."<sup>150</sup> Significantly, for mediation communications referenced in this section, a mediator is not compelled to offer evidence of the mediation communications. If a party were to claim mediator misconduct to rescind or reform a mediated agreement, an exception to the privilege applies. However, the UMA gives a limited privilege to mediators with respect to their own communications.<sup>151</sup> Consequently, the mediator could choose to waive the privilege and provide evidence, but would not be compelled to do so. Significantly, the mediator would be precluded from asserting the privilege for having failed to make required disclosures regarding conflicts of interest.<sup>152</sup>

Two states, New York<sup>153</sup> and Massachusetts,<sup>154</sup> have recently introduced the Uniform Mediation Act in their legislatures, while twelve states have already enacted the UMA: The District of Columbia,<sup>155</sup> Hawaii,<sup>156</sup> Idaho,<sup>157</sup> Illinois,<sup>158</sup> Iowa,<sup>159</sup> Nebraska,<sup>160</sup> New Jersey,<sup>161</sup> Ohio,<sup>162</sup> South Dakota,<sup>163</sup> Utah,<sup>164</sup> Vermont,<sup>165</sup> and Washington.<sup>166</sup> The adopting states have statutes that clearly define the

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148. UNIF. MEDIATION ACT § 4, Comment (2)(a).

149. *Id.* at § 4(a).

150. *Id.* at § 6(b)(2).

151. *Id.* at § 4(b)(2).

152. *Id.* at § 9(2)(d).

153. N.Y. S.B. 1017.

154. Mass. H.B. 49.

155. D.C. CODE §§ 16-4201-16-4213.

156. HAW. REV. STAT. § 658H 1-13.

157. IDAHO CODE ANN. §§ 9-801-9-814.

158. 710 Ill. Comp. Stat. 35-1-35-99.

159. IOWA CODE ANN. §§ 679C.10-679C.115.

160. NEB. REV. STAT. §§ 25-2930-25-2942.

161. N.J. STAT. ANN. 2A:23.C-1-2A:23C-13.

162. OHIO REV. CODE ANN. §§ 2710.01-2710.10

163. S.D. CODIFIED LAWS §§ 19-13A-1-19-13A-15.

164. UTAH CODE ANN. §§ 78B-10-101-78B-10-114.

165. VT. STAT. ANN. TIT. 12, §§ 5711-5723.

166. WASH. REV. CODE ANN. §§ 7.07.010-7.07.904.

privilege holders and the scope of each holder's privilege.<sup>167</sup> States that have not adopted the UMA, may not identify the holders of the privilege or may identify only the parties as the privilege holders.<sup>168</sup>

### C. *State Mediation Law Allowing Admission of Mediator Misconduct Communications*

State statutes offer varying confidentiality protection for mediation communications. California represents the iron-clad armor, with most states providing a qualified privilege with limited exceptions to the privilege.<sup>169</sup> The exceptions will determine what mediation communications will be subject to discovery and admissible in evidence. Mediation privilege statutes may also specifically provide that information subject to discovery remains so, even if it was communicated during mediation.<sup>170</sup> Many privileges provide exceptions for actions seeking or offered to prove or disprove a claim or complaint against a mediator arising from the mediation.<sup>171</sup> Some exceptions specify the mediator,<sup>172</sup> while others speak to professional misconduct or malpractice generally.<sup>173</sup> Others provide a general exception, such as

167. Cole, *supra* note 56 at § 8:13.

168. See, e.g., FLA. STAT. § 44.405(2) (“a mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation Communications”).

169. See *infra* Section VIII.B and C.

170. See, e.g., FLA. STAT. § 44.405(5); CAL. EVID. CODE § 1120 (a).

171. See, e.g., N.J. STAT. ANN. 2A:23C-6(5) (providing an exception when “sought or offered to prove or disprove a claim or complaint filed against a mediator arising out of a mediation”) and VA. CODE ANN. § 2.2-4119 (iv) (where communications are sought or [o]ffered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against the mediator”).

172. See, e.g., COLO. REV. STAT. ANN. § 13-22-307(d) (providing “that “[d]isclosure of the mediation communication is necessary and relevant to an action alleging willful or wanton misconduct of the mediator or mediation organization”); ARIZ. REV. STAT. ANN. § 12-2238 (providing an exception when “[t]he communication, material or act is relevant to a claim or defense made by a party to a mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party”); ID. CODE 9-806(1)(e) (providing exception to privilege for a mediation communication “[s]ought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator”).

173. See, e.g., FLA. STAT. § 44.405(4)(a)(4) (providing no confidentiality or privilege for a mediation communication “[o]ffered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding”); FLA. STAT. § 44.405(4)(a)6 (providing no confidentiality or privilege for a mediation communication “[o]ffered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct”); The Florida statutory exception applicable to mediator misconduct used as a basis for setting aside the mediated agreement is FLA. STAT. § 44.405(4)(a)(5) (providing no confidentiality or privilege for

when “the interest of justice outweighs the need for confidentiality,”<sup>174</sup> or as “required by law or code of ethics.”<sup>175</sup> Louisiana provides an exception for “[a] judicial determination of the meaning or enforceability of an agreement resulting from a mediation procedure if the court determines that testimony concerning what occurred in the mediation is necessary to prevent fraud or manifest injustice.”<sup>176</sup>

#### D. *State Statutes Requiring Courts to Set Aside Mediated Agreements*

State statutes, in addition to providing for admissibility of delineated mediation communications, may mandate that courts set aside mediated agreements based on mediator misconduct.<sup>177</sup> Minnesota has had such a provision since 1984, which specifically identifies mediator ethical violations that would require the court to reform or set aside mediated agreements:

In any action, a court of competent jurisdiction shall set aside or reform a mediated settlement agreement if appropriate under the principles of law applicable to contracts, or if there was evident partiality, corruption, or misconduct by a mediator prejudicing the rights of a party.<sup>178</sup>

Similarly, mandatory language for setting aside or reforming a mediated agreement for “evident mediator partiality or misconduct by the mediator, prejudicing the rights of any party”<sup>179</sup> has appeared in the Virginia statutes since 2002:

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a mediation communication “[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation”).

174. *See, e.g.*, CONN. GEN. STAT. ANN § 52-235(B)(4) (providing an exception when “the disclosure is required as a result of circumstances in which a court finds that the interest of justice outweighs the need for confidentiality, consistent with the principles of law”).

175. *See* SO. CAR. COURT RULE 8(b)(5). *See also* CONN. GEN. STAT. ANN. §52 – 235(d)(3) (providing exception when “the disclosure is required by statute or regulation, or by any court, after notice to all parties to the mediation”).

176. LA. REV. STAT. ANN. §9:4112(B)(1)(C).

177. *See* VA. CODE ANN. § 8.01-581.26; MINN. STAT. ANN. § 572.36.

178. MINN. STAT. ANN. § 572.36 (“That relief could not or would not be granted by a court of law or equity is not ground for setting aside or reforming the mediated agreement unless it violates public policy.”). Minnesota statutory law provides an exception to mediation confidentiality for parties seeking to have mediated agreements set aside or reformed. MINN. STAT. ANN. § 595.02(m).

179. VA. CODE ANN. § 8.01-581.26.



For purposes of this section, “misconduct” includes failure of the mediator to inform the parties at the commencement of the mediation process that: (i) the mediator does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.<sup>180</sup>

These statutes go beyond the holding in *Vitakis-Valchine*, which establishes court access for parties alleging mediator misconduct to set aside their mediated agreements for court-ordered mediation cases.<sup>181</sup> The Virginia and Minnesota statutory provisions definitively protect mediation parties from mediator misconduct and partiality prejudicing their rights by mandating that the court set aside or reform mediated agreements falling within the statutory parameters.<sup>182</sup>

While the exceptions to mediation privileges serve as a basis for admitting evidence, parties would still require a viable cause of action to seek relief from the court.<sup>183</sup> The Minnesota and Virginia statutes clearly establish the mediation parties’ right to access the court. Before the *Vitakis-Valchine* case, Florida case law did not recognize mediator misconduct as a basis to overturn or reform mediated agreements. Since the enactment of the Mediation Confidentiality and Privilege Act in 2004,<sup>184</sup> Florida has had a statutory exception for mediation communications “[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement reached during a mediation.”<sup>185</sup> It was not until the court holding in the case that mediator misconduct established a legally recognized basis for voiding or reforming a mediated agreement.<sup>186</sup> Unlike the Minnesota and Virginia statutes, the Florida statute does not require the courts to overturn or reform mediated agreements. It merely provides a statutory exception to confidentiality for purposes of admitting evidence to prove mediator misconduct.

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180. *Id.*

181. *Vitakis-Valchine*, 793 So. 2d at 1095.

182. VA. CODE §§ 8.01-581.26; MINN. STAT. § 572.36.

183. Contracts are set aside based on “a showing of fraud, misrepresentation, mistake, duress, or undue influence.” Thompson, *supra* note 6 at 522 (citations omitted); Mediator misconduct has been recognized as a basis for setting aside mediated agreements. *Vitakis-Valchine*, 793 So. 2d. 1094.

184. FLA. STAT. §§44.401–06.

185. FLA. STAT. §44.405(5).

186. *Vitakis-Valchine*, 793 So. 2d at 1095.

### E. *Mediation Privilege in Federal Courts*

Federal courts handle mediation privilege on an *ad hoc* basis, with inconsistent results. Federal mediation privilege law is uncertain as to both the existence and applicability of mediation privilege, with some courts recognizing mediation privilege and others refusing to do so.<sup>187</sup> Federal courts within the same state may handle mediation confidentiality differently. The Southern District of Florida recognizes the state statutory confidentiality and privilege,<sup>188</sup> specifically referencing the state statute in its local rule; the Middle District of Florida makes no reference to the Florida Mediation and Confidentiality Act.<sup>189</sup>

In a 1999 United States District Court case in Northern California, the court held that the parties' waiver of confidentiality<sup>190</sup> was not sufficient to order the mediator to testify.<sup>191</sup> This case highlights the complexity of the court's analysis of mediation privilege to determine the admissibility of evidence. The court first had to decide whether to apply state or federal law. Since the issue was whether the parties had entered into an enforceable mediated settlement agreement, it was a question of state contract law.<sup>192</sup> The court next faced the difficult question of whether to admit the mediator's testimony.<sup>193</sup> Federal Rule of Evidence 501<sup>194</sup> provides that the privilege of a witness be determined in accordance with State law when State law supplies the rule of decision.<sup>195</sup> The court confirmed the parties' waiver of confidentiality for purposes of having the mediator testify regarding the mediator's and the defendants' interaction during the mediation with both the plaintiff and her attorney.<sup>196</sup> Deciding that in the interest of fairness, the court needed to take testimony from

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187. Cole, *supra* note 59 at § 8.18.

188. FLA. SO. DIST. LOCAL RULE 16.2(g)(2) ("all proceedings of mediation shall be confidential and privileged in all respects as provided under federal law and Florida statutes §44.405").

189. FLA. MID. DIST. LOCAL RULE 9.07(b) ("all proceedings of the mediation conference, including statements, made by any party, attorney, or other participant, are privileged in all respects").

190. *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d. 1110, 1129 (N.D. Cal. 1999) (the plaintiff and defendant expressly waived the confidentiality protections provided by applicable California law).

191. *Id.*

192. *Id.* at 9.

193. *Id.* at 14.

194. "[I]n a civil case, state law governs privilege regarding a claim or defense for which a state law supplies the rule of decision." Fed. R. Evid. 501.

195. *Olam*, 68 F. Supp. 2d at 1130; *Id.* at 1128.

196. The plaintiff waived attorney-client privilege with her former counsel, and the defendants agreed to limited waiver of their privilege to allow testimony about

the mediator, it took the mediator's testimony in closed proceedings, under seal.<sup>197</sup> Then, considering the benefit of the mediator's testimony to outweigh its potential detriment to the mediation process, the court unsealed the testimony.<sup>198</sup>

This case is distinguished from subsequent California cases which strictly construe California's mediation confidentiality statutes, even when equity would suggest otherwise.<sup>199</sup> The court in *Wimsatt v. Superior Court* was obligated to follow the California Supreme Court's directive that courts may not craft exceptions to confidentiality.<sup>200</sup> The court, concerned about the inequity resulting from the state's mediation confidentiality statutes, suggests that "parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute."<sup>201</sup> The warning would give them the opportunity to steer clear of the harsh confidentiality law by avoiding mediation.<sup>202</sup>

#### IX. MEDIATORS' ETHICAL RULES

When parties challenge mediated agreements based on mediator misconduct, they may allege specific misconduct or make a general allegation of misconduct. Courts may look specifically at the ethical rules governing mediator conduct or look to see if the mediator violated applicable law. In both *Golden v. Hood*<sup>203</sup> and *Chitkara v. New York Telephone Co.*,<sup>204</sup> the courts looked to see if the alleged mediators' statements were fraudulent or a material misrepresentation, and applied contract law principles in their determination. In both cases, the plaintiffs alleged that the mediators had predicted the litigation value of their cases. In *Golden*, the court determined that the record did not reflect that the mediator's opinions, if offered, were fraudulent or a material misrepresentation.<sup>205</sup> The *Chitkara* court

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their interactions and the mediator's interactions during the mediation with the plaintiff and her attorney. *Id.* at 1129.

197. *Id.* at 1128.

198. *Id.* at 1139.

199. *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137 (2007) (holding the law firm was entitled to a protective order prohibiting the disclosure of mediation e-mails and briefs). Consequently, a client of the law firm was unable to admit evidence needed for his legal malpractice claim against the firm. *Id.* at 163.

200. *Id.*

201. *Id.* at 164.

202. *Id.*

203. *Golden v. Hood*, No. E1999-02443-COA-MR3-CV, 2000 WL 122195, at \*2 (Tenn. Ct. App. Jan. 26, 2000).

204. *Chitkara*, 2002 WL 31004729 at \*54.

205. *Golden*, 2000 WL 122195 at \*2.

determined that the plaintiff could not show detrimental reliance on the mediator's statements regarding the case's litigation value when they were based on verifiable fact, and the party was represented by counsel who was present when the mediator made the statement.<sup>206</sup> The courts' analyses centered on whether the mediators' statements were inaccurate, rather than whether the mediators had predicted the court outcome that led the parties to reach an agreement they would otherwise not have reached. In neither case did the appellate court find support for setting aside the mediated agreement signed by the plaintiff with the advice of counsel.

Mediators are subject to different ethical rules based on factors, such as the court and state in which the case arose, the type of case being mediated, and whether the mediator is certified by an entity requiring compliance with its ethical rules. The specific rules regulating a mediator's conduct will be dispositive in determining whether the mediator's actions or inactions were violative of the applicable ethical standard. For example, Florida certified and court-appointed mediators are prohibited from offering "a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute."<sup>207</sup> Additionally, Florida rules prohibit a mediator from offering a professional or personal opinion "intended to coerce the parties, decide the dispute, or direct a resolution of any issue."<sup>208</sup> Consequently, a Florida court may find that a mediator's prediction of a trial outcome will form the basis for overturning the parties' mediated agreement if the moving party proves that (a) the mediator had made a substantial ethical violation which caused the party to enter into the agreement, and (b) the mediation had been court-ordered, with the mediator obligated to follow the ethical rules established by the Supreme Court of Florida.<sup>209</sup>

Similarly, the Model Standards of Conduct for Mediators require mediators to honor the parties' self-determination,<sup>210</sup> stating "a mediator shall conduct a mediation based on the principle of party self-

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206. *Chitkara*, 2002 WL 31004729 at \*55.

207. FLA. RULES FOR CERTIFIED & CT.-APPOINTED. MEDIATORS, R. 10.370(c). "A mediator shall not offer a personal or professional opinion intended to coerce the parties . . . decide the dispute, or direct a resolution of any issue." *Id.*

208. *Id.*

209. *Vitakis-Valchine*, 793 So.2d at 1099.

210. AM. ARBITRATION ASS'N, AM. BAR ASS'N, ASS'N FOR CONFLICT RES., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, I.A. ("Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome.").

determination.”<sup>211</sup> Further, if a conflict of interest<sup>212</sup> may reasonably be seen as undermining the integrity of mediation, the mediator must withdraw or decline to mediate.<sup>213</sup>

Parties have alleged mediator conflict of interest as a basis to overturn mediated agreements, and in one atypical case, in an unsuccessful attempt to avoid a jury verdict.<sup>214</sup> The ethical rules for mediators address the mediators’ obligation to avoid conflicts of interest. The Florida Rules for Certified and Court-Appointed Mediators prohibit mediators from mediating “a matter that presents a clear or undisclosed conflict of interest.”<sup>215</sup> Therefore, pursuant to Florida’s Rules for Mediators,<sup>216</sup> some conflicts are not subject to waiver. “A conflict of interest which clearly impairs a mediator’s impartiality is not resolved by mere disclosure to, or waiver by, the parties.”<sup>217</sup> Consistently, the Model Standards of Conduct for Mediators require a mediator to withdraw or decline to mediate if the conflict of interest may reasonably be seen as undermining the integrity of the mediation, despite the express desire or agreement of the parties.<sup>218</sup>

While cases underscore the difficulty faced by parties asserting mediator misconduct to set aside their mediated agreements, the literature does not disclose the frequency with which mediators may significantly be violating ethical rules. Mediation participants report a high satisfaction rate with mediation.<sup>219</sup> “Although the frequency with which mediation agreements are enforced suggests that mediation processes are generally fair, the increasing volume of enforcement-related litigation may suggest otherwise.”<sup>220</sup>

The referenced cases reflect the formidable challenges faced by parties seeking to set aside mediated agreements based on mediator

211. *Id.*

212. “A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality.” *Id.* at III.A.

213. *Id.* at III.E.

214. *CEATS, Inc. v. Cont’l Airlines, Inc.*, 755 F.3d 1356, 1367 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 1549 (holding mediator’s failure to disclose potential conflict he had a duty to disclose, was not an “extraordinary circumstance” justifying relief from judgment under Federal Rules of Civil Procedure Rule 60(b)).

215. FLA. RULES FOR CERTIFIED & CT.-APPOINTED. MEDIATORS, R. 10.340(a).

216. The rules apply to certified and court-appointed mediators. *See* FLA. RULES FOR CERTIFIED & CT.-APPOINTED. MEDIATORS, R. 10.200.

217. FLA. RULES FOR CERTIFIED & CT.-APPOINTED. MEDIATORS, R. 10.340

218. AM. ARBITRATION ASS’N, AM. BAR ASS’N, ASS’N FOR CONFLICT RES. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, III. E.

219. Coben & Thompson, *supra* note 14, at 74.

220. *Id.* at 75.

misconduct. The plaintiff bearing the burden of proof will likely meet opposition from the party looking to enforce the agreement, as well as the mediator who will likely deny having committed ethical violations. Additionally, we would expect attorneys representing parties at mediation to assert their appropriate advocacy and representation regarding the process. Difficulty ascertaining and admitting into evidence the mediation communications needed to prove the plaintiff's case may seem insurmountable, or at least unlikely. Nonetheless, parties should be granted access to the court to seek redress if they experienced significant unethical behavior by the mediator that led them to enter into a mediated agreement they would not otherwise have signed.

## X. RECOMMENDATIONS

### A. *Define Mediation and Call Other Processes by Other Names*

People involved in the mediation process deserve to know about the process in which they are participating. Mediation needs to be adequately defined so participants, lawyers and judges know “the scope of acceptable mediation styles and practices.”<sup>221</sup> Mediation is sometimes seen as including varied techniques or styles, which while fitting within the dispute resolution spectrum, are not mediation.<sup>222</sup> Further, the term mediation is inappropriately used for other dispute resolution processes.<sup>223</sup>

Robust debate continues within the dispute resolution community as to the breadth of the mediation process. Specifically, disagreement abounds as to whether evaluation legitimately plays a part in the process. In 1996, Leonard Riskin published an Article with a grid reflecting the scope of mediation styles.<sup>224</sup> He focused on mediators' orientation as either facilitative or evaluative, and problem definition

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221. Brien Wassner, *A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs*, 4 CARDOZO ONLINE J. CONFLICT RESOL. 3, 8 (2002).

222. *Id.*

223. *See, e.g., Estate of Skalka v. Skalka*, 751 N.E.2d 769 (Ind. Ct. App. 2001) (judge advising parties that he will no longer be a mediator, he will be a judge, and that what they will go through will be financially draining and they will lose the property); *Isaacson v. Isaacson*, 792 A.2d 525 (N.J. Super. Ct. App. Div. 2002) (holding the same person could not be both the *Guardian ad Litem* and the mediator, when the trial court had the *Guardian ad Litem* for the children also serving as the binding mediator for the parents, with the authority to make a decision should they not settle at mediation).

224. Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 35 (1996).

going from narrow to broad.<sup>225</sup> The Riskin Grid and its creator's inclusion of the varied activities fitting within the definition of mediation drew strong disagreement. Notably, Kimberlee K. Koch and Lela P. Love responded with an Article addressing the risks of Riskin's Grid, including the incongruity of allowing non-lawyers to be mediators, yet allowing mediators to evaluate cases, which constitutes giving legal advice.<sup>226</sup> Subsequently, Leonard Riskin revised his grid to use "directive" and "elicitive" for the mediator orientations, rather than "evaluative" and "facilitative".<sup>227</sup>

However, boundaries establishing acceptable mediation practices have yet to be agreed upon within the dispute resolution community, and a variety of dispute resolution practices are mislabeled as mediation.<sup>228</sup> "Definitions present both perils and opportunities when applied to complex human activities"<sup>229</sup> Nonetheless, a definition of mediation is required to allow parties and attorneys to know enough about the process to meaningfully participate, and to determine the extent of their participation. They must be able to identify mediation's strengths and limitations, know their roles, the mediator's role, as well as the rules governing the process.<sup>230</sup> The definition should not constrain mediation's flexibility; it must advise what it is and how it works. Parties entering mediation need to know that they are the decision makers - as to whether to resolve (some or all of) their dispute, as well as the terms of resolution.<sup>231</sup> The mediator does not have the authority to make the resolution decision and is ethically obligated to honor the parties' self-determination.<sup>232</sup> Importantly, mediation participants have a right to know what is and what is not

225. *Id.*

226. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 104-105 (1998).

227. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30-31(2003).

228. Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 72 (2005). *See supra* note 214.

229. *Id.* at 70.

230. *See, e.g.*, Thompson, *supra* note 6 at 570 (noting the unfairness of parties being told that the mediator is a neutral who yields no power, and then having the mediator become an advocate for settlement with a great deal of practical power)

231. "A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes." AM. ARBITRATION ASS'N, AM. BAR ASS'N, ASS'N FOR CONFLICT RES., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, III. E.

232. *Id.*

confidential, and how confidentiality might benefit or limit them.<sup>233</sup> “Mediation would no longer be a consensual process if a party could be tricked or forced into an agreement and have no recourse.”<sup>234</sup>

### B. *Offer Choice of Process - Many Doors to the Courthouse*

In 1976, Frank Sander introduced the concept of “many doors to the courthouse” in a prophetic speech at the Pound Conference, which is viewed as the “big bang” moment for Alternative Dispute Resolution.<sup>235</sup> He wondered whether in the future, cases would be matched to the appropriate form of dispute resolution, with some going to trial, and others to mediation, arbitration, fact-finding or another process tailored to the particular case.<sup>236</sup> Much has changed during the four decades following the Pound Conference. With the extensive utilization of mediation and arbitration, commentators note the significant decline in the number of trials.<sup>237</sup> ADR is now recognized as standing for Appropriate Dispute Resolution, rather than Alternative Dispute Resolution, since the vast majority of matters are resolved through dispute resolution processes.<sup>238</sup>

Mediation has many virtues and well serves the court system, parties and attorneys. It deserves to be a respected process that the public knowingly chooses to beneficially resolve their disputes. Nonetheless, mediation is not the only dispute resolution process; for some disputes, other processes may better fit the parties’ issues and goals. When professionals offer parties a choice of dispute resolution processes so they may “fit the forum to the fuss,” fundamental values

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233. Maureen E. Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. TEX. L. REV. 943, 985 (2008). (“Mediators have an ethical obligation: (1) to stop making blanket statements about confidentiality that mislead the participants; and (2) to become knowledgeable about the limits of confidentiality and exceptions to privilege.”)

234. Deason, *supra* note 21 at 68.

235. Michael L. Moffitt, *Special Section: Frank Sander and His Legacy as an ADR Pioneer, Before the Big Bang: The Making of an ADR Pioneer*, 22 NEG. J. 437, 437 (2006).

236. *Id.*

237. Kimberlee K. Kovach, *The Vanishing Trial: Land Mine On The Mediation Landscape Or Opportunity For Evolution: Ruminations On The Future Of Mediation Practice*, 7 CARDOZO J. CONFLICT RESOL. 27, 30 (2005).

238. Carrie Menkel-Meadow, *Ethics in ADR: The Many “CS” of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979, 980 (2001).



in the alternative dispute resolution movement are advanced.<sup>239</sup> Specifically, the professionals honor the disputants' role in making decisions about their disputes, allowing the disputants to tailor procedures to fit their preferences and interests.<sup>240</sup>

Party self-determination, a hallmark of mediation, extends beyond the terms of the mediated agreement. Parties decide matters of process as well as outcome, which may include mediator selection, process design, and the extent of their participation in the process.<sup>241</sup> If parties want a decision-maker or evaluator, rather than a facilitator, they should have that option. Consistent with Frank Sander's notion of many doors to the courthouse, processes other than mediation should be available to the parties. The processes need to be identified, named and defined. If the process is not mediation, it must be called by another name. The success of dispute resolution processes depends on the public's comfort and confidence in using the processes. Savvy consumers educate themselves so they can make wise decisions. They deserve access to readily available and comprehensible information. To advance the matching of the process to the case, attorneys and judges must stay abreast of available dispute resolution options, as well as developments in the field.

### C. *Set High Standards for Training and Credentialing of Mediators*

Court mandated and court encouraged mediation, an established component of the judicial system, requires that the public have access to "quality providers of mediation services."<sup>242</sup> Mediators must meet and maintain the established mediator qualifications and ethical standards. Consequently, a mechanism must be in place to help mediators, through education, who deviate from the expected standards, or if necessary, reprimand or remove mediators who are not complying with the established standards.<sup>243</sup>

Mediators require training in the practices and theories unique to mediation, as well as mediation ethics.<sup>244</sup> Training standards for mediators should be periodically reviewed to determine if they are

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239. John Lande & Gregg Herman, *Fitting the Forum To The Family Fuss –Choosing Mediation, Collaborative Law, Or Cooperative Law For Negotiating Divorce Cases*, 42 FAM. Ct. Rev. 280, 284 (2004).

240. *Id.*

241. MODEL STND. OF COND. MED. (ABA, AAA & ACR), I.A.

242. Press, *supra* note 91, at 113.

243. *Id.*

244. Andrea Yang, *Ethics Codes for Mediator Conduct: Necessary But Still Insufficient*, 22 GEO. J. LEGAL ETHICS 1229, 1242.

providing the knowledge, skills, and ethical standards necessary for mediators to properly perform their responsibilities. Reviewing grievances filed against mediators will identify the actual or perceived ethical lapses by the mediators.<sup>245</sup>

Mediators' initial training should include at least one comprehensive test to show requisite mastery of ethical obligations. Their preparation should also include observation and co-mediation opportunities with experienced mediators who will serve as role models and mentors.<sup>246</sup> Ideally, mediators-in-training will have the opportunity to reflect on their mediator mentorship experience through writing and speaking with their mentors. Critical reflection and self-analysis enable mediators to determine the efficacy of the mediation techniques they utilize. As there are multiple responses worth considering for various mediation dilemmas, reflective practice promotes skilled mediators.<sup>247</sup> Additionally, mediators should have on-going continuing education requirements, and be encouraged to participate in peer evaluation to learn from and teach other mediators throughout their mediation careers.<sup>248</sup>

The public requires access to information regarding mediator training and credentialing, and qualified mediators should be readily identified by them.<sup>249</sup> The public also requires a mechanism for filing grievances against mediators who they believe to have violated ethical rules. While most parties feel that mediation gives them the opportunity to be heard, exercise self-determination, and resolve their differences, some do not. The two most common and troubling complaints filed against mediators are mediator partiality and mediator "[i]nterference with a party's self-determination, by offering legal advice, by giving legal opinions, by recommending settlement, or by engaging in more overt acts of coercion . . ." <sup>250</sup> Interestingly, these are precisely the type of allegations parties make when seeking to set aside their mediated agreements based on mediator misconduct. Parties and attorneys should be apprised of the applicable ethical rules for mediators to prevent violations, and to identify violations should they occur.

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245. See Press, *supra* note 91.

246. Yang, *supra* note 244 at 1243.

247. Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, J. DISP. RES. 303, 336-37 (2004).

248. *Id.*

249. Press, *supra* note 91, at 168.

250. Paula M. Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. ON. DISP. RESOL. 721, 774 (2006).

D. *Allow Parties Access to Court and Ability to Admit Requisite Evidence to Set Aside Mediated Agreements Based on Mediator Misconduct*

Parties wronged through a process ordered by the court deserve court access to remedy the wrong. Parties who enter into mediated agreements as a direct result of mediator misconduct require a viable cause of action, as well as the ability to admit the evidence needed to prove their case.<sup>251</sup> The cause of action may specify mediator misconduct or may be the more familiar contract actions, such as duress, coercion or fraud. Additionally, courts have the inherent power “to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation agreement obtained through violation and abuse of the judicially prescribed mediation procedures.”<sup>252</sup> Regardless of the cause of action, the party alleging mediator misconduct to set aside the agreement will face an uphill battle. Cases reflect the almost insurmountable hurdles for parties looking to set aside mediated agreements based on mediator misconduct.<sup>253</sup> While the challenging party seeks relief from the agreement, the other party will be looking to enforce the agreement. Additionally, the mediator will likely assert his compliance with ethical rules, and attorneys present will likely state their appropriate representation throughout the process, which would have included client protection from the mediator, had it been necessary.

Courts order parties to mediation to give them the opportunity to work with a specially trained third party and craft an agreement that meets their unique needs and interests. Mediation is no mere negotiation and is governed by specific law and rules.<sup>254</sup> Mediation’s unique characteristics need to be identified, communicated and protected throughout the process. They also need to be considered should a party seek to set aside an agreement due to mediator misconduct. Once parties allege mediator misconduct, the ethical obligations owed by the mediator to the parties must be carefully identified and

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251. A party alleging mediator misconduct to set aside a mediated agreement may be denied court access if the governing law does not recognize wrongful actions by a third party as a basis for setting aside an agreement. *Vitakis-Valchine v. Valchine*, 793 So.2d at 1095. In *Vitakis-Valchine*, neither the general master nor the trial court had made any findings regarding the truth of the wife’s allegations of mediator misconduct. *Id.* It was not until the appellate court held that mediator misconduct can be a basis for a court to refuse to enforce a mediated agreement and remanded the case for further findings that the wife’s allegations were considered. *Id.*

252. *Vitakis-Valchine*, 793 So.2d at 1099.

253. See *supra* Parts VII & VIII.A.

254. See *supra* Parts VI, VII, VIII, IX and X.

analyzed to determine if the mediator substantially violated ethical rules and if the violation(s) led the party to enter into the agreement. Should this be the case, the party deserves redress for the cognizable wrong.

Wronged parties will also require the ability to admit necessary evidence. Mediation confidentiality and privilege are meant to enhance the process and to benefit the parties, not to diminish their legal rights. Confidentiality exceptions require consideration of the varying, possibly conflicting, interests of the mediation participants, the mediator and the courts. Mere utterance of the term “mediator misconduct” should not open the door to admitting evidence. In camera determination by a court that the mediator misconduct allegation has merit will help balance the interests of the party alleging wrongdoing with those of the mediator and the other participants.<sup>255</sup>

Society’s interest in preserving the confidentiality of mediation communications is not intended to allow mediators who substantially violate ethical rules to hide behind the cloak of mediation confidentiality. Admittedly, the rights of all parties to the contract must be recognized. The confidentiality interests of the other mediation participants and the mediator need also be considered. Fortunately, the substantial body of mediation and contract law, along with evidentiary rules serve as a guide in addressing this quandary. The UMA and certain state privilege exceptions provide samples of statutory provisions that accomplish the goal of providing protection of mediation communications with targeted exceptions that would cover admitting evidence to set aside mediated agreements based on mediator misconduct.<sup>256</sup> States with near absolute privileges or privileges with very limited exceptions should look to the UMA or other privileges that balance mediation confidentiality with the countervailing interests of justice.<sup>257</sup>

While mediation provides a safe environment for parties to exercise self-determination and resolve their own disputes, it is not meant to be a safe haven for mediators or lawyers to violate ethical rules and obligations with impunity. In general, parties have a high satisfaction rate with mediation, and we have reason to believe mediators

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255. “As with other privileges, when it is necessary to consider evidence to determine if an exception applies, The Act contemplates that a court will hold an in camera proceeding at which the claim for exemption from the privilege can be confidentially asserted and defended.” UNIF. MEDIATION ACT § 6 cmt 1.

256. See *supra* Parts VIII.B. and C.

257. *Id.*

are performing well and ethically.<sup>258</sup> Nonetheless, parties' rights to seek redress for cognizable wrongs suffered through the process need to be protected. If parties fear the loss of rights because they settled at mediation, they may well decide against resolving their cases through the process and courts may reconsider the advisability of ordering parties to mediate their cases.

## XI. CONCLUSION

Meeting the needs of parties as well as the courts, mediation is an expected and favored dispute resolution process. Its many virtues make it a unique and efficacious process. Ironically, on occasion some intended benefits may be detrimental in practice. The mediator, intended process protector, has the potential to morph from problem solver to problem maker by substantially violating ethical rules, causing parties to enter into agreements they would not otherwise have accepted. Additionally, mediation confidentiality and privilege, intended to provide a safe space for the parties to openly communicate, may preclude parties from introducing evidence needed to prove their case.

While parties generally report a high satisfaction rate with mediation, we have seen an increase in litigation about the process, with increasing complaints from parties in court-ordered mediations alleging mediator misconduct.<sup>259</sup> Should parties be injured by their participation in court-ordered mediation, they deserve access to the court to redress wrongs and the ability to admit the requisite evidence. Further, they deserve consideration of their allegations based on the specific dispute resolution process to which the court ordered them. Mediation is no mere negotiation<sup>260</sup> and the mediator is no ordinary third party.<sup>261</sup> The unique attributes of the mediation process with attending reasonable party expectations must be considered when evaluating parties' allegations of mediator misconduct to set aside mediated agreements. Mediation, beneficially used for millennia, has

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258. Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?* 18 *HAMLIN J. PUB. L. & POL'Y* 376, 377 (1997) (stating "that ADR processes, especially mediation, do consistently result in increased litigant satisfaction").

259. Welsh, *supra* note 2 at 9. *But see* Coben & Thompson, *supra* note 14 at 48–49 (noting a low percentage of litigated cases addressing mediator misconduct and drawing the general conclusion that "existing legal norms force defects in the mediation process to be framed in terms identical to those used to address issues that plague un-facilitated party-bargaining").

260. *See supra* note 4.

261. *Vitakis-Valchine v. Valchine*, 793 So.2d 1094, 1099 (Fla. Dist. Ct. App. 2001).

stood the test of time. With the advent of court-connected mediation, renewed emphasis on the unique qualities of the process will allow parties to reap the benefits of mediation for millennia to come.