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Mediator Immunity: The Misguided and Inequitable Shifting of Risk

Consider the case of the Negligent Neutral and the Disgruntled Dealer:[1]

After months of squabbling, two partners trying to split up their rare and ancient art business reluctantly succumb to the urging of their accountant and attempt to resolve their conflict through mediation. In the early stages of the mediation, while trying to get a handle on the value of the various components of the business, the mediator states, "I am not a tax lawyer, but doesn't this issue on taxes have some value that should be considered in your division of assets?"

"We hadn't thought of that," the partners chime in.

"Now, you should confirm this with your attorneys, but I think it's worth considering," the mediator says.

Although the bargaining becomes quite contentious at times, the partners persevere in their efforts. Late into the evening they work. Patience is running thin and tempers are frayed. The parties and the mediator are obviously exhausted. Many issues have been addressed, but the two continue to squabble over a prized Grecian urn they have held as a hallmark of their business since first opening the doors. The mediator, trying to break the

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[1] Adopted from Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 14 (2001). Used with permission of the Marquette Law Review.

logjam, mentions the tax issue again, but fails to attach her previous admonition about seeking a separate opinion.

"All right, all right . . . if you give me the tax break, you can have the urn." Tears rolling down his cheeks, the partner continues, "That urn is so special. I don't want to part with it, but I can't keep it either. I can use the tax break to help care for my mother." Near defeat, his voice trails off, "I think she has Alzheimer's. . . ." After another two hours of drafting, an agreement is signed at 1:00 a.m.

Ominously, the mediator was wrong; the tax break is useless. After the parties learn the truth, the Disgruntled Dealer sues to void the agreement and recover his interest in the Grecian urn under the theory of mutual mistake of the law.[2] As an alternative remedy, his attorney joins the mediator as a co-defendant and alleges malpractice arising from the negligent tax opinion. Unfortunately, plaintiff's counsel has overlooked a little-known statute granting the mediator immunity for her acts.[3] Counsel for the mediator files the appropriate motion and quickly obtains a dismissal.

Should the Negligent Neutral be afforded immunity, thus barring the Disgruntled Dealer from any remedy for the negligent tax advice?

Consider next, the case of the Misbehaving Mediator and the Pasty Participant:[4]

Late in the afternoon, after a long day of mediation over a disputed oil lease, one of the parties begins to complain of chest pains and cites a history of heart troubles. Upon asking that the mediation be postponed to a later date, the mediator commands, "Nobody's leaving this place until we have an agreement!" Overwhelmed by the mediator's stridency, the party surrenders to the mediator, and a settlement is reached shortly thereafter. However, the stricken party has little memory of the final stages

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[2] *See generally* Future Plastics, Inc. v. Ware Shoals Plastics, 407 F.2d 1042 (4th Cir. 1969) (supporting the common law principle of mutual mistake of the law).

[3] Both of these scenarios refer to statutes because the majority of states with immunity provisions have done so in this manner, although some case law exists and a number of states have court rules that create mediator immunity. *See infra* Appendix and Parts II and III.

[4] This hypothetical is adopted from Randle v. Mid Gulf, Inc., No. 14-95-01292-CV, 1996 WL 447954, at *1 (Tex. App. Aug. 8, 1996) (finding an exception to the normal rule of confidentiality where defendant alleged coercion in defense of action to enforce settlement agreement reached during mediation).

of negotiation and even less of what she signed. When the other party sues to enforce the agreement, counsel for the Pasty Participant impleads the mediator. Using a statute similar to the one in the previous hypothetical, counsel for the mediator convinces the court to dismiss the claim against the mediator. Should the mediator be able to avoid answering for this egregious conduct? Whether or not the Pasty Participant would ultimately prevail at trial on her claim against the mediator, should she be foreclosed from bringing her claim? If the legislatures and the courts extend immunity to mediators, should it cover willful misconduct or just negligence? What are the economic and social ramifications that arise from providing mediators with immunity for their actions?

INTRODUCTION

The last twenty-five years have seen enormous growth in the use of mediation as a practical, efficient, and gentle alternative to traditional litigation for conflict resolution.[5] Much of the increased use of mediation has been accomplished through the development of mediation programs by state and federal court systems,[6] referred to as "court-annexed" or "court-connected."[7] Court-annexed mediation has expanded the "win/win" culture of integrative bargaining to include settlement of actions pending in

[5] *See* Kent L. Brown, *Confidentiality in Mediation: Status and Implications*, 1991 J. DISP. RESOL. 307 (1991).

[6] *See* Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 594 (1997) ("One common route to ADR is through legislatively or judicially mandated programs for certain types of disputes. Many state legislatures have enacted statutes that require certain cases—identified primarily by subject matter and/or the amount in controversy—to be arbitrated or mediated before they may be tried in court."); EDWARD J. BERGMAN & JOHN G. BICKERMAN, COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (1998); Art Thompson, *The Use of Alternative Dispute Resolution in Civil Litigation in Kansas*, 12 KAN. J.L. & PUB. POL'Y 351, 354 (2003).

[7] A search for "court-annexed mediation" on the Web using the Google search engine generated 3,480 hits with references for nearly every state, many federal courts, and places as diverse as Argentina, Australia, Canada, England, Germany, India, Japan, Korea, The Netherlands, Ukraine, and Zambia. Google Search: "court-annexed mediation," *at* http://www.google.com (May 1, 2003). A follow-up search on April 11, 2004 generated 5,830 hits with similar international diversity. Interestingly, the second search produced a proposed piece of legislation in Trinidad and Tobago that would provide for full immunity with an interesting twist. Mediators would be completely immune except if they breach confidentiality. *See* Mediation Bill, 2003, *available at* http://www.ttparliament.org/bills/senate/2003/b2003s10.pdf.

the courts.[8] In addition to the normal gains attributable to the parties, such as the retention of self-determination, and the ability to craft creative settlements and possibly decrease costs, the courts can now celebrate a reduced docket, as well as increased levels of disputant satisfaction.[9]

Accompanying this growth, a majority of states and the District of Columbia now have statutes, court rules (both state and federal), or case law creating immunity for mediators to insulate them from most, if not all, civil liability for wrongdoing during the mediation, such as the cases of the Negligent Neutral and the Misbehaving Mediator.[10] If mediators can avoid litigation because of their conduct, the argument goes, an adequate supply of mediators will be guaranteed.[11] Without protection from vexatious litigation, mediators will be reluctant to participate in court-annexed programs, thus denying the courts the necessary resources to settle claims. This is especially true when mediators are expected to volunteer their services or are paid substantially less than market rates.[12]

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[8] *See generally* ROGER FISHER ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT (1994); ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton, 2d ed. 1991); ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE (1989); WILLIAM URY, GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE (1991); WILLIAM URY, THE THIRD SIDE: WHY WE FIGHT AND HOW WE CAN STOP (2000).

[9] STEVENS H. CLARKE ET AL., COURT ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS vii (1995); JOHN A. GOERDT, SMALL CLAIMS AND TRAFFIC COURTS: CASE MANAGEMENT PROCEDURES, CASE CHARACTERISTICS, AND OUTCOMES *in* 12 URBAN JURISDICTIONS xii (1992); Keith Schildt et al., Major Civil Case Mediation Pilot Program, 17th Judicial Circuit of Illinois ii (1994) (unpublished preliminary report, on file with author); Linda Slack, A Comparative Analysis on the Benefits of Mediation in the Cobb County Superior Court 10 (May 1996) (unpublished preliminary report, on file with author).

[10] For a complete listing of such provisions, see the Appendix; *see also* discussion *infra* at Parts II and III.

[11] Howard v. Drapkin, 271 Cal. Rptr. 893, 901 (Ct. App. 1990); Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876, 1893 (1986) [hereinafter *Sultans of Swap*]; *but cf*. Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 149 (2003) (arguing that it is very difficult to sue mediators successfully).

[12] No empirical data exists to support this supposition. However, there is anecdotal evidence to the contrary. In seventeen years of administering the MetroCourt Mediation Division, Director Susan Barnes Anderson has never encountered any resistance from mediators about mediating in this small claims program without protection from civil liability. During this period the program has conducted approximately 15,000 mediations with a revolving panel of volunteer mediators that frequently numbers more than one hundred. The mediators cover a diverse array of

Unfortunately, the reasoning behind both the statutes and the limited case law are unsound and the results are inequitable. First, the two important cases that have found mediator immunity have misapplied the principles, policies, and reasoning from the case law on judicial immunity.[13] Second, while the parties and the courts both gain from court-annexed mediation, mediator immunity removes the risk of harm by a poor or misbehaving mediator from the courts' shoulders and places it firmly on a few unlucky and unprepared disputants. Mediator immunity represents the inequitable shifting of risk of mediator misconduct from the mediators and the courts to those mediation participants least able to protect themselves from or shoulder the burden of such negative behavior. Although there has been considerable scholarship, both pro and con, concerning the advisability of mediator immunity,[14] none has addressed the disparate economic impact

experience, including some of the most experienced and sophisticated practictioners in New Mexico. Interview with Susan Barnes Anderson, Director, MetroCourt Mediation Division, in Albuquerque, N.M. (April 2, 2004).

[13] *Howard*, 271 Cal. Rptr. at 893; Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994).

[14] Arguments in favor of immunity for mediators include: Brian Dorini, *Institutionalizing ADR:* Wagshal v. Foster *and Mediator Immunity*, 1 HARV. NEGOT. L. REV. 185 (1996) (asserting that immunity is necessary to make ADR more productive for users and practitioners, but provides no explanation of this phenomena); Joseph B. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85, 86-87 (1986) (arguing that mediator should not be liable for terms agreed to by the parties, but that there should be mechanisms for relieving parties of responsibility without liability on the mediator's part); *but see Sultans of Swap*, *supra* note 11, at 1893 (arguing against mediator liability due to the deterrent effect that potential liability would have on participation in mediation programs).

For arguments in favor of a limited form of immunity for mediators, *see* Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47 (1986) (claiming that absolute immunity would lead to a decline in accountability and professional standards by mediators and that the cost to the profession would be too great); Caroline Turner English, *Mediator Immunity: Stretching the Doctrine of Absolute Quasi-Judicial Immunity:* Wagshal v. Foster, 63 GEO. WASH. L. REV. 759 (1996) (believing that without some form of responsibility there would be no safeguards to review mediator's conduct, but asserting that without some protection no one would volunteer, thus destroying the use of ADR within the courts); Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629 (1997) (using an economic argument, the author calls for qualified immunity because the cost of insurance may limit accessibility, particularly in cases with smaller amounts at risk); Moffitt, *supra* note 11, at 200 (arguing that qualified immunity for egregious conduct strikes the proper balance between allowing the mediator to exercise subjective discretion and the rights of parties to recover in the most offensive cases).

Arguments against mediator immunity include: Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731 (1984) (arguing that

that such immunity regimes may have on participants in mediation or the question of who is best situated to shoulder such risk.[15]

Part I of this Article contains a brief history and analysis of judicial and quasi-judicial immunity derived from the common law tradition dating back to seventeenth-century England. Part II contains an analysis of mediator immunity arising from the case law, while Part III contains an analysis of statutes and rules creating immunity. Finally, Part IV concludes with an analysis of mediator immunity from a risk-shifting and risk-spreading perspective and finds that no viable economic argument exists to support the proposition.

I

A Brief History and Analysis of Judicial Immunity[16]

A. History

Mediator immunity has its roots buried deeply within the common law tradition of judicial immunity that has developed over the last four centuries. Judicial immunity allows judges to make

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the mediator has a fiduciary duty to the parties and, if that duty is violated, the parties should have a cause of action against the mediator); Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 Rutgers L.J. 131 (1999) (arguing that immunity would erode the standards of conduct and that potential liability provides incentives for conscientious behavior); Linda R. Singer, *Immunity Imperils the Public and Mediator Professionalism*, Nat'l L.J. C12 (Apr. 11, 1994); Kevin C. Gray, Wagshal v. Foster*: Mediators, Case Evaluators, and Other Neutrals—Should They Be Absolutely Immune?*, 26 U. Mem. L. Rev. 1229, 1249-50 (1996) (arguing that mediator immunity only confuses the roles of the judge and mediator, especially for unknowing litigants whom are forced through a mandatory mediation system); J. Sue Richardson, Comment, *Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators*, 17 Fla. St. U. L. Rev. 623 (1990).

[15] *But cf.* National Standards for Court Connected Mediation Programs 14.0, *at* http://www.caadrs.org/studies/liabilit.htm:

> Courts should not develop rules for mediators to whom they refer cases that are designed to protect those mediators from liability. Legislatures and courts should provide the same indemnity or insurance for those mediators who volunteer their services or are employed by the court that they provide for non-judicial court employees.

[16] For more complete histories of judicial immunity, *see*, J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 Duke L.J. 879, 881 (1980); Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. Rev. 201, 237 (1980); K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 How. L.J. 95, 97, 104 (1995).

rulings without being hindered or intimidated by possible subsequent litigation. Judicial immunity first appeared in 1608 in *Floyd v. Barker* when the English Court of Star Chamber dismissed the claim of Floyd against Judge Barker and others for conspiracy in the murder trial and execution of William Price.[17] Lord Coke wrote on the question of liability:

> [Y]et the Judge . . . sworn to do justice, cannot be charged for conspiracy, for that which he did openly in Court as Judge or Justice of Peace: and the law will not admit any proof against this vehement and voilent [sic] presumption of law, that a justice sworn to do justice will do injustice . . . ."[18]

This immunity was limited to "any thing done by him as Judge."[19] While acting as a judge in his or her official capacity, the immunity is "absolute," no matter how malicious and corrupt the judge may be.[20] Absolute judicial immunity shields a judge from civil liability and from all related trial proceedings,[21] but not injunctive relief[22] or criminal prosecution.[23]

In his 1980 article, Block delineated four public policy reasons

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[17] 77 Eng. Rep. 1305, 1307 (1608). When dealing with the "violent" presumption that a judge will do justice, the immunity granted seems to run from the sovereignty of the King.

> And the reason and cause why a Judge, for any thing done by him as Judge, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his justice) shall not be drawn in question before any other Judge, for any surmise of corruption, except before the King himself, is for this; the King himself is *de jure* to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath.

Id.

Interestingly, the opinion does not use the word "immunity," although the general use of the word to mean freedom from charges, burdens, or duties dates to the 16th century. "Certayn pryuylegys and prerogatyf . . . as . . . he schold not be constraynyd to go forth to warre . . . wyth such other lyke immunytes and pryuylegys." 7 THE OXFORD ENGLISH DICTIONARY 691 (2d ed. 1989) (quoting STARKEY, *England* II. i.151 (1538)).

[18] *Floyd*, 77 Eng. Rep. at 1306.

[19] *Id*. at 1307.

[20] Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 349 (1871) (citing Fray v. Blackburn, 3 B & S 576, 122 Eng. Rep. 217 (1863)). Bradley is discussed *infra*, text accompanying notes 40-47; *see also* Pierson v. Ray, 386 U.S. 547, 554 (1967) ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly . . . ."); Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (finding that an allegation of malice will not destroy immunity).

[21] Mitchell v. Forsyth, 472 U.S. 511 (1985).

[22] Pulliam v. Allen, 466 U.S. 522, 536 (1984).

[23] *Id*. at 522; O'Shea v. Littleton, 414 U.S. 488 (1974).

in Lord Coke's opinion in *Floyd v. Barker*, three of which are still relevant today.[24] First, litigation must be brought to an end, otherwise "controversies will be infinite; *et infinitum in jure reprobatur*."[25] Second, since "[j]udges of the realm have the administration of justice, under the King, to all his subjects, they ought not to be drawn into question for any supposed corruption."[26] In other words, the independence of the judiciary must be protected;[27] otherwise, judges might surrender their good judgment in the face of threats and intimidation.[28] Third, without immunity, such attacks "would tend to the scandal and subversion of all justice,"[29] thus injuring the public confidence in the courts.[30]

The first judicial immunity case in the United States dates from 1792 and involves events predating the ratification of the Constitution.[31] After a state court of admiralty ignored an appellate decision from the U.S. Court of Appeals and distributed prize proceeds according to its own, earlier decision,[32] the Pennsylvania Supreme Court ruled that an action for money against the offending judge could not be sustained.[33]

The history of judicial immunity over the next century is somewhat hazy, with some academics asserting that the principle was not widely accepted,[34] and others arguing that cases finding liability dealt mostly with justices of the peace in their administrative, as contrasted with their judicial, authority.[35] However,

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[24] Block, *supra* note 16.

[25] Block, *supra* note 16, at 886 (quoting Floyd v. Barker, 77 Eng. Rep. 1305, 1306 (1608)).

[26] Block, *supra* note 16, at 886 (quoting *Floyd*, 77 Eng. Rep. at 1307).

[27] Block, *supra* note 16, at 886–87; Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

[28] *Bradley*, 80 U.S. at 347.

[29] Block, *supra* note 16, at 886 (quoting *Floyd*, 77 Eng. Rep. at 1307).

[30] Block, *supra* note 16, at 887.

[31] Ross v. Rittenhouse, 2 Dall. 160 (Pa. 1792).

[32] Block, *supra* note 16, at 897 ("Congress had passed a law encouraging the states to set up state courts of admiralty, but directing that appeals from the judgments of these courts be taken in the Court of Appeals of the United States.").

[33] *Ross*, 2 Dall at 166.

[34] Feinman & Cohen, *supra* note 16, at 237; Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1, 2 (1990) (asserting that the history of judicial immunity has been far from uniform and universal); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 326-27 (1969) (showing decisions from state courts with a variety of approaches to judicial immunity, including some states that found judges liable if they acted maliciously).

[35] Block, *supra* note 16, at 899-900; THOMAS M. COOLEY, A TREATISE ON THE

nearly two hundred years later in 1967, the Supreme Court saw little controversy when it found "[f]ew doctrines . . . more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."[36]

Despite the Supreme Court's conviction in the latter part of the twentieth century, it gave the principle an inauspicious launch a hundred years earlier in the 1868 case of *Randall v. Brigham*, when it decreed that judges were not liable for civil lawsuits for their actions even beyond their jurisdiction, "unless perhaps where the acts, in excess of jurisdiction, are done *maliciously or corruptly*."[37] Three years later, in *Bradley v. Fisher*,[38] Justice Field corrected his previous remarks and placed the Supreme Court firmly in line with English precedent.[39] Field held that judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."[40]

What are the American courts' views of the policy reasons supporting judicial immunity? "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."[41] In this sentence, buried deeply in a footnote in *Bradley v. Fisher*, Justice Field quoted an 1867 English case and delineated two major policy reasons supporting judicial immunity. First, the judiciary must remain independent to insure continued public confidence in the judicial system. "Liability to answer to every one who might feel himself aggrieved by the action of the judge . . . would destroy that independence without which no judiciary can be either re-

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LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 478-79 n.2 (2d ed. 1888).

[36] Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (finding immunity from liability for municipal justice arising from claims of imprisonment and deprivation of civil rights for the arrest and conviction of black clergy during the Civil Rights Movement). For a critical analysis of the Supreme Court's historical view of immunity, *see* Pillai, *supra* note 16, at 97, 104.

[37] Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1868) (emphasis added).

[38] 80 U.S. (13 Wall.) 335 (1871).

[39] Block, *supra* note 16, at 901.

[40] *Bradley*, 80 U.S. at 351.

[41] *Id.* at 349 n.16 (quoting Scott v. Stansfield, (1868) (3 L.R. - Ex. 220)); *see also* Pierson v. Ray, 386 U.S. 547, 554 (1967) (containing same quotation).

spectable or useful."[42] Second, a judge must "be free to act upon his own convictions, without apprehension of personal consequences to himself."[43]

B. The Tests for Judicial Immunity

1. The Judicial Act Test

In order for immunity to attach to a judge's conduct, two tests must be met.[44] First, the conduct in question must constitute a "judicial act."[45] Second, the judge must not act in the absence of jurisdictional authority.[46] For purposes of this discussion, the "judicial act" test is crucial. One of the first attempts in the United States to address the question of what constitutes a judicial act took place in the 1880 Supreme Court case of *Ex parte Virginia*, where the Court explored the distinction between judicial and administrative acts.[47] The Court found that the compiling of voter lists by a county court judge during Reconstruction in Virginia constituted a ministerial act and not a judicial act.[48] In so doing, the Court avoided a conflict between the principle of judicial immunity and equal protection rights under the 1874

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[42] *Bradley*, 80 U.S. at 347.

[43] *Id.*; *Pierson*, 386 U.S. at 554 (finding that a judge "should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decisionmaking but to intimidation.").

[44] The case law concerning the relationship between these two questions is not well formed. The Supreme Court in *Stump v. Sparkman*, 435 U.S. 349 (1978), uses both tests, but does so with little clarity and organization; *see generally* Block, *supra* note 16, at 914; Forrester v. White, 484 U.S. 219, 225 (1988) ("As a class, judges have long enjoyed a comparatively sweeping form of immunity, though one not perfectly well-defined.").

[45] Floyd v. Barker, 77 Eng. Rep. 1305, 1307 (1608) (finding a judge immune "for any thing done by him as Judge"); Lining v. Bentham, 2 S.C.L. (2 Bay) 1 (1796) (finding immunity from claims of unlawful imprisonment for contempt because the "justice of the peace is not answerable in an action for what he does by virtue of his judicial power"); *Forrester*, 484 U.S. at 227 ("Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges.").

[46] *The Case of the Marshalsea*, 77 Eng. Rep. 1027 (K.B. 1612) (finding that a judge who held a surety bond was not immune from liability because the court lacked jurisdiction over the underlying action); *Bradley*, 80 U.S. at 352; *Stump*, 435 U.S. at 349, 356-57.

[47] *Ex parte* Virginia, 100 U.S. 339 (1879).

[48] The distinction between administrative and ministerial acts has generally been abandoned in favor of distinguishing between judicial acts and administrative functions. *See generally* Block, *supra* note 16, at 887-92.

Civil Rights Act:[49]

> Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. . . . The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, [etc.] Is their election or their appointment a judicial act?[50]

Nearly one hundred years later, Justice White, in the 1978 case of *Stump v. Sparkman*, ignored the judicial–administrative distinction established in *Ex parte Virginia* and created a new test for judicial acts:

> The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity.[51]

Sidestepping the administrative act question is understandable. Despite the circularity of this standard,[52] the Court was faced with allegations surrounding the signing of a petition,[53] clearly distinguishable from an arguably administrative act such as the creation of voter lists faced by the Supreme Court in *Ex parte Virginia*.[54]

Ten years later the tables would turn back to examine the judicial-administrative distinction. In the 1988 case of *Forrester v. White*, the Supreme Court refused to extend absolute judicial immunity to a judge's conduct in firing a court employee.[55] Faced

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[49] Ch. 114, § 4, 18 Stat. 335, 336 (1874) (current version at 18 U.S.C. § 243 (2000)).

[50] *Ex parte* Virginia, 100 U.S. at 348.

[51] 435 U.S. at 362.

[52] *But cf.* Block, *supra* note 16, at 914 ("[T]he Court had not previously 'had occasion to consider, for purposes of the judicial immunity doctrine, the necessary attributes of a judicial act . . . .'") (quoting Justice White from *Stump*, 435 U.S. at 360, although such a comment by Justice White is appropriate in context of the question presented).

[53] *Stump*, 435 U.S. at 349.

[54] 100 U.S. at 348.

[55] 484 U.S. 219 (1988).

with a claim of sex discrimination arising from the demotion and firing of a probation officer, the Court had to undertake the difficult task of drawing "the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges."[56] The Court determined that the decisions to demote and fire, if proven, were administrative in nature and not judicial.[57]

The results of the judicial act inquiries provided by the Supreme Court have not been without controversy.[58] In *Stump*, the Supreme Court was not faced with a question of whether the Court was exercising an administrative function, but whether the circumstances comprised a judicial act. The case involved a circuit judge who approved an ex parte petition by a mother requesting authority to have her "somewhat retarded" minor daughter sterilized.[59] The court approved the petition without a hearing, without notice to the child, and without appointment of a guardian ad litem. The fifteen-year-old girl was told that she needed an appendectomy and the surgery was performed. Two years later, after discovering her condition, Sparkman brought suit under 42 U.S.C. § 1983 for denial of her constitutional rights.[60] Despite the tragic circumstances, the Court found that the judge's conduct constituted a judicial act:

> Because Judge Stump performed the type of act normally performed only by judges and because he did so in his capacity as a Circuit Court Judge, we find no merit to respondents' argument that the informality with which he proceeded rendered his action nonjudicial and deprived him of his absolute immunity.[61]

In his dissent, Justice Stewart stated, "I think that what Judge Stump did on July 9, 1971, was beyond the pale of anything that could sensibly be called a judicial act."[62] In support, he focused on the fact that judges are not normally asked "to approve a mother's wish to have her daughter sterilized,"[63] nor otherwise seek court approval for care of a sick child.[64] Even if the mother

[56] *Id*. at 227.
[57] *Id*. at 229.
[58] Pillai, *supra* note 16, at 98.
[59] 435 U.S. 349, 349 (1978).
[60] *Id.*
[61] *Id*. at 362-63.
[62] *Id.* at 365 (Stewart, J., dissenting).
[63] *Id*. at 366.
[64] *Id.*

was wrong about her belief in the judge's authority, those "false illusions" cannot convert the judges' response into a "judicial act."[65] Justice Stewart then equated Judge Stump's act to a petition by the mother to lock her daughter in the attic.[66] In conclusion, he stressed that no case of judicial action existed. Also, there was no notice, no right of appeal, nor "even the pretext of principled decision-making."[67]

The "it's normal," "no, it's not normal" tit for tat that characterizes the reasoning of both the majority and the dissenting opinions in *Stump* is of little help in distilling any rule or principle from the case to determine what behavior constitutes a judicial act. Nothing from either position would translate well to other fact patterns. On the other hand, application of the metaphor of scale (as in the scale on a map) may aid in the analysis of the facts. If you look at each opinion using the appropriate scale, it is possible to see the division between the two opinions. In the majority opinion, Justice White stood very far from the facts and used the largest scale to examine Judge Stump's conduct. From this distance, Justice White could only see that Judge Stump was presented with a petition regarding a minor and at the time was "'acting as a county circuit court judge.'"[68] With this distant vantage point, the court was forced to rely upon the simplest representation—the mother approached the judge qua judge with a petition regarding a minor.[69] No other facts were necessary or were sloughed off as unimportant:[70]

> Mr. Justice Stewart's dissent suggests that Judge Stump's approval of Mrs. McFarlin's petition was not a judicial act be-

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[65] *Id.* at 367.

[66] *Id*.

[67] *Id.* at 369. Justice Powell joined in the dissent of Justice Stewart and emphasized that the judge's conduct did not constitute a "judicial act" because there was no "possibility for the vindication of respondents' rights elsewhere in the judicial system." *Id*.

[68] *Id*. at 362. "State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors, as for example, a petition to settle a minor's claim." *Id.*

[69] *Id.*

[70] *Id*.

> Nor does it dispute that judges normally entertain petitions with respect to the affairs of minors. Even if it is assumed that in a lifetime of judging, a judge has acted on only one petition of a particular kind, this would not indicate that his function in entertaining and acting on it is not the kind of function that a judge normally performs.

Id. at 362 n.11.

> cause of the absence of what it considers the "normal attributes of a judicial proceeding." These attributes are said to include a "case," with litigants and the opportunity to appeal, in which there is "principled decisionmaking." But under Indiana law, Judge Stump had jurisdiction to act as he did; the proceeding instituted by the petition placed before him was sufficiently a "case" under Indiana law to warrant the exercise of his jurisdiction, whether or not he then proceeded to act erroneously. That there were not two contending litigants did not make Judge Stump's act any less judicial. Courts and judges often act *ex parte*.[71]

Justice Stewart, on the other hand, stood much closer to the facts where it was possible to see greater detail. Instead of just viewing the act as one involving the approval of a petition about a minor, the dissent questioned whether the majority meant that "a judge 'normally' is asked to approve a mother's decision to have her child given surgical treatment generally, or that a judge 'normally' is asked to approve a mother's wish to have her daughter sterilized."[72] Either way, a parent does not normally need approval from a judge,[73] therefore, what the judge did "was in no way an act 'normally performed by a judge.'"[74]

When examining a map of the United States, Washington, D.C. will be only a small star or, at most, a truncated diamond sandwiched between Maryland and Virginia. From that distance, streets, boulevards, freeways, monuments, museums, and public buildings are beyond our view. By choosing a similar, large scale map, Justice White could only see a judge signing a petition, something judges commonly do. All other detail was obscured from his view. He could not see or question the circumstances surrounding the petition that Justice Stewart observed, including the bizarre nature of the petition and the request being made by Sparkman's mother.

The scale metaphor can be used to analyze the Supreme Court's subsequent decision in *Mireles v. Waco*.[75] In that case, Waco alleged that California Superior Court Judge Mireles, in an impatient fit, ordered two police officers "'to forcibly and with excessive force seize and bring'" the public defender into court

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[71] *Id*. at 363 n.12.

[72] *Id.* at 365-66.

[73] *Id.* at 366.

[74] *Id.* at 367.

[75] 502 U.S. 9 (1991).

when he failed to appear.[76] In summarily reversing the Ninth Circuit,[77] the Court relied upon the test from *Stump* in finding that the judge's act was a "function normally performed by a judge."[78] "A judge's direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge . . . . Waco, who was called into the courtroom for purposes of a pending case, was dealing with Judge Mireles in the judge's judicial capacity."[79] Again, this analysis of the facts represented the broadest scale possible. Do judges order people to appear before them? If so, this is a judicial act for which the judge is immune.

Justice Stevens, in dissent, examined the conduct of Judge Mireles from a closer vantage point and divided the judge's order into two commands: an order to bring the respondent and an order to "commit a battery."[80] The first order was a judicial act; the second was not. Justice Stevens' review of the facts took place on a smaller scale, which allowed him to more accurately dissect the offending conduct and arrive at the opinion that judicial immunity should not be stretched to cover Judge Mireles' conduct.[81]

2. Absence of Jurisdiction Test

In order for the plaintiff to recover under the second test for judicial immunity, the offending conduct by the judge must have been done in a clear absence of jurisdiction, not just in excess of it.[82] For instance, if a probate judge with authority over wills and estates started trying people for public offenses, there clearly would be no jurisdiction.[83] On the other hand, if a judge in a criminal court attempted to try a defendant for something that was not a crime, the judge's conduct would be in excess of his or

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[76] *Id.* at 10.

[77] Waco v. Baltad, 934 F.2d 214 (9th Cir. 1991).

[78] *Mireles*, 502 U.S. at 12.

[79] *Id*. The court continued by finding that Judge Mireles' actions may have been excessive, but that excessiveness will not defeat immunity. *Id.* at 12-13.

[80] *Id.* at 14 (Stevens, J., dissenting).

[81] One commentator has asserted that the *Mireles* court abandoned the minimal test of a "'function normally performed by a judge'" from *Stump* and that all that is required now is "some nexus between the challenged act and the 'general function' of the judge." Pillai, *supra* note 16, at 116.

[82] Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871).

[83] *Id.* at 352.

her jurisdiction, not completely without jurisdiction.[84] "Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."[85] The "clear absence of all jurisdiction" must be known to the judge.[86]

This test can be as opaque as the judicial act test. What represents an excess of jurisdiction or an absence of jurisdiction is by no means clear. Certainly, Judge Mireles has the authority to order his bailiffs to hunt for and retrieve an attorney thought to be elsewhere in the courthouse. If the judge directs them to use whatever force is necessary, does this represent an excess of jurisdiction or an absence thereof? The answer is unclear and the test itself provides little guidance.

C. Judicial Immunity Extended to Others

The stream of immunity began to run wider and deeper in the late 1970s when the Supreme Court, in *Butz v. Economou*,[87] extended quasi-judicial immunity to members of the executive branch of government who exercise quasi-judicial functions, including administrative law judges and hearing officers in administrative agencies. And, in *Imbler v. Pachtman*,[88] the court confirmed an old common law principle and extended immunity to state prosecutors from suits under 42 U.S.C. § 1983 when they function in a prosecutorial manner because they are "intimately associated with the judicial phase of the criminal process."[89]

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[84] *Id.* As the Court noted,

> Mr. Justice Blanc said there was "a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;" and held that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should by reason of the error be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction.

Id. at 353 (quoting Calder v. Halket, 13 Eng. Rep. 12 (1840)).

[85] *Bradley*, 80 U.S. at 351-52.

[86] *Id.* at 351.

[87] 438 U.S. 478 (1978); *see* discussion *infra* accompanying notes 110-133; *see also* Taylor v. Mitzel, 147 Cal. Rptr. 323 (Ct. App. 1978). For a short discussion of immunity cases after *Bradley*, see Forrester v. White, 484 U.S. 219, 225-26 (1988).

[88] 424 U.S. 409, 430 (1976) (affirming the holding of immunity for federal prosecutors in *Yaselli v. Goff*, 275 U.S. 503 (1927) (per curiam)).

[89] *Imbler*, 424 U.S. at 430, *see also* Miller v. Reddin, 293 F. Supp. 216 (C.D. Cal.

Some of the circuits have extended this reasoning to include state parole officials.[90]

Based upon a combination of the reasoning from *Butz* and *Imbler*, a line of cases involving public actors has created quasi-judicial immunity when the discretionary act or decision involves "the exercise of reasoned judgment which could typically produce different acceptable results."[91] Immunity has been extended to such diverse actors as probation officers,[92] a superintendent of a juvenile facility over the temporary release of an inmate,[93] and deputy counsel of a state bar disciplinary board.[94] However, the courts have declined to extend immunity to other public actors, including members of boards or committees who, although they make decisions after hearing evidence and deliberating, function normally in other roles and do not appear to be independent hearing officers or administrative law judges. This includes school board members participating in a student disciplinary process,[95] members of a prison disciplinary committee,[96] and faculty members diverted from their regular duties to determine if a professor should be dismissed from the

1968); Pearson v. Reed, 44 P.2d 592, 601-03 (Cal. Ct. App. 1935). *But cf.* Cooney v. White, 845 P.2d 353, 364-65 (Wyo. 1992) (refusing to extend immunity to prosecutor for advice to probation officer on how to proceed with petition to revoke probation because it involved an executive function and not one tied irretrievably to the prosecutorial function). *See generally Forrester,* 484 U.S. at 225-26 ("The common law's rationale for these decisions—freeing the judicial process of harassment or intimidation—has been thought to require absolute immunity even for advocates and witnesses.").

90 *See, e.g.*, Evans v. Dillahunty, 711 F.2d 828, 830-831 (8th Cir. 1983); United States *ex rel*. Powell v. Irving, 684 F.2d 494 (7th Cir. 1982); Sellars v. Procunier, 641 F.2d 1295, 1303 (9th Cir. 1981).

91 Tango v. Tulevech, 459 N.E.2d 182, 186 (N.Y. 1983).

92 *Id.*

93 Santangelo v. New York, 474 N.Y.S.2d 995 (App. Div. 1984).

94 Forman v. Ours, 804 F. Supp. 864 (E.D. La. 1992); *see also* Sparks v. Character and Fitness Comm. of Ky., 859 F.2d 428 (6th Cir. 1988) (granting immunity to members of a state supreme court committee dealing with admission to practice law); Simons v. Bellinger, 643 F.2d 774, 780 (D.C. Cir. 1980) (granting immunity to members of an attorney disciplinary committee); Clark v. Washington, 366 F.2d 678 (9th Cir. 1966) (granting immunity to a state bar association conducting disciplinary proceedings).

95 Wood v. Strickland, 420 U.S. 308 (1975) (granting, instead, quasi-immunity for acts where the illegality under the Constitution or statutes was not clearly spelled out).

96 Cleavinger v. Saxner, 474 U.S. 193 (1985) (finding no absolute immunity for member of prison disciplinary committee); *see also* Mary and Crystal v. Ramsden, 635 F.2d 590, 600 (1980) (finding no absolute immunity for chair of disciplinary committee in juvenile facility).

university as well as the members of the Board of Regents who eventually decided to dismiss the professor.[97]

Other courts have extended immunity to court personnel and others closely related to judicial functions, such as law clerks,[98] court clerks,[99] bailiffs,[100] jurors,[101] grand jurors,[102] witnesses,[103] court commissioners,[104] and referees.[105] Also, immunity has been extended to court-appointed individuals such as physicians appointed to determine the mental condition of an inmate nearing release (who later assaulted the plaintiff),[106] a trust officer appointed as a conservator,[107] a child protective services worker taking a child into custody in accordance with a court order,[108] guardians ad litem, psychologists, and attorneys for children involved in child abuse actions.[109] However, immunity generally was not extended to court personnel for actions alleging a viola-

97 Tonkovich v. Kan. Bd. of Regents, Civ. A. No. 95-2199-GTV, 1996 WL 705777, at *11 (D. Kan. Nov. 22, 1996).

98 Oliva v. Heller, 670 F. Supp. 523, 526 (S.D.N.Y. 1987), *aff'd*, 839 F.2d 37 (2d Cir. 1988).

99 Scott v. Dixon, 720 F.2d 1542, 1547 (11th Cir. 1983) (extending immunity for discretionary acts normally reserved to the judiciary); Wiggins v. N.M. State Supreme Court Clerk, 664 F.2d 812 (10th Cir. 1981); Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981) (granting absolute immunity when court clerks act pursuant to a court order or at a judge's discretion); Slotnick v. Stavinskey, 560 F.2d 31 (1st Cir. 1977) (finding absolute immunity for state court judges and their clerks from damage suits under 42 U.S.C. § 1983); Denman v. Leedy, 479 F.2d 1097, 1098 (6th Cir. 1973) (applying immunity for court clerks for acts done in performance of their discretionary or quasi-judicial duties).

100 Adkins v. Clark County, 717 P.2d 275, 276-77 (Wash. 1986) (finding immunity for bailiff who, contrary to instructions, gave the jury a law dictionary resulting in a mistrial since the bailiff, in performing her duties, was the "judge's alter ego").

101 White v. Hegerhorst, 418 F.2d 894 (9th Cir. 1969).

102 Turpen v. Booth, 56 Cal. 65, 69 (1880).

103 Briscoe v. LaHue, 460 U.S. 325, 335 (1983).

104 Tagliavia v. County of Los Angeles, 169 Cal. Rptr. 467, 471 (Ct. App. 1980); Linder v. Foster, 295 N.W. 299 (Minn. 1940).

105 Park Plaza, Ltd. v. Pietz, 239 Cal. Rptr. 51, 55-56 (Ct. App. 1987).

106 Brown v. Rosenbloom, 524 P.2d 626 (Colo. Ct. App. 1974), *aff'd*, 532 P.2d 948 (Colo. 1975) (limiting immunity to good faith conduct by defendant physicians) *see also Linder*, 295 N.W. at 301 (Minn. 1940) (finding immunity for two physicians who were appointed by the court to examine plaintiff to determine her mental condition).

107 Mosher v. Saalfeld, 589 F.2d 438, 442 (9th Cir. 1978); *see also* New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1302-03 (9th Cir. 1989) (granting immunity to a receiver appointed to manage marital property during a dissolution).

108 Coverdell v. Dep't of Soc. & Health Servs., 834 F.2d 758, 764-765 (9th Cir. 1987).

109 Myers v. Morris, 810 F.2d 1437, 1465-68 (8th Cir. 1987). *See generally* Howard v. Drapkin, 271 Cal. Rptr. 893, 899-900 (Ct. App. 1990).

tion of their statutory duties.[110]

To determine if quasi-judicial immunity applies, the court must determine how closely the decision of the public actor compares to that of judicial decision-making. Unfortunately, the dividing line is unclear and the cases are not consistent. For purposes of this analysis, we must focus on the conduct of the public actor. In each case, he or she made a decision that impacted people's lives directly or carried out the decisions of judges. This is true whether or not absolute immunity is afforded to the public actor. Whether it is a probation officer who is afforded immunity or members of the Board of Regents who are not, the courts' analysis has focused on the nature of the decision and the surrounding environment. Each has made a decision that determines the alignment of the rights between the parties, conduct that is totally opposite that of a mediator.

It is in this milieu that the Circuit Court for the District of Columbia,[111] the California Court of Appeals,[112] and numerous courts and legislatures around the nation have extended immunity to mediators.[113] First, I will discuss the case law and then follow with an analysis of the legislation.

II

A Case Law Analysis of Mediator Immunity

Although the first decision extending immunity to mediators was issued in 1985,[114] the first major case dates from 1990. In *Howard v. Drapkin*, the Court of Appeals for the Second District of California extended judicial immunity to psychologists,

[110] McGhee v. Moyer, 60 F.R.D. 578, 585-86 (W.D. Va. 1973) (refusing to dismiss clerk who allegedly violated state law).

[111] Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994).

[112] *Howard*, 271 Cal. Rptr. at 893; *see also Wagshal*, 28 F.3d at 1249.

[113] *See infra* Appendix and discussion in Part III.

[114] Mills v. Killebrew, 765 F.2d 69 (6th Cir. 1985) (rejecting appellants' argument that the mediators acted in a clear absence of all jurisdiction). Although this case deals with "mediators," it arises under Michigan law where the role of mediators looks much more like that of arbitrators. The mediators issue an evaluation of the case that at least one of the parties must reject in order to avoid it becoming the basis of a judgment. Rule 403.7(c) and 403.15(a), Wayne County Cir. Ct. Further, if a party rejects the evaluation, he or she must do 10% better in order to avoid the imposition of actual costs. Rule 403.15, Wayne County Cir. Ct. This form of mediation is referred to as "Michigan Mediation" and is extremely distant from any acceptable definition of mediation. *See* Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 15 (2d ed. 1996).

mediators, and other neutrals.[115] The D.C. Circuit produced the second major case in 1994 when it granted quasi-judicial immunity to a court-appointed mediator in *Wagshal v. Foster* after an analysis of the test from *Butz*.[116] We shall visit both cases at length.

A. Howard v. Drapkin

In *Howard v. Drapkin*, after a bitter custody battle, a disgruntled mother sued the parties' psychologist, alleging professional negligence, among other claims, arising from an evaluation conducted for the parties during the underlying action.[117] Although the parties originally hired the psychologist privately, they stipulated to a court order confirming that the expert would "render non-binding findings and recommendations" in addition to his evaluation.[118] In decreeing "that absolute quasi-judicial immunity is properly extended to neutral third persons who are engaged in mediation, conciliation, evaluation or similar dispute resolution efforts,"[119] the California Court of Appeals paid only momentary homage to the normal function test for judicial actions from *Stump v. Sparkman*,[120] jumped through a few intermediate hoops,[121] and then concluded that because of the litigation crisis, such neutrals are very important and are badly needed by the courts.[122]

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115 271 Cal. Rptr. at 893. This case was recently followed by the Fourth District of the California Court of Appeals, which found immunity for a mediator following the issuance of a report to the family court judge. *See* Goad v. Ervin, 2003 WL 22753608 (Ct. App. 2003).

116 *Wagshal*, 28 F.3d at 1249 (applying Butz v. Economou, 438 U.S. 478 (1979)). One other case dealing with mediator immunity comes from the bankruptcy court for the Middle District of Florida: Matter of Sargeant Farms, Inc., 224 B.R. 842, 848 (1998). The court granted immunity to a court-appointed mediator but did so without analysis other than a momentary reference to *Wagshal* and without an actual controversy concerning immunity being presented. Although there appears to be a case, there does not appear to have been any controversy on this subject. This is not surprising considering that Florida has a long tradition of mediator immunity. *See infra* FLA. STAT. ANN. § 44.107 (West 1998) and Appendix. This case merits little further attention due to the dearth of analysis of the issues.

117 271 Cal. Rptr. at 894.

118 *Id*.

119 *Id*. at 896.

120 *Id.* at 896 n.3, 900 ("Immunity exists for 'judicial' actions; those relating to a function normally performed by a judge and where the parties understood they were dealing with the judge in his official capacity.") (interpreting Stump v. Sparkman, 435 U.S. 349, 362 (1978)).

121 *Howard*, 271 Cal. Rptr. at 896-900.

122 *Id*. at 901 ("We are persuaded that the approach of the federal courts is consis-

> In arguing for extensions of immunity to the category of persons who function apart from the courts in an attempt to resolve disputes, defendant and amicus emphasize that in this day of excessively crowded courts and long delays in bringing civil cases to trial, more reliance is being placed by both parties and the courts on alternative methods of dispute resolution.[123]

The court then concluded by equating mediators, conciliators, and evaluators with judges because they are impartial and neutral and,

> hence, there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes. In a sense, those persons are similar to a judge who is handling a voluntary or mandatory settlement conference, no matter whether they are (1) making binding decisions . . . (2) making recommendations to the court . . . , or (3) privately attempting to settle disputes, such as the defendant here.[124]

Now, let us return to a detailed review of the court's analysis. After invoking the roots of English common law,[125] the court first recited the traditional two-part judicial act/jurisdiction test for establishing judicial or quasi-judicial immunity:[126]

> It bars civil actions against judges for acts performed in the exercise of their judicial functions and it applies to all judicial determinations, including those rendered in excess of the judge's jurisdiction, no matter how erroneous or even malicious or corrupt they may be . . . . The judge is immune unless "he has acted in the clear absence of all jurisdiction."[127]

The court then referenced the normal function test for judicial acts from *Forrester v. White*, but did so only in a footnote: "Immunity exists for 'judicial' actions; those relating to a function normally performed by a judge and where the parties understood they were dealing with the judge in his official capacity."[128] The court made no analysis of the facts of the case in terms of either the judicial act or the jurisdiction tests. It said nothing about

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tent with the relevant policy considerations of attracting to an overburdened judicial system the independent and impartial services and expertise upon which that system necessarily depends.").

[123] *Id*.

[124] *Id*. at 902-03.

[125] *Id*. at 896.

[126] For a discussion of these two tests, see *supra* Part I.B.

[127] 271 Cal. Rptr. at 896-97 (citations omitted).

[128] *Id*. at 896 n.3 (quoting Olney v. Sacramento County Bar Ass'n, 260 Cal. Rptr. 842, 844 (Ct. App. 1989)).

what the psychologist and other neutrals actually did that equated to a judicial act,[129] nor was there any discussion of jurisdiction (either the excess or the absence). The failure to address these principles fatally cripples the opinion when related to neutrals such as mediators.

Furthermore, justifying immunity on the basis that the courts really need these neutrals is a blatant example of self-interest. The court proceeds, without interruption, to the two principle policy reasons supporting judicial immunity: First, the need for finality of judgments and, second, to free judges from the fear of vexatious litigation and, thereby, insure fearless and independent judicial acts.[130] With nothing more than a recitation of all the actors upon whom the courts have bestowed immunity,[131] the court jumped amazingly to the conclusion that the right to immunity extends to actors connected to the judicial process,[132] or those who serve "functions integral to the judicial process."[133] This position was bolstered by the need to attract "to an overburdened judicial system the independent and impartial services and expertise upon which that system necessarily depends."[134] Using the court's reasoning, it matters little what the actor does so long as the actor is needed to help the court deal with an overburdened docket.

Although the public policy recitations are representative, they do not support immunity alone. Public policy arguments, while supportive of immunity, do not constitute the tests to determine if immunity should attach. First, the court must determine that

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[129] The court discusses the judicial act test briefly in terms of the duty performed as contrasted with the status of the actor, but this adds little to the overall determination of whether or not the actor actually committed a judicial act.

> So also, in determining whether a person is acting in a quasi-judicial fashion, the courts look at "the nature of the duty performed [to determine] whether it is a judicial act—not the name or classification of the officer who performs it, and many who are properly classified as executive officers are invested with limited judicial powers."

Id. at 898 (quoting Pearson v. Reed, 44 P.2d 592, 597 (Cal. Ct. App. 1935)).

[130] *Howard*, 271 Cal. Rptr. at 897.

[131] *Id*.

[132] *Id*. at 898 ("However, a reading of the court's opinion shows that the court was more interested in the 'connected with the judicial process' portion . . . than with the fact that the defendant could be classified as an 'official.'") (quoting White v. Towers, 235 P.2d 209, 211 (Cal. 1951)).

[133] 271 Cal. Rptr. at 900.

[134] *Id.* at 901.

the individual performed a judicial act;[135] second, that the actor did not act in a total absence of jurisdiction.[136] So, what is a "judicial act"? A pertinent definition of the word "judicial" comes from the Oxford English Dictionary: "Giving judgement or decision upon any matter."[137] This is reinforced by the language quoted by the *Howard* court from the Supreme Court's opinion in *Forrester v. White*: "If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering *decisions* likely to provoke such suits."[138] This language does not appear in the Court of Appeals' analysis of the judicial act test, nor anything like it, because no analysis occurred. It only appeared in the heart of the court's discussion of the policy reasons supporting judicial immunity.[139] Unfortunately, although it quoted *Forrester v. White*, the court did not completely state the policy justification; instead, it only referred to the benefit to the public "when its judicial officers are free from fear of personal consequences for acts performed in their judicial capacity."[140] This is correct so far but not complete. The key to "acts performed in their judicial capacity," which the court sought to keep independent and impartial, is whether the act is one of "rendering decisions" as stated by the Supreme Court in *Forrester v. White*.[141] Courts make decisions that impose their will upon the parties to actions, and mediators do not. This is a subject we shall soon discuss in more detail.[142]

Judge Klein recognized this problem when she concurred in the result but "emphatically" dissented from the majority's reasoning.[143] The judge stated that immunity

> even for judges, is limited to those judicial acts which are adjudicatory in nature, i.e., decisionmaking, dispositive, and the immunity does not otherwise extend to acts which simply hap-

[135] Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347-48 (1871); Stump v. Sparkman, 435 U.S. 349, 362 (1978); *see also* discussion *supra* accompanying notes 58-96.

[136] *Bradley*, 80 U.S. (13 Wall.) at 352; *Stump*, 435 U.S. at 356; *see also supra* discussion accompanying notes 97-102.

[137] 8 OXFORD ENGLISH DICTIONARY 297 (2d ed. 1989).

[138] 271 Cal. Rptr. at 897 (emphasis added) (quoting Forrester v. White, 484 U.S. 219, 226-27 (1988)).

[139] 271 Cal. Rptr. at 897.

[140] *Id*.

[141] 484 U.S. 219, 226-27 (1988) (quoted with approval in *Howard*, 271 Cal. Rptr. at 897).

[142] *See infra* text accompanying notes 192–96.

[143] *Howard*, 271 Cal. Rptr. at 906.

> pen to be done by judges. It is the *function* of adjudication of an issue, the decisionmaking function, which requires and is the basis for judicial immunity . . . . *Forrester v. White* is controlling on that point; and it provides no basis for extending such immunity to the non adjudicatory actions of judges, nor of their adjuncts.[144]

A few paragraphs later, she reiterated that immunity is granted for functions that are "adjudicatory, decision-making, in nature."[145] Mediators do make decisions, but the decisions that they make aid the parties in exercising their self-determination. Neutrals do not adjudicate or decide the outcome of the parties' conflict. Mediators' decisions do not impose the will of the court upon the parties.[146]

An application of the scale metaphor will further illustrate the difficulties inherent in the court's analysis. From the furthest distance, it is simple to conclude that judges resolve conflict, the same as mediators. Perhaps it results from the court having to deal with a crowded docket. Consequently, judges spend less and less time actually trying cases and more and more time managing their dockets. In an effort to deal with this situation, more and more courts are employing court-annexed ADR programs. Since judges and mediators are all in the conflict resolution business, the argument goes, mediators are the same as judges and should get immunity for what they do. In order to encompass the work of mediators and other neutrals within the ambit of quasi-judicial immunity, the court had to examine the work of judges and mediators using the very largest scale. This is evident from the conclusion in *Howard v. Drapkin*:

> We therefore hold that absolute quasi-judicial immunity is properly extended to these neutral third-parties for their conduct in *performing dispute resolution services* which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes. As the defendant was clearly engaged in this latter activity, she is entitled to the protection of such quasi-judicial

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144 *Id*. at 907 (citing with approval *Forrester*, 484 U.S. at 219).

145 271 Cal. Rptr. at 907.

146 Some mediators, through the strength of their personality or skills, may be thought to impose a solution upon the parties due to their persuasive power, but this does not detract from the fundamental distinction between adjudication and mediation. *Cf*. LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 7 (2d ed. 1997).

immunity.[147]

The court examined the judicial acts through binoculars, except it held them backwards and looked the wrong way. The majority did not examine the role of judges and mediators at an appropriate scale. The appropriate scale requires an analysis of the actor's conduct in terms of the tests for judicial immunity. Further, the appropriate scale requires an examination of the act in the terms used by the Supreme Court in *Forrester v. White*, which framed judicial acts in terms of "rendering decisions" that invoke the authority and power of the court.[148] Whether it is a dismissal, monetary judgment, summary judgment, defendant's verdict, dissolution of a business relationship, protective order, or other declaration of rights from among the huge panoply of remedies available to the court, the key to the judicial act is an imposition of the court's will on the parties involved in the action before it.

The case law on judicial immunity reflects that the proper focus is the scale of power-invoking decisions and not the broader focus of conflict resolution. As the California Court of Appeals stated in *Forrester v. White*,[149] judges must be free to render impartial and independent decisions.[150] Further, in *Stump*,[151] the Supreme Court stated that "it is only for acts performed in his 'judicial' capacity that a judge is absolutely immune."[152] It was in *Stump* that the Supreme Court established the normal function test for judicial acts,[153] but it wrote this test in the context of a petition to have the young woman sterilized. The context and the scale are crucial to understanding the court's decision:

> State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors, as for example, a petition to settle

147 271 Cal. Rptr. at 903 (emphasis added).

148 484 U.S. at 226-27.

149 *Id*. at 219; *see supra* discussion accompanying notes 128-40.

150 *Howard*, 271 Cal. Rptr. at 897 (quoting with approval *Forrester*, 484 U.S. at 226-27).

151 Stump v. Sparkman, 435 U.S. 349 (1978).

152 *Id*. at 360.

153 The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity.

Id. at 362.

> a minor's claim. Furthermore, as even respondents have admitted, at the time he approved the petition presented to him by Mrs. McFarlin, Judge Stump was "acting as a county circuit court judge." We may infer from the record that it was only because Judge Stump served in that position that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval. Because Judge Stump performed the type of act normally performed only by judges and because he did so in his capacity as a Circuit Court Judge, we find no merit to respondents' argument that the informality with which he proceeded rendered his action nonjudicial and deprived him of his absolute immunity.[154]

Cases previously discussed illustrate this point further.[155] In the *Butz* and *Imbler* progeny, some actors were immune, such as probation officers,[156] while others, such as school board members who were participating in a student disciplinary process, were not.[157] Examined from from the largest scale, each actor was resolving disputes, but not all were accorded immunity for their acts. From a smaller scale, each actor was making decisions that impacted the lives of individuals. Since some actors were immune and some were not, the courts involved in those cases must have examined the nature of the decision-making and not just whether the actors were resolving conflict.

B. Wagshal v. Foster

In *Wagshal v. Foster*, the D.C. Circuit was faced with a claim that Mark Foster, a court-appointed neutral case evaluator, had forced Jerome S. Wagshal to settle at a disadvantageously low figure.[158] The district court held that the neutral case evaluator was absolutely immune and dismissed the action.[159] In affirming

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154 *Id*. at 362-63.

155 *See supra* Part I.B.-C.

156 *Id.*

157 Wood v. Strickland, 420 U.S. 308 (1975) (granting, instead, quasi-immunity for acts where the illegality under the Constitution of statutes was not clearly spelled out).

158 28 F.3d 1249, 1250-51 (D.C. Cir. 1994). The court noted the distinctions and similarities between mediators and neutral case evaluators and used the terms interchangeably.

> Each acts as a neutral third party assisting the parties to a dispute in exploring the possibility of settlement, the principal difference being that implicit in the name: the case evaluator focuses on helping the parties assess their cases, while the mediator acts more directly to explore settlement possibilities.

Id. at 1250, n.2.

159 *Id*. at 1251.

the trial court, the court used three factors for determining whether to grant quasi-judicial immunity,[160] derived from *Butz* and distilled in *Simons v. Bellinger*:[161]

> [w]hether the functions of the official in question are comparable to those of a judge; (2) whether the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect; and (3) whether the system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct.[162]

This reasoning gathers an eclectic gaggle of justifications for granting immunity. The first reason resembles the judicial act test, the second is gathered from policy, and the third is a new test totally unrelated to the jurisprudential history of judicial immunity. This collage of judicial artwork suffers less from a lack of detailed reasoning and more from myopic, post-hoc rationalization.

In determining that the neutral case evaluator's functions are

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[160] *Id.* The Supreme Court, in *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985), derived six factors from *Butz v. Economou*, 438 U.S. 478, 511-12 (1978):

> And in *Butz* the Court mentioned the following factors, among others, as characteristic of the judicial process and to be considered in determining absolute as contrasted with qualified immunity: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

It is not too difficult to boil this effort down to the three-part test announced in *Simons v. Bellinger*, 643 F.2d 774, 778 (D.C. Cir. 1980).

[161] 643 F.2d 774, 778 (D.C. Cir. 1980) ("First, 'the functional comparability' of an official's judgments to those of a judge is a *sine qua non* of falling within the umbrella of 'quasi-judicial immunity.' Second, the nature of the controversy in which the official is forced to become a participant must be sufficiently intense so that there is a realistic prospect of continuing harassment or intimidation by disappointed litigants. And, third, the system in which the official operates must contain safeguards adequate 'to reduce the need for private damage actions as a means of controlling unconstitutional conduct.'") (quoting *Butz*, 438 U.S. at 512 (citations omitted).

It is interesting that the court used the analysis from *Butz* that was developed by the Supreme Court to extend quasi-judicial immunity to administrative law judges and hearing examiners in the executive branch of government. It is not clear why the court did not apply the normal two-part, judicial act/jurisdiction analysis from *Stump v. Sparkman*, 435 U.S. 349 (1978), or *Forrester v. White*, 484 U.S. 219, 225 (1988), that deals with affairs in the judiciary.

[162] Wagshal v. Foster, 28 F.3d 1249, 1252 (D.C. Cir. 1994).

comparable to that of a judge, the court focused only on collateral aspects, such as identifying issues and scheduling motions,[163] even though Wagshal's complaint had nothing to do with these issues.[164] Instead of focusing on the decisions made by the neutral, the court examined the neutral's mental activities and equated them to those of judges. "Further, viewed as mental activities, the tasks appear precisely the same as those judges perform going about the business of adjudication and case management."[165] This constitutes an absolutely unique and bizarre construction within the jurisprudence surrounding judicial immunity. Instead of focusing on actions of judges or other actors, the court turned to the neutral's mental activities.

Opposed to the reasoning of the *Wagshal* court, the Supreme Court in *Butz* found that judges and federal hearing examiners were "functionally comparable" because they "may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions."[166] The Court continued by stating that "the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency."[167] These comparisons are hardly collateral, but they are central to the normal functions of judges and hearing examiners.

It is impossible to equate neutral case evaluators or mediators with judges by just comparing the scheduling of discovery, the coordination of settlement hearings, or even the neutral's mental activities. Neutral case evaluators or mediators aid the parties to communicate and, hopefully, reach mutually agreeable settlements. Judges decide cases and impose the jurisdiction of the court upon the parties.[168] Mediators do not impose resolutions upon parties and have no jurisdiction to impose upon the parties.[169] Using the *Butz* analysis, a neutral is not "functionally

163 *Id*.

164 *Id*. at 1251.

165 *Id*. at 1252.

166 438 U.S. at 513.

167 *Id.*

168 RISKIN & WESTBROOK, *supra* note 146, at 2 ("[Court], the most familiar process to lawyers, features a third party with power to impose a solution upon the disputants."); STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 4 (3d ed. 1999).

169 WIS. STAT. ANN. § 93.50(3)(f) (West 2000) ("The function of the mediator is to encourage a voluntary settlement among the parties. The mediator may not compel

comparable" to a judge. The first consideration from *Butz* has certainly not been met.

To fulfill the second consideration of the three-part test, the neutral must be subject to the realistic prospect of harassing or intimidating litigation.[170] The D.C. Circuit found that "[c]onduct of pre-trial case evaluation and mediation also *seems likely to inspire* efforts by disappointed litigants to recoup their losses, or at any rate harass the mediator, in a second forum."[171] Conjecture such as this would not be admissible in the trial court absent some empirical support, of which the court cited none. In fact, Michael Moffitt, in a cogent analysis, concludes that the likelihood of success of such suits is extremely small.[172]

The vague inspiration for harassing lawsuits against mediators is not based upon the mediator making binding decisions that draw the ire of disputants, but merely that the mediator "must often be the bearer of unpleasant news—that a claim or defense may be far weaker than the party supposed."[173] The court made no attempt to demonstrate how a mediator merely bearing bad news in the form of an evaluation could possibly give rise to even an inkling of a cause of action when compared to the delivery of such bad news in the form of a dismissal or judgment by a court.[174] Conversely, the *Butz* Court characterized the judicial

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a settlement."); WYO. STAT. ANN. § 11-41-105(f) (Michie 1999) ("Mediators may not compel a settlement."); *see also* Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81, 120 (2003) (arguing that efforts by the mediator to impose his or her will on a party to force a settlement constitutes malpractice and invites a lawsuit).

170 Wagshal v. Foster, 28 F.3d 1249, 1252 (D.C. Cir. 1994).

171 *Id*. at 1253 (emphasis added).

172 Moffitt, *supra* note 11, at 200.

173 *Wagshal*, 28 F.3d at 1253.

174 Moffitt, *supra* note 11, at 205. Beyond malpractice or simple negligence, a dissatisfied party could theoretically bring a number of tort claims against a mediator. Intentional infliction of emotional distress, false imprisonment, tortious interference with contractual relations and invasion of privacy each provide a possible basis for recovery from a mediator. In practice, however, none of these exposes most practicing mediators to sweeping liability.

In an egregious set of circumstances, a mediator could conceivably be held liable for intentionally inflicting emotional distress on one of the parties. However, an action under intentional infliction of emotional distress requires that the defendant "by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another." Mustard v. Timothy J. O'Reilly Co., Ltd., No. CA2003-05-059 2004 WL 192957 (Ohio App. Feb. 2, 2004). The aggressive approach some mediators adopt in challenging parties' perceptions and assessments would not come near to satisfying the requirements for demonstrating tortious infliction of emotional distress.

process as one leading to a final decision: "[C]ontroversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree."[175] In *Butz*, the Court established immunity for hearing examiners and administrative law judges because of the realistic prospect that harassing litigation could arise from their decisions that determined the legal rights and obligations of the parties assembled before them, not because the hearing officer may have to tell the parties bad news. In *Butz*, the Supreme Court determined that the independence of the hearing officer's decision-making would be impaired without such immunity. In *Wagshal*, the D.C. Circuit extended immunity to neutral case evaluators and mediators merely because they bear bad news and because of the court's unfounded fear that they therefore seemed likely to attract litigation. To satisfy the second consideration from *Butz*, the *Wagshal* court unjustifiably conflated binding adjudication and just conveying bad news.

For the third *Butz* factor, the court must consider whether sufficient safeguards exist to justify dispensing with civil litigation as a means of controlling wrongful conduct.[176] In *Wagshal*, Foster had conducted one session as the case evaluator when Wagshal claimed that Foster had lost his neutrality.[177] When Wagshal would not withdraw the allegation, Foster recused himself and made a recommendation for the trial judge to continue efforts to settle the case.[178] A second case evaluator was appointed and the case settled. It was the settlement while using the second neutral that caused Wagshal to complain.[179] In finding that safeguards against wrongful conduct existed, the court stated that Wagshal could have sought relief from the trial court judge: "The avenues of relief institutionalized in the ADR program and its judicial context provide adequate safeguards."[180] Beyond this vague reference to seeking relief from the judge, the court failed to elaborate upon what these "adequate safeguards" might entail.

Whatever safeguards might have existed in the midst of the *Wagshal* settlement discussions, it is doubtful that they compare to the safeguards contemplated by the Supreme Court in *Butz*.

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175 438 U.S. 478, 512 (1978).
176 *Wagshal*, 28 F.3d at 1252.
177 *Id*. at 1251.
178 *Id*.
179 *Id*.
180 *Id*. at 1253.

Pertinent safeguards mentioned by the Court in *Butz* include "the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal."[181] Mediation fails on all three counts. Obviously, mediators have no precedents to govern their conduct. One key to successful mediation is the ability of the parties to avoid precedent and craft a solution to the conflict that is built around the unique interests and needs of the parties.[182] Certainly, there are no governing decisions that can be brought to bear in such a process to protect the parties.

Next, mediation is far from adversarial. Assertions by one side or the other will not be "contested by their adversaries in open court."[183] It is precisely because early neutral evaluation and mediation lack the normal aspects of adversarial proceedings that parties are drawn to these and other forms of alternative dispute resolution. Instead of facing off in court with their proxies sparring for every point, parties are able to sit down and discuss their needs, interests, and emotions in a calm and peaceful exchange. The parties' ability to attempt resolution in such an atmosphere is further enhanced by the prospect of confidentiality.[184] It is behind the doors of the mediation room, closed by confidentiality, that mediators can misbehave, as we saw in the two hypothetical cases at the beginning. The mediators' misconduct does not take place in an adversarial setting open to challenge by the parties.

Finally, and contrary to the *Wagshal* court's opinion, there is most likely no opportunity for correction of error when a neutral misbehaves during settlement discussions. Although Wagshal was free to seek relief from the trial judge,[185] the wrongful conduct of Foster (if there was any) may not have manifested itself before the second session with the new case evaluator.[186] In retrospect, it seems highly unlikely that Wagshal and his counsel were aware of a cause of action for the misconduct of Foster, yet sat on their rights while the trial judge recused Foster and ap-

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[181] 438 U.S. 478, 512 (1978).

[182] *See generally* Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 705 (1997).

[183] *Butz*, 438 U.S. at 512.

[184] *See, e.g.*, UNIFORM MEDIATION ACT, prefatory note, *in* 2003 J. DISP. RESOL. 1, 5 (2003).

[185] *Wagshal*, 28 F.2d at 1253.

[186] *Id*. at 1251.

pointed the second neutral evaluator. It is more likely that Wagshal was unable to put two and two together until after the settlement was signed and delivered.

Disputants who seek relief while the mediation is in process are the ones who avoid wrongdoing by the mediator or neutral case evaluator. If parties become aware of negligence during a mediation session, as in the case of the Negligent Neutral, or if parties refuse to succumb to a mediator's attempts at coercion, as in the case of the Pasty Participant, disputants can just withdraw from the mediation, thereby avoiding the wrongful conduct and obviating the need for any safeguards. On the other hand, the Disgruntled Dealer who drew the Negligent Neutral did not become aware of the negligence until the supposed tax break turned out to be valueless. So too, the Pasty Participant only began to understand the damage wrought by the Misbehaving Mediator when he was able to recover and shine the bright light of day on the agreement. As is the nature of mediation and neutral case evaluation, disputants trade their causes of action for contracts. By settling, the parties agree to forego their rights in court (and rights of appeal) and, most likely, to dismiss the underlying actions with prejudice in return for agreements that spell out each party's rights and responsibilities. Any problems that might arise from the settlement discussions and the agreements are subsumed into the settlement agreements themselves. Any of the normal safeguards described in *Butz*,[187] or even the minor safeguard relied upon by the *Wagshal* court,[188] evaporate as the ink dries on the settlement documents. When this occurs, the only relief available to a damaged party is to file a lawsuit against the mediator or case evaluator. The decision of the *Wagshal* court can only be supported by a tortured misunderstanding of the foundational premises of mediation.

The scale metaphor factors into the *Wagshal* decision as well. After noting and dismissing Wagshal's protestations that mediation is nothing like "authoritative adjudication,"[189] the court states, "[h]owever true his point may be as an abstract matter, the general process of encouraging settlement is a natural, almost inevitable, concomitant of adjudication."[190] Again, for a court to

[187] 438 U.S. at 512.
[188] 28 F.3d at 1253.
[189] *Id*. at 1252.
[190] *Id.*

find that mediators and case evaluators are functionally equivalent to judges, it is necessary to draw back from the scene and examine the activities of each from the furthest distance. With this view, the only comparison that can be made is that both judges and neutrals resolve conflict. From this distance, judges and third-party neutrals appear the same. If, however, you draw any closer to their actual duties and responsibilities, the similarities fade and quickly disappear. The *Wagshal* court wore the same backwards binoculars that afflicted the court in *Howard v. Drapkin*. Neither court seems bothered by this extreme farsightedness.

C. Case Law: The Two Ironies

The decisions in *Howard v. Drapkin* and *Wagshal v. Foster* present two ironies. First, as pointed out by Pillai,

> judicial immunity is inextricably tainted by the blemish of conflict of interest. Conflict of interest is in its worst form when it entangles judicial decisionmaking. "No man is allowed to be a judge in his own cause," warned James Madison, "because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." . . . In the history of modern jurisprudence, the Supreme Court's decisions regarding judicial immunity, which exempt judicial officers en masse from civil liability and deprive citizens who are injured by their unlawful actions of compensation, appear to be inequitable and made solely in self-interest.[191]

Although the conflict of interest created by mediator immunity may not be as direct as the conflict that accompanies judicial immunity, the courts still stand to benefit from their decision. Obviously, the courts benefit from settlements and a reduced docket, but with mediator immunity they also benefit by shedding the risk of mediator misbehavior or the cost of insuring against such wrongful conduct. This gain may be somewhat offset if thwarted disputants begin to spread dissension about court-annexed mediation programs. Even so, this is a more remote problem and not nearly as immediate as the gains that result from adopting mediator immunity and shifting the risk away from the court.

The second irony arises from the reasoning embedded in the two decisions. Mediators may be thankful that the courts are willing to grant immunity from any liability for their misdeeds. Others may be laughing all the way to the bank because they

[191] Pillai, *supra* note 16, at 106.

need not be concerned with purchasing malpractice insurance, especially those who receive fee-generating cases from court-annexed programs. They are not, however, rushing to sandbag the foundations of the courts' reasoning against any impending flood of counter-arguments. For many mediators, courts may have arrived at the right answer, but for the wrong reason. To reach the conclusion that immunity was proper, the courts had to equate mediators with judges, which is the opposite of what mediators have been trying to do for three decades. "The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties."[192]

Mediators frequently are confronted with questions from disputants related to their role. They ask, "Are you going to decide our case for us?" Or, "Are you going to tell us how we have to resolve this matter?" Disputants pose these questions even after the mediator has finished an opening statement in which he or she disavows any role in deciding these cases.[193] Further, any conduct that looks like that of a judge may be highly problematic. Telling the parties how they should settle or threatening to make a recommendation to the judge about resolution may constitute the very actionable behavior for which the mediator has just been granted immunity. In fact, if mediators did impose *their* will upon the parties to settle, it would constitute coercion and would most likely be actionable,[194] similar to the facts in the Misbehaving Mediator and the Pasty Participant.

In summary, mediators understand they are not judges. They are trained that the principal goal of mediation is self-determination and, as such, they must disavow any resemblance to judges and judging.[195] Finally, if mediators attempt to act like judges by

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[192] GOLDBERG ET AL., *supra* note 168, at 123.

[193] *See* MARK BENNETT & MICHELE HERMANN, THE ART OF MEDIATION 37 (1996) (recommending that the mediator might consider covering the parties' role in decision-making in the opening monologue by saying to the disputants, "We want you to make a good decision, but we will not tell you what to do, nor will we make recommendations").

[194] Moffitt, *supra* note 169, at 120 (arguing that efforts by the mediator to impose his or her will on a party to force a settlement constitutes malpractice and invites a lawsuit).

[195] MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I (American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution 1994) ("Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time."); Revised Standards of Conduct for Mediators, Standard I (Joint Com-

imposing their will upon the parties, they risk creating civil liability.[196] It is disingenuous for mediators to accept the protections of immunity, the jurisprudential basis of which depends upon equating their role with that of judges.

III

STATUTES & RULES PROVIDING FOR MEDIATOR IMMUNITY

A. Description and Analysis

Immunity provisions fall along two continua. One relates to the scope of mediation programs; it ranges from general programs that cover all mediation in a state to those created for specific types of disputes. The other continuum relates to the range of mediator misconduct covered by the immunity provisions. With regards to the scope of mediation programs with mediator immunity, we were able to locate ninety-six statutes or rules for mediation programs with immunity provisions in thirty-eight states and the District of Columbia.[197] Twenty-one provisions (from eighteen states) can be found within general programs, covering statewide programs or broad-based court-annexed pro-

mittee Draft, January 2004) ("A mediator shall conduct a mediation as to both process and outcome based on the principle of party self-determination."). *See* BENNETT & HERMANN, *supra* note 193, at 37 ("We will not make judgments about who is right and who is wrong.").

196 Moffitt, *supra* note 169, at 120.

197 *See infra* Appendix. Twenty-two states had more than one provision, with the vast majority of those having only two. Tennessee won the competition for most immunity provisions, with four: one general and three specialized programs. No attempt was made to count or analyze immunity provisions contained within non-binding arbitration or non-binding-like arbitration programs such as commercial conciliation. *See*, *e.g.*, CAL. CIV. PROC. CODE § 1297.432 (West 2003) (providing full immunity for conciliators of international commercial disputes); HAW. REV. STAT. § 672-9 (2003) (stating that "[n]o member of a design professional conciliation panel shall be liable in damages for libel, slander, or other defamation of character of any party to the design professional conciliation panel proceeding for any action taken or any decision, conclusion, finding, or recommendation made by the member while acting as a member of a design professional conciliation panel under this chapter").

The counting and classification of statutes and rules is far from an exact science. For instance, do two provisions located in the same section or chapter count as one or two statutes? We counted them as one statute if they referred to the same program or were in the same code chapter. Further, is a program for court-annexed mediation in the civil court of general jurisdiction a general or specific program? We counted them as general programs. The difficulty arises from the huge diversity in programs developed and language utilized for these statutes and rules. A second evaluation may change these numbers slightly in any direction. The review was completed only to provide a backdrop for the analysis of immunity.

grams for civil actions.[198] General mediation programs often cover mediation at any stage of a conflict.[199] Some, while contained within court-related statutes, enable mediation whether or not an action has been filed.[200] Other generalized statutes cover only disputes after an action has been commenced.[201]

A total of seventy-five provisions (from thirty-two states) can be found within specialized programs,[202] including victim/offender,[203] business and technology,[204] appellate,[205] domestic relations,[206] workers compensation,[207] and health care.[208] Five states have programs for farmer-lender disputes.[209] Programs in narrower areas of conflict include those for mediating disputes involving special education,[210] attorney admission and discipline,[211]

198 *See infra* Appendix and under each state examine the category for programs listed as "general."

199 *See*, *e.g.*, IOWA CODE § 679C.4 (2003); KAN. STAT. ANN. § 5-513 (2003); NEB. REV. STAT. § 25-2915 (2003).

200 *See*, *e.g.*, COLO. REV. STAT. ANN. § 13-22-305(6) (2003); WASH. REV. CODE § 7.75.100(2) (2004).

201 *See, e.g.*, DEL. SUP. CT. R. CIV. P. 16.1(n); FLA. STAT. ch. 44.107 (2003); GA. ADR R. VII(C); W. VA. TR. CT. R. 25.13; WYO. STAT. ANN. § 1-43-104 (Michie 2003).

202 Because many states have both general and specialized programs, the total number of states with an immunity provision in a general program (18) and the number of states with provisions in a specialized program (33) exceeds the total number of states with immunity provisions (38). For instance, Arizona has a mediation statute found in the evidence code that was counted as a general program (ARIZ. REV. STAT. § 12-2238(E) (2003)), as well as specific mediation programs for mediation of appellate disputes (ARIZ. R. CIV. APP. P. 30(o)) and mediation of disputes involving admission and discipline of attorneys (ARIZ. SUP. CT. R. 48(l)).

203 DEL. CODE ANN. tit. 11, § 9505(b) (2004); TENN. CODE ANN. § 16-20-105 (2004).

204 DEL. CH. CT. R. 95.

205 ARIZ. R. CIV. APP. P. 30(o); MONT. CODE ANN. § 25 ch. 21 R. 54(d) (2003); N.Y. SUP. CT. APP. DIV. CT. R., Part 1220, App. A(5)(d); N.C. GEN. STAT. § 7A-38.1(j) (2004); UTAH CODE ANN. § 78-2a-6(4) (2004).

206 MINN. STAT. § 518.1751(5) (2003); N.J. STAT. ANN. § 2A:34-12.6 (West 2004) (providing for mediation of disputes arising from the Parent's Education Programs for dissolutions involving children); N.C. GEN. STAT. § 7A-38.4A(h) (2004); W. VA. R. PRAC. & PROC. FAM. CT. MED. 45.

207 IOWA CODE § 679C.4 (2003); NEB. REV. STAT. § 48-168(2)(b) (2003).

208 TENN. CODE ANN. §§ 63-4-115(g), 63-6-214(i)(3), 63-7-115(c)(3) (2004); WIS. STAT. § 655.465(6) (2003).

209 IOWA CODE § 13.16(1) (2003); MINN. STAT. § 583.26(7)(a) (2003); N.D. CENT. CODE § 6.09.10-04.1 (2001); S.D. CODIFIED LAWS § 54-13-20 (Michie 2003); WIS. STAT. § 93.50(2)(c) (2003). Mississippi and Montana had immunity provisions in their farmer-lender mediation programs, but both programs have been repealed. 1990 Miss. Laws 496; 1989 Mont. Laws 269.

210 ME. REV. STAT. ANN. tit. 20-A, § 7207-C (West 2003).

automobile merchandising,[212] contracts for property insurance,[213] recreational vehicle manufacturers and dealers,[214] mobile home park tenancies[215] and the licensing of podiatrists.[216] Five states have immunity provisions contained in programs for county- or community-based mediation centers.[217] Finally, a few states have local rules that create programs limited to certain counties or judicial districts.[218]

The second continuum covers the degree of immunity afforded mediators, ranging from statutes creating full immunity to provisions that severely limit coverage to little beyond negligent behavior. Although the diversity of programs containing immunity provisions is pronounced, the spectrum of potentially actionable conduct protected by immunity rules and statutes is even broader and more varied. At one end of the continuum, fifty-four provisions (from twenty-four states) provide immunity similar to that of judges, while at the other end of the continuum, forty-two provisions (from twenty-five states) extend only qualified or lesser forms of protection. At the former end of the continuum, only Hawaii phrases its immunity provision in terms of absolute immunity,[219] while Tennessee extends full immunity by stating that acting as a neutral is a "judicial function."[220] Several states legislate immunity to the "same extent as judges,"[221] while others

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211 COLO. R. CIV. P. 251.32(e); ARIZ. SUP. CT. R. 48(l); WASH. ADMISSION TO PRACTICE R. 16(e)(1).

212 N.C. GEN. STAT. § 20-301.1(b)(3) (2004); 63 PA. CONS. STAT. § 818.11(c) (2004); WIS. STAT. § 218.0138 (2003).

213 FLA. STAT. ANN. § 627.7015(5) (West 2003).

214 ME. REV. STAT. ANN. tit. 10, § 1440(5) (West 2003).

215 FLA. STAT. ANN. § 723.038(9) (West 2003).

216 225 ILL. COMP. STAT. ANN. 100/4(B) (2004).

217 FLA. STAT. ch. 44.201(6) (West 2003); IOWA CODE § 679.13 (2003); MICH. COMP. LAWS § 691.1557a (2004); NEB. REV. STAT. § 25-2915 (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 154.055 (Vernon 2004); WASH. REV. CODE § 7.75.100(2) (2003).

218 N.M. 2D J. DIST. R. LR2-601(E); Fla. 9th J. Cir. Admin. Order 2001-34; ILL. 19TH J. CIR. R 11.13(n); OHIO CUYAHOGA COUNTY C.P. DOM. REL. R. 32(E)(4); S.C. CIR. CT. ADR R. 8(i); S.C. FAM. CT. MEDIATION R. 7(i).

219 HAW. APP. CONF. PROG. R. 9.

220 TENN. SUP. CT. R. 31 § 12 ("Activity of Rule 31 Neutrals in the course of Rule 31 ADR proceedings shall be deemed the performance of a judicial function and for such acts Rule 31 Neutrals shall be entitled to judicial immunity.").

221 FLA. STAT. ch. 44.107(l) (2003) (" . . . judicial immunity in the same manner and to the same extent as a judge"); CAL. BUS. & PROF. CODE § 6200(f) (West 2003) ("In any arbitration or mediation conducted pursuant to this article by the State Bar or by a local bar association, pursuant to rules of procedure approved by the board of governors, an arbitrator or mediator, as well as the arbitrating association and its

provide mediators immunity from suit,[222] immunity within the scope of appointment,[223] or within their "powers and duties."[224] Still others phrase immunity in terms of freedom from liability,[225] and Kentucky, while not calling it immunity as such, requires that parties hold the mediator harmless for "any action arising out of the procedures set forth by this rule and for any and all conduct of the . . . mediator . . . presiding over the procedures herein."[226]

Moving down the continuum toward limited immunity, the forms of qualified immunity are even more diverse. Several states provide for immunity except in cases of willful or wanton

directors, officers, and employees, shall have the same immunity which attaches in judicial proceedings."); ILL. SUP. CT. R. 99(b)(1); IND. CODE § 4-21.5-3.5-4 (2003) (". . . immunity in the same manner and to the same extent as a judge having jurisdiction in Indiana"); MONT. CODE ANN. § 25-21 R. 54(d) (2003) (". . . shall enjoy such judicial immunity as the Montana Supreme Court would enjoy if performing the same functions"); N.C. GEN. STAT. § 7A-38.1(j) (2004); N.C. GEN. STAT. § 20.301.1(b)(3) (2004); UTAH R.J. ADMIN. 4-510(13) ("An ADR provider acting as a mediator. . . in cases under the ADR program shall be immune from liability to the same extent as judges of this state . . . ."); W. VA. R. PRAC. & PROC. FAM. CT. MED. 45 ("Mediators and premediation screeners shall have immunity in the same manner and to the same extent as a family court judge.").

222 N.H. SUPER. CT. R. 170(e) ("The litigants and counsel must recognize that the neutrals will not be acting as legal advisors or legal representatives. They must further recognize that, because the neutrals are performing quasi-judicial functions and are performing under the auspices of the Court, each such neutral has immunity from suit . . . .").

223 N.M. 2D J. DIST. R. LR2-601(E) ("Attorneys and other persons appointed by the court to serve as settlement facilitators, arbitrators or mediators or in other such roles . . . are immune from liability for conduct within the scope of their appointment"); N.Y. SUP. CT. COMM. DIV. ADR R. 6 ("Any person designated to serve as Neutral pursuant to these rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity."); N.Y. SUP. CT. APP. DIV. CT. R., Part 1220, App. A(5)(d) ("The mediator will not be liable for any act or omission while serving as approved volunteer mediator except for willful misconduct."); WIS. STAT. § 218.0138 (2003) ("A mediator or arbitrator is immune from civil liability for any good faith act or omission within the scope of the mediator's or arbitrator's performance of his or her powers and duties under s. 218.0136. . . .").

224 WIS. STAT. § 93.50(2)(c) (2003) ("Mediators and arbitrators are immune from civil liability for any act or omission within the scope of their performance of their powers and duties under this section.").

225 FLA. BAR R. 14-7.1 ("[M]ediators . . . shall have absolute immunity from civil liability for all acts within the course of their official duties."); N.D. CENT. CODE § 6.09.10-04.1 (2004) ("The board, commissioner, administrator, staff, negotiators, and mediators are not subject to any liability arising from any actions undertaken regarding a farmer, creditor, or other person in attempting to reach a settlement."); S.C. CIR. CT. ADR R. 8(i) ("The mediator shall not be liable to any person for any act or omission in connection with any mediation conducted under these rules.").

226 KY. SUP. CT. R. 3.815(10).

misconduct,[227] while Iowa and Michigan add both the lower standard of bad faith and the higher one of maliciousness to the list.[228] Others, including Delaware,[229] Georgia,[230] Kansas,[231] and New Jersey,[232] provide a laundry list of wrongful conduct limiting immunity. Virginia's immunity statute for court-annexed programs is typical of this approach:

> When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia . . . then that mediator . . . shall be immune from civil liability for, or resulting from, any act or omission . . . unless the act or omission was made or done in bad faith, with mali-

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227 ARK. CODE ANN. § 16-7-207 (Michie 2003); NEB. REV. ST. § 25-2915 (2003); NEB. REV. STAT. § 48-168(2)(b) (2003); TENN. CODE ANN. § 16-20-105 (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 154.055 (Vernon 2004); WASH. REV. CODE § 7.75.100 (2004).

228 IOWA CODE § 679.13 (2003) ("No mediator, employee or agent of a center, or member of a center's board may be held liable for civil damages for any statement or decision made in the process of dispute resolution unless the mediator, employee, agent or member acted in bad faith, with malicious purpose or in a manner exhibiting willful and wanton disregard of human rights, safety or property."). MICH. COMP. LAWS § 691.1557a (2003) ("A mediator of a community dispute resolution center shall not be liable for civil damages for any act or omission in the scope of his or her employment or function as a mediator, unless he or she acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of the rights, safety or property of another.").

229 DEL. CH. CT. R. 95(c) ("Mediators shall be immune from civil liability for or resulting from any act or omission done or made in connection with efforts to assist or facilitate a mediation, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another."); *see also* DEL. CH. CT. R. 174; DEL. SUP. CT. R. CIV. P. 16.1(n); DEL. CT. COM. PL. CIV. R. 16.1(n).

230 GA. ADR R. VII(C) ("No neutral in a court-annexed or court-referred program shall be held liable for civil damages for any statement, action, or omission or decision made in the course of any ADR process unless that statement, action, omission or decision is 1) grossly negligent and made with malice or 2) is in willful disregard of the safety or property of any party to the ADR process.").

231 KAN. STAT. ANN. § 5-513 (2003) ("No neutral person, staff member, or member of a governing board of an approved program may be held liable for civil damages for any statement or decision made in the process of dispute resolution unless such person acts, or fails to act, in a manner constituting gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety or property of any party to the process of dispute resolution.").

232 N.J. STAT. ANN. § 2A:34-12.6(a) (West 2003) ("Notwithstanding any other provision of law to the contrary, no person serving as a program representative in the 'Parents' Education Program' . . . shall be liable for damages resulting from an exercise of judgment or discretion in connection with the person's duties unless the actions are fraudulent or evidence a reckless disregard for the duties imposed by the position. Nothing in the this section shall be deemed to grant immunity to any program representative causing damage by that person's willful, wanton or grossly negligent act of commission or omission.").

> cious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.[233]

New Jersey's dispute resolution program for parents' education contains some very convoluted language:

> [N]o person serving as a program representative in the "Parents' Education Program" . . . shall be liable for damages resulting from an exercise of judgment or discretion in connection with the person's duties unless the actions are fraudulent or evidence a reckless disregard for the duties imposed by the position. Nothing in this section shall be deemed to grant immunity to any program representative causing damage by that person's willful, wanton or grossly negligent act of commission or omission.[234]

While some states have provisions phrased in terms of bad faith,[235] language in Maine,[236] Pennsylvania,[237] and Wisconsin[238] creates a presumption of good faith that can only be overcome with clear and convincing evidence.

If the two continua (one for program coverage and the other for conduct coverage) are used as the x-y axes of a grid, four possibilities arise, as shown on the table:[239]

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233 VA. CODE ANN. § 8.01-581.23 (Michie 2004).

234 N.J. STAT. ANN. § 2A:34-12.6(a) (West 2003).

235 IOWA CODE § 679C.4 (2003); MICH. COMP. LAWS § 691.1557a (2004); OR. REV. STAT. § 36.210(1) (2003); VA. CODE ANN. § 8.01-576.9 (Michie 2004).

236 ME. REV. STAT. ANN. tit. 10, § 1440(5) (West 2003) ("A mediator or arbitrator is immune from civil liability for any good faith act or omission within the scope of the mediator's or arbitrator's performance of powers and duties under this section. Every act or omission is presumed to be a good faith act or omission. This presumption may be overcome only by clear and convincing evidence.").

237 63 PA. CONS. STAT. ANN. § 818.11(c) (West 2003) ("A mediator or arbitrator is immune from civil liability for any good faith act or omission within the scope of the mediator's or arbitrator's performance of his powers and duties under this section. Every act or omission of a mediator or arbitrator is presumed to be a good faith act or omission. This presumption may be overcome only by clear and convincing evidence.").

238 WIS. STAT. § 218.0138 (2003) ("A mediator or arbitrator is immune from civil liability for any good faith act or omission within the scope of the mediator's or arbitrator's performance of his or her powers and duties under s. 218.0136 . . . . Every act or omission of a mediator or arbitrator is presumed to be a good faith act or omission. This presumption my be overcome only by clear and convincing evidence.").

239 The rules for the U.S. District Court for the Southern and Eastern District of New York are not counted in the totals shown in the table because the exact extent of immunity provided by law is not clear from the rules themselves. U.S. DIST. CT. S. & E.D.N.Y. R. 83.11(g) ("Mediators shall be immune from liability or suit with respect to their conduct as such to the maximum extent permitted by applicable law.").

FULL IMMUNITY— GENERAL PROGRAM 7 PROVISIONS IN 7 STATES	FULL IMMUNITY— SPECIFIC PROGRAM 47 PROVISIONS IN 22 STATES
LIMITED IMMUNITY— GENERAL PROGRAM 14 PROVISIONS IN 11 STATES	LIMITED IMMUNITY— SPECIFIC PROGRAM 28 PROVISIONS IN 17 STATES

Interestingly, the upper left quadrant for general programs with full immunity is the least populated with only seven states providing full immunity for general programs,[240] with three of these states creating immunity to the "same extent as a judge."[241] The remaining eleven states with general programs limit protection (lower left quadrant),[242] such as by the Arizona statute which does not protect against "intentional misconduct or reckless disregard of a substantial risk of a significant injury to the rights of others,"[243] and by the Iowa statute that does not cover conduct "made in bad faith, with malicious purpose, or in a manner exhibiting willful or wanton disregard of human rights, safety, or property."[244]

The right hand side of the grid, representing specific programs, has a much larger number of total provisions and number of

[240] FLA. STAT. ch. 44.107 (2003); IND. CODE § 4-21.5-3.5-4 (2004); ME. REV. STAT. ANN. tit. 4, § 18-B(3) (West 2003); N.H. SUPER. CT. R. 170(e); N.Y. SUP. CT. COMM. DIV. ADR R. 6; N.C. GEN. STAT. § 7A-38.1(j) (2003); TENN. SUP. CT. R. 31 § 12; W. VA. TR. CT. R. 25.13.

[241] FLA. STAT. ch. 44.107 (2003); IND. CODE § 4-21.5-3.5-4 (2003); W. VA. TR. CT. R. 25.13 (creating immunity "to the same extent as a circuit judge").

[242] ARIZ. REV. STAT. § 12-2238(E) (2004); ARK. CODE ANN. § 16-7-207 (Michie 2003); COLO. REV. STAT. § 13-22-305(6) (2003); DEL. SUP. CT. R. CIV. P. 16.1(n); GA. ADR R. VII(C); IOWA CODE § 679C.4 (2003); KAN. STAT. ANN. § 5-513 (2003); OR. REV. STAT. § 36.210(1), (2) (2003); OR. REV. STAT. § 36.264 (2003); VA CODE ANN. § 8.01-576.9 (Michie 2003); VA. CODE ANN. § 8.01-581.23 (Michie 2003); WYO. STAT. ANN. § 1-43-104 (Michie 2003).

[243] ARIZ. REV. STAT. § 12-2238(E) (2004).

[244] IOWA CODE § 679C.4 (2003).

states represented. The two right hand quadrants have a total of seventy-five statutes and rules from thirty-two states. Of all the rules and statutes creating some form of mediator immunity, more than seventy-five percent of them have been crafted for specialized programs. And, of the specialty provisions, slightly more than sixty percent have granted mediators absolute immunity. This contrasts with the one-third of the general programs that grant absolute immunity. In the creation of mediation programs, drafters are much more willing to extend absolute immunity for specialty programs than for general programs.

Next, let us examine the level of consistency of the immunity provisions in the states with multiple rules and statutes. Of the total of thirty-eight states with immunity provisions, thirteen states and the District of Columbia have only one provision. Of the remaining twenty-five states with multiple provisions,[245] sixty percent (sixteen) maintain reasonable consistency with regards to the degree of immunity granted mediators within their mediation programs and the broad categories provided by the matrix. These states can be categorized by those with provisions that all land in one quadrant (i.e. specialized programs with limited immunity) and those with provisions that land in horizontal quadrants, but maintain the same degree of immunity (i.e. general and specialized programs both with full immunity or both with similar limited immunity). First, eight states have provisions in only one quadrant.[246] For instance, Minnesota has two specialized mediation programs: one for resolving disputes between farmers and lenders and one for resolving parenting time disputes, both of which grant the mediators full immunity.[247] South Carolina has two court-annexed programs for certain counties; both programs utilize identical language to grant full immunity.[248] Unfortunately, while Washington's provisions are both within the quadrant for specialized programs with limited immunity, the state failed to create complete uniformity. Washington has a pro-

[245] Although Colorado has three listings, the entry for international dispute resolution was not counted because the provision deals with immunity from process while in the state for a mediation and does not deal with mediator immunity directly. *See* COLO. REV. STAT. § 13-22-507 (2003).

[246] *See infra* Appendix for Alaska, Minnesota, Nebraska, Oregon, South Carolina, Virginia, and Washington.

[247] MINN. STAT. § 518.1751(5) (2003); MINN. STAT. § 583.26(7)(a) (2003).

[248] S.C. CIR. CT. ADR R. 8(i) ("The mediator shall not be liable to any person for any act or omission in connection with any mediation conducted under these rules.").

gram for mediation by authorized dispute resolution centers that protects their volunteers for all but "willful or wanton misconduct."[249] On the other hand, the program for mediation of attorney-client and attorney-professional disputes extends protection for acts done in "good faith."[250]

Second, eight states have provisions in both general and specialized programs (in two quadrants), with six maintaining consistency by having all provisions provide for either full or limited immunity, but never both.[251] Utah has two provisions that provide full immunity, but in different ways. The general program for court-annexed mediation provides for immunity "to the same extent as judges,"[252] while the appellate mediation program invokes the Governmental Immunity Act.[253]

Two states had problems maintaining consistency. Delaware has four court rules that limit immunity with a laundry list of wrongful conduct. For instance, immunity in the general program for court-annexed mediation in the Delaware Superior Court does not extend to acts that are "in bad faith, with malicious intent, or exhibit a willful or wanton disregard of the rights, safety, or property of another."[254] Conversely, the victim-offender mediation statute provides immunity that covers all but "willful or wanton misconduct."[255]

In Oregon, the situation is somewhat the reverse. Two state statutes setting up general programs for court-annexed mediation provide for immunity unless an "act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another."[256] The U.S. District Court took the opposite approach in creating its specialized program for court-annexed mediation by equating mediators to officers of the court with judicial immunity.[257]

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[249] WASH. REV. CODE § 7.75.100(2) (2003).

[250] WASH. ADMISSION TO PRACTICE R. 16(e)(1).

[251] *See infra* Appendix for Indiana, North Carolina, and West Virginia for examples of full immunity. *See infra* Appendix for Georgia, Iowa, and Wyoming for examples of identical limited immunity.

[252] UTAH R. J. ADMIN. 4-510 (13).

[253] UTAH CODE ANN. § 78-2a-6(4) (2004).

[254] DEL. SUP. CT. R. CIV. P. 16.1(n); *see also* DEL. CH. CT. R. 95(c); DEL. CH. CT. R. 174; DEL. CT. COM. PL. CIV. R. 16.1(c).

[255] DEL. CODE ANN. tit. 11, § 9505(b) (2004).

[256] OR. REV. STAT. §§ 36.210(1), 36.264 (2003).

[257] U.S. DIST. CT. D. OR. CIV. R. 16.4(e)(2)(C) ("During the conduct of court

The problems Delaware and Oregon face pale when compared with the inconsistent provisions in the remaining ten states with multiple immunity provisions. Arizona's appellate mediation program and the program for mediation of disputes regarding admission and discipline of attorneys provide mediators with absolute immunity,[258] while the general mediation statute found in the evidence chapter limits immunity by providing coverage for all conduct "except for those acts or omissions that involve intentional misconduct or reckless disregard of a substantial risk of a significant injury to the rights of others."[259] Colorado suffers a similar problem. Its specialized program for mediation of attorney discipline matters provides for full immunity for "conduct in the course of [mediators'] official duties,"[260] while the general program under the state Dispute Resolution Act limits immunity to conduct that does not constitute "willful or wanton misconduct."[261]

The problems in Florida are more of a mixed bag. The general program for court-ordered mediation and the mandatory small claims mediation program provide for full immunity to the "same extent as a judge,"[262] while the statute establishing Citizen Dispute Settlement Centers within the judicial districts provides immunity "unless such person acted in bad faith or with malicious purpose or in manner exhibiting wanton and willful disregard of the rights, safety, or property of another."[263] Illinois has three specialized programs: two court-annexed programs provide immunity to the "same extent as a judge,"[264] while the program for mediation of licensing disputes for podiatrists provides immunity "except in cases involving willful or wanton misconduct."[265] In Maine, both the general court-annexed program and the special

directed mediation, mediators act as officers of the court and have judicial immunity.").

[258] ARIZ. R. CIV. APP. P. 30(o) ("Appellate mediators . . . involved in the Program shall be absolutely immune from suit for all conduct in the course of their official duties."). ARIZ. SUP. CT. R. 48(l) ("[M]ediators . . . shall be immune from suit for any conduct in the course of their official duties.").

[259] ARIZ. REV. STAT. § 12-2238(E) (2003).

[260] COLO. R. CIV. P. 251.32(e).

[261] COLO. REV. STAT. § 13-22-305(6) (2003).

[262] FLA. STAT. ANN. ch. 44.107 (Harrison 2003). *See also* Fla. 9th J. Cir. Admin. Order 2001—34 (providing mediators in small claims cases in Orange County with the same immunity).

[263] FLA. STAT. ch. 44.201(6) (2003).

[264] ILL. SUP. CT. R. 99(b); ILL. 18TH J. CIR. CT. R. 15.18(I)(K).

[265] 225 ILL. COMP. STAT. 100/4(B) (2004).

education program provide for full immunity,[266] but the program for disputes involving recreational vehicle manufacturers and dealers covers only acts done in good faith.[267]

In New York, the local court rule for a court-annexed mediation program in the New York County Supreme Court Commercial Division provides for full immunity,[268] but the court rule providing immunity for mediators in attorney-client disputes does not cover willful misconduct.[269] Oklahoma and Wisconsin suffer a similar disconnect with two specialized programs. In Oklahoma, the court-annexed program for disputes of "small social or economic magnitude" provides only limited immunity for an action that is not the "result of gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety, or property of any party to the mediation,"[270] while the specialized program for victim/offender disputes provides mediators full immunity.[271] In Wisconsin, the farmer/lender mediation program provides that "[m]ediators . . . are immune from civil liability for any act or omission within the scope of their performance of their powers and duties,"[272] while both the specialized program for mediation of disputes between motor vehicle dealers, salespersons, and sales finance companies and the program for disputes involving heath care extend immunity only to acts or omissions that are done in good faith.[273]

Finally, the rules of the Tennessee Supreme Court that create the court-annexed mediation program provide full judicial immunity,[274] while the statutory immunity provisions contained in

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266 ME. REV. STAT. ANN. tit. 4, § 18-B (3) (West 2004) (pertaining to the court-annexed program); ME. REV. STAT. ANN. tit. 20-A, § 7207-C (West 2003) (pertaining to the licensing of podiatrists).

267 ME. REV. STAT. ANN. tit. 10, § 1440(5) (West 2003) (creating a presumption of good faith that can "be overcome only by clear and convincing evidence").

268 N.Y. SUP. CT. COMM. DIV. ADR R. 6 ("Any person designated to serve as Neutral pursuant to these rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity.") Although this provision provides for immunity for acts or omissions while serving in the capacity of a neutral, this is no different from the judicial act test for judicial immunity within the common law. *See supra* Part I.B.1.

269 N.Y. SUP. CT. APP. DIV. CT. R., Part 1220, App. A(5)(d).

270 OKLA. STAT. tit. 12, §§ 1801, 1805(E) (2004).

271 OKLA. STAT. tit. 22, § 991a(A)(1)(m) (2004).

272 WIS. STAT. § 93.50(2)(c) (2003).

273 WIS. STAT. § 218.0138 (2003) (providing that the presumption of good faith can only be overcome by clear and convincing evidence). WIS. STAT. § 655.465(6) (2003).

274 TENN. SUP. CT. R. 31 § 12.

three specialized programs all provide for limited immunity. Even within the specialized programs, no consistency exists. The victim-offender program covers all conduct except "willful or wanton misconduct,"[275] but mediators involved in disputes over licensure of chiropractors and in disputes involving other health-related boards are provided protection only so long as they act "in good faith and without malice."[276]

There is one area of relative consistency. In the twelve local federal rules contained in the Appendix and counted in all of the various state totals, the U.S. district and bankruptcy courts (with one rather amazing exception) have all provided for full immunity for their court-annexed mediators.[277] The one exception is remarkable. Of the ninety-six provisions found in the statutes, rules, and local rules, only the local rule for the U.S. District Court for Idaho specifically rejects immunity for mediators. While granting immunity for arbitrators, it states, "Mediators are not afforded this same protection."[278]

The vast inconsistency among immunity provisions within individual states, as well as between different states, presents a nearly impenetrable jungle obscuring the current status of mediator immunity in the United States. Where states attempt to establish absolute immunity, in addition to invoking some derivation of the word absolute,[279] they recite "judicial function,"[280] "the same extent as judges,"[281] "immunity from suit,"[282] "within the scope of . . . duties,"[283] and "powers and duties."[284]

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275 TENN. CODE ANN. § 16-20-105(b) (2004).

276 TENN. CODE ANN. § 63-4-115(g) (2004); TENN. CODE ANN. § 63-1-138(b) (2003); TENN. CODE ANN. § 63-4-118 (2003).

277 *See supra* Appendix for local rules of the U.S. district courts in Alaska, California, the District of Columbia, Hawaii, Idaho, Indiana, New York, North Carolina, Oregon, and South Carolina.

278 U.S. DIST. CT. D. IDAHO CIV. R. 16.5(g).

279 *See, e.g.*, ARIZ. R. CIV. APP. P. 30(o) ("Appellate mediators . . . shall be absolutely immune from suit for all conduct in the course of their official duties.").

280 *See*, *e.g.*, TENN. SUP. CT. R. 31 § 12 ("Activity of Rule 31 Neutrals in the course of Rule 31 ADR proceedings shall be deemed the performance of a judicial function and for such acts Rule 31 Neutrals shall be entitled to judicial immunity.").

281 *See*, *e.g.*, FLA. STAT. ch. 44.107 (2003) ("[A] mediator appointed under s. 44.102 shall have judicial immunity in the same manner and to the same extent as a judge.").

282 *See*, *e.g.*, N.H. SUPER. CT. R. 170(e) ("[E]ach such neutral has immunity from suit . . . .").

283 *See*, *e.g.*, ME. REV. STAT. ANN. tit. 4, § 18-B(3) (West 2004) ("A person serving as an ADR provider under contract with the Judicial Department . . . is immune from any civil liability . . . for acts performed within the scope of the provider's or

Where less than full immunity is afforded mediators, the full panoply of tort standards (good faith,[285] bad faith,[286] gross negligence,[287] willful and wanton,[288] maliciousness,[289] or a

the director's duties."); WIS. STAT. § 93.50(2)(c) (2003) ("Mediators . . . are immune from civil liability for any act or omission within the scope of their performance of their powers and duties under this section.").

[284] *See, e.g.*, WIS. STAT. § 93.50(2)(c) (2003) ("Mediators . . . are immune from civil liability for any act or omission within the scope of their performance of their powers and duties under this section.").

[285] *See, e.g.*, ME. REV. STAT. ANN. tit. 10, § 1440(5) (West 2003) ("A mediator or arbitrator is immune from civil liability for any good faith act or omission within the scope of the mediator's or arbitrator's performance of powers and duties under this section. Every act or omission is presumed to be a good faith act or omission. This presumption may be overcome only by clear and convincing evidence."); S.D. CODIFIED LAWS § 54-13-20 (Michie 2003) ("Any person serving as a mediator . . . pursuant to this chapter is immune from civil liability in any action brought in any court in this state on the basis of any act or omission resulting in damage or injury if the individual was acting in good faith, in a reasonable and prudent manner, and within the scope of such individual's official functions and duties as a mediator . . . pursuant to this chapter.").

[286] *See, e.g.*, DEL. SUP. CT. R. CIV. P. 16.1(n) ("All ADR Practitioners, when serving as an arbitrator, mediator or neutral assessor, shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in ADR, unless an act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another."); FLA. STAT. ch. 44.201(6) (2003) ("No officer, council member, employee, volunteer, or agent of a Citizen Dispute Settlement Center shall be held liable for civil damages for any act or omission in the scope of employment or function unless such person acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of the rights, safety, or property of another."); IOWA CODE § 13.16(1) (2003) ("A member of the farm mediation staff, including a mediator . . . is not liable for civil damages for a statement or decision made in the process of mediation, unless the member acts in bad faith, with malicious purpose, or in a manner exhibiting willful and wanton disregard of human rights, safety, or property.").

[287] *See, e.g.*, KAN. STAT. ANN. § 5-513 (West 2003) ("No neutral person . . . of a government board of an approved program may be held liable for civil damages for any statement or decision made in the process of dispute resolution unless such person acts, or fails to act, in a manner constituting gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety or property of any party to the process of dispute resolution.").

[288] *See, e.g.*, ARK. CODE ANN. § 16-7-207 (Michie 2003) ("No impartial third party administering or participating in a dispute resolution process shall be held liable for civil damages for any statement or decision made in connection with or arising out of the conduct of a dispute resolution process unless such person acted in a manner exhibiting willful or wanton misconduct."); TEX. CIV. PRAC. & REM. CODE ANN. § 154.055(a) (Vernon 2003) ("A person appointed to facilitate an alternative dispute resolution procedure . . . who is a volunteer and who does not act with wanton and wilful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party.").

[289] *See, e.g.*, DEL. SUP. CT. R. CIV. P. 16.1(n) ("All ADR Practitioners, when serv-

hodgepodge of standards[290]) are invoked in the various provisions. Whether it is intra-provision, intrastate, or interstate, the cacophony of voices establishing immunity does not bode well for the comprehensibility or predictability of this area.

B. The Irony of the Statutes and Rules

An irony embedded within the vast variety of provisions affording immunity for mediators fatally undermines the foundations of such immunity. Over one hundred thirty years ago the Supreme Court understood that judges should be afforded absolute immunity,[291] and four hundred years ago the English courts understood this principle as well.[292] If the protection afforded the judiciary had been less than absolute, there would have been incessant litigation attempting to determine if a judge's conduct was done in good faith or was reckless, willful or wanton, or any of the myriad other tort standards. Giving a judge partial immunity is only minutely better than giving him or her no protection at all.

The failure to align the rule- and statute-based mediator immunity with the absolute immunity provided to judges and to the case law establishing mediator immunity exposes the self-interested and self-serving nature of these provisions.[293] Either mediators are the same as judges, or they are not. Either they deserve the same protection as judges, or they do not.

Perhaps a quantitative analysis would aid the discussion. In order to conclude that mediator behavior is sufficiently unlike judicial behavior and that mediators deserve something less than absolute protection, two questions must be answered. First, what

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ing as an arbitrator, mediator or neutral assessor, shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in ADR, unless an act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another.").

290 *See, e.g.*, *id*.; KAN. STAT. ANN. § 5-513 (West 2003) ("No neutral person . . . may be held liable for civil damages for any statement or decision made in the process of dispute resolution unless such person acts, or fails to act, in a manner constituting gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety or property of any party to the process of dispute resolution.").

291 Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 349 (1871); *see supra* text accompanying notes 31–40.

292 Floyd v. Barker, 77 Eng. Rep. 1305, 1307 (1608); *see supra* text accompanying notes 16–23.

293 *See supra* Part II.

is the degree of similarity (or dissimilarity) between mediators and judges, and how is that relationship expressed as a percentage or ratio? In other words, do a mediator's duties represent fifty percent or two-thirds of a judge's duties? Is there an eighty-percent similarity? Second, when the first question has been answered, how is the percentage or ratio of similarity applied to the various tort measures of misconduct? Once the ratio of similarity has been determined, how do you find the appropriate degree of misconduct that deserves protection? If a mediator's acts represent five-sevenths of a judge's acts, does that mean a mediator should be immune unless his or her conduct amounts to recklessness? Or, willful and wanton misconduct?

Certainly, such an analysis represents a profound act of folly and futility. On the first question, it is impossible to extend the argument beyond the simple observation that a mediator is sufficiently comparable to a judge to deserve absolute immunity or, as I have argued throughout this paper, he or she is so sufficiently unlike a judge that no protection is warranted. Although such arguments appear to be based upon logic, they rest principally upon our own perspective. For instance, let us reexamine the scale metaphor invoked earlier. If an observer stands at a far distance, mediators look like judges because they both resolve conflict, but upon closer examination the similarity quickly dissolves.

For the second question, we must apply the similarity ratio to standards of tort liability to determine what degree of a mediator's conduct deserves tort protection. Again, this task is impossible. Within this inquiry, one hoary question resides: is it possible to quantify tort standards of conduct, either separately or together? Does recklessness represent seventy-five percent of the distance from non-negligent behavior to intentional behavior? Is maliciousness worse than willful and wanton action? This is an inquiry to which scholars surrendered many years ago. Even embarking on such a journey of comparison and analysis is absurd and would only amount to pure speculation.

It is impossible to justify limited immunity on anything other than the self-interest of mediators and the courts, combined with a misperception of the need. This is exacerbated by the fact that the ADR movement has few natural predators, other than a small number of scholars who raise such questions. If mediation can be instrumental in clearing dockets, how could anyone op-

pose a bit of protection for mediators? Further, I believe that most ADR statutes are written by those in the profession who may not want to risk going after absolute immunity for fear of overreaching. Therefore, any protection is better than none. The courts certainly don't oppose mediator immunity because they operate on the misguided perception that without some form of immunity, mediators will not staff the court-annexed ADR programs. And, as we shall see in a moment, it provides an easy method of avoiding the difficult questions of mediator misconduct.

So, while the question regarding the degree of protection that should be afforded judges has been settled for centuries, the vast range of protections written for mediators speaks volumes about the disarray surrounding the question of mediator immunity. If mediators are unlike judges, they deserve no protection whatsoever, not some limited form of protection as found in the majority of the provisions described above.

IV

INEQUITABLE & MISGUIDED RISK-SHIFTING

Immunity shifts the risk of a poor mediator from the mediator and the sponsoring institution to the disputants. If a mediator acts tortiously, the resulting damages will fall squarely on the shoulders of the injured disputant who has no legal recourse and who will thus have to "lump" the results.[294] This risk-shifting is both inequitable and misguided. It is inequitable because the risk of negligent or intentionally wrongful behavior by the mediator should be borne by those who are best able to shoulder and appropriately spread the risk. It is misguided because it will interfere with the long-term development of mediation in five ways, all of which I will develop below.

A. Inequitable Risk-Shifting

First, let us examine the advantages and disadvantages of court-annexed mediation from the point of view of the parties. Obviously, disputants who reach a valid and enduring settlement receive numerous benefits from a court-annexed program. Parties save time and resources (and those of their associates, part-

294 For a broader discussion of this term, see William L. F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 81 (1974).

ners, employers, employees, fellow workers, family members, and friends) that would ordinarily be expended for preparation and trial, as well as attorneys' fees and costs.[295] Resources saved include not only monetary savings, but also the mental and emotional energy that would normally be expended preparing for and attending any trial. This must be offset against the cost of the mediation, but it is safe to assume that the tradeoff goes markedly in favor of the parties.

Then, there are the less tangible benefits, including the ability of the parties to exercise self-determination,[296] which usually leads to more enduring agreements.[297] Parties can retain confidentiality over settlement discussions and over any agreement reached.[298] Also, the parties often craft resolutions that are far more flexible, creative, and interest-based than the normal remedies available to a trial judge.[299] Finally, and most ephemeral of all, are the reduction of irrationality[300] and hostility,[301] and the possible repair of damaged relationships.[302] Trial, to the contrary, contributes to emotional pain and suffering and often ren-

[295] Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982); Schildt et al., *supra* note 9, at 17 (finding mediation to be faster and cheaper); Joan B. Kelly, *Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs*, 8 MEDIATION Q. 15, 23 (1990) (finding that comprehensive divorce mediation processes are "considerably less expensive . . . than the two-attorney adversarial process"); GEORGE C. FAIRBANKS, IV & IRIS C. STREET, "TIMING IS EVERYTHING" THE APPROPRIATE TIMING OF CASE REFERRALS TO MEDIATION: A COMPARATIVE STUDY OF TWO COURTS 23-24 (2001) (finding that early intervention with mediation led to higher rates of settlement and much lower rate of cases being adjudicated); GOERDT, *supra* note 9, at 104 (finding small claims mediation programs "to be very cost-effective"); Slack, *supra* note 9, at 31 (perceiving, by attorneys, that mediation shortened case lifespan in 80% of cases and reduced costs to their clients in 70%). *But see* SUSAN L. KEILITZ ET AL., MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL COURT PROCESSING 51 (1992) (finding no clear picture that mediation programs reduce parties' costs).

[296] JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 10 (1984); JAY FOLBERG & ANN MILNE, DIVORCE MEDIATION: THEORY AND PRACTICE 7 (1988); RISKIN & WESTBROOK, *supra* note 146, at 34.

[297] FOLBERG & TAYLOR, *supra* note 296.

[298] *See generally* KIMBERLEE K. KOVACH, MEDIATION PRINCIPALS AND PRACTICE 52-53 (2d ed. 2000); FOLBERG & MILNE, *supra* note 296, at 9.

[299] KOVACH, *supra* note 298, at 52-53; RISKIN & WESTBROOK, *supra* note 146, at 34.

[300] D. Brown, *Divorce and Family Mediation: History, Review, Future Directions*, 20 CONCILIATION CTS. REV. 1, 14 (1982).

[301] FOLBERG & TAYLOR, *supra* note 296, at 10; FOLBERG & MILNE, *supra* note 296, at 9.

[302] GOLDBERG ET AL., *supra* note 168, at 180; KOVACH, *supra* note 298, at 52.

ders relationships beyond repair.[303] In court-annexed programs, parties that settle receive the full panoply of blessings that have been touted since the modern rebirth of mediation almost three decades ago.[304]

For parties that do not settle during mediation, the picture is not entirely bleak. Although disputants incur the cost and time expenditures involved with the mediation, as well as all of the costs associated with trial,[305] parties often reduce the number and complexity of outstanding issues. Mediation can also reduce the overall levels of hostility between the parties and/or their counsel, thus saving time by reducing the number and length of acrimonious hearings and making discovery more efficient.[306]

However, the disputants are not the only ones to gain from a successful mediation; the courts win, as well. Although some may like to attribute altruistic motives to the courts, they are charged with resolving conflicts and must make do with the resources they are allocated by the legislature. This means clearing the docket in the most expeditious manner possible. To many in the judiciary, mediation may seem to be a black box,[307] into which disputes and disputants are thrust and out of which comes settlement agreements and happy disputants. The courts may care little and understand less of what goes on inside this black box, so long as the mediators deliver settlements and satisfied customers. Each settlement means one less case on the docket; each successful program means reduced caseloads for the entire trial bench.

Unfortunately, the data are inconclusive on the question of savings to the courts of time and money.[308] Even so, the percep-

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303 FOLBERG & TAYLOR, *supra* note 296, at 10-11.

304 KOVACH, *supra* note 298, at 28-30; *see also* CARRIE MENKEL-MEADOW ET AL., DISPUTE PROCESSES AND CONFLICT RESOLUTION: BEYOND THE ADVERSARIAL MODEL 272-75 (forthcoming 2004) (discussing several parallel roots of mediation all developing in the latter part of the 20th century).

305 FAIRBANKS & STREET, *supra* note 295, at 23-24 (finding that the lack of settlement can have a "significant monetary impact").

306 FOLBERG & MILNE, *supra* note 296, at 7.

307 A "black box" is generally an "electronic device with known performance characteristics but unknown constituents and means of operation." THE AMERICAN HERITAGE DICTIONARY 90 (3d ed. 1994). *See generally* Local 808, Bldg. Maint., Serv., and R.R. Workers v. Nat'l Mediation Bd., 888 F.2d 1428, 1435 (D.C. Cir. 1989) (finding the need for a "black box" relates to the "special role of the mediator and the unusual dynamics of the mediation process"); Brown, *supra* note 5, at 310.

308 CLARKE ET AL., *supra* note 9, at 37 (1995) (reporting that a program of court-ordered "mediation settlement conferences" did not seem to "have reduced the

tion of savings is certainly prominent.[309] However, parties report increased procedural and substantive satisfaction.[310] Most disputants feel that they have been heard while exercising self-determination and resolving differences. They frequently leave with increased satisfaction for the entire process. Such effects redound to the benefit of the courts as the sponsors of the mediation programs. So, in the aggregate, courts benefit greatly from court-annexed programs.

So, when parties settle with the help of a qualified and competent mediator, everyone gains, the parties and the courts. The disputants go home with an agreement that comes closer to meeting their joint needs than would a court resolution and they have accomplished this with much less financial and psychological cost. The courts benefit because a case has been eliminated from the docket. Further, the court is the indirect recipient of the procedural and substantive satisfaction felt by the parties. Even when the parties are unable to settle, the level of conflict is often reduced to a more manageable level and some, if not all, of the issues may have been resolved or simplified. Even without a settlement, the parties can feel better about the entire process.

Everyone gains from a court-annexed mediation program, it seems, except for the parties forced into a settlement tainted by mediator misconduct. Although parties, as a class, are benefited by court-annexed mediation, this benefit is spread unevenly across the class with most receiving great benefit and a small number receiving a detriment, sometimes not insignificant, because of mediator negligence or intentional misconduct. Parties enter mediation in an attempt to avoid cumbersome and costly

courts' workload in terms of trials, motions, or orders"); GOERDT, *supra* note 9, at 104-05 (hypothesizing considerable savings of judicial time in small claims courts based upon mediation programs that rely heavily on volunteer mediators and where costs are minimal or borne by other parties); Pamela A. Eavenson, Mandatory Divorce Mediation: The Impact on the Courts 22 (May 1998) (unpublished manuscript, on file with the National Center for State Courts) (showing mixed results on time-to-disposition of divorce cases involved in mediation); *cf.* Susan L. Keilitz, et al., Multi-State Assessment of Divorce Mediation and Traditional Court Processing 51 (September 1992) (unpublished manuscript, on file with the National Center for State Courts) ("[W]hether mediation reduces costs to the parties remains an open question."); U.S. GEN. ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 19 (1997) (reporting decreased costs for employer utilization of mediation programs involving EEOC conflicts).

309 Slack, *supra* note 9, at iv.

310 GOERDT, *supra* note 9, at 104; Slack, *supra* note 9, at 10.

trials, but if disputants are not allowed to recover for a mediator's wrongful act, then they have essentially lost the benefit of any mediation agreement. As a result, courts with mediator immunity benefit from reduced dockets and increased rates of satisfaction while shifting all of the risk of mediator misconduct to a few unsuspecting and unprepared disputants.

The courts, however, are better situated than individual disputants to withstand the costs and to spread the risk of mediator misconduct. Three reasons support this conclusion. First, when compared with the courts, disputants are poorly situated to shoulder costs imposed by mediator misconduct. The general inability to shoulder this risk is especially true for court-annexed programs aimed at smaller cases and ones in which the parties frequently appear pro se or where they cannot afford to bring counsel to mediation. Even if individual litigants could afford the cost of mediator misconduct, the imposition of such costs cannot be justified in light of the relative ease with which the courts could insure mediators in court-annexed programs by purchasing a separate policy to cover the mediators or placing the risk in the statewide risk management system. Courts could then absorb the cost or spread it over all mediations with an administrative fee or add-on. Or, they could spread the costs over all civil case filings by asking the legislatures to increase the civil filing fee accordingly. If the court-annexed program relies upon fee-paid mediators, the cost could be covered by a surcharge on the mediators' fees. Or, as has been done by a few counties in Ohio, the court can require that mediators maintain liability insurance.[311]

Second, even if parties wanted to, they cannot spread the risk of mediator misconduct across the class of all disputants. Unlike the courts, parties as a class have no risk-spreading mechanism, akin to uninsured motorist coverage, to insure against mediator misconduct. Every prudent driver carries an uninsured motorist provision on her insurance policy to provide coverage in case she is involved in an accident where the negligent driver has no liability insurance. The uninsured driver provision is activated and provides insurance in place of the other driver's non-existent lia-

311 *See* OHIO CUYAHOGA COUNTY C.P. DOM. REL. R. 32(E)(4) ("Mediators shall have the following minimum qualifications: . . . . (4) Maintenance of appropriate liability insurance specifically covering the activities of the individual as a mediator."); OHIO FRANKLIN COUNTY C.P. DOM. REL. R. 22(5); Ohio Ct. Order 22, LUCAS DOM. REL. R. 18.04(D).

bility coverage. However, drivers purchase coverage that protects them over the entire term of the policy and the hundreds of times they drive; they do not buy a separate uninsured driver provision every time they jump into their car. Similarly, parties cannot purchase insurance to protect themselves from a negligent mediator on a single-case basis.

And, finally, even if such insurance were available, we cannot assume that parties to mediation are efficient economic actors and would understand the risks involved. As a result, parties would not bargain for such protection in face of the admittedly microscopic risk. This is true for both the small pro se case and the large counsel-guided case. In the pro se case, it is safe to assume that most parties have little or no understanding of mediation, let alone the potential risks involved and the need to protect against them. In the larger cases where the parties are more likely to pick their own mediator, it is hard to imagine an attorney advising a client, on the one hand, that they chose an excellent mediator and, on the other, telling the client they need to purchase insurance prior to mediation.

Further, work in the psychology of bounded rationality implies that parties may not purchase insurance to protect against a negligent mediator, even if they were fully advised of the risks involved.[312] Most people will think negatively of paying money now for future protection against the unlikely chance that the mediator will act wrongfully. When faced with the choice of paying money now for the insurance or saving the insurance premium and hoping that the mediator will not misbehave, most will become risk-seeking and choose to go unprotected. In other words, they will save the premium and assume the risk of mediator misconduct and hope that it will not happen.[313] As a result, most disputants will not have any protection against mediator misbehavior.

In summary, immunity for mediators is inequitable for several reasons. First, disputants are much less able to shoulder the burden of malpractice. Second, they cannot (or probably will not) protect themselves against wrongful conduct. And finally, courts

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[312] Daniel Kahneman, *A Perspective on the Judgment of Choice*, 58 AM. PSYCHOL. 697 (2003).

[313] MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 35 (1992); Scott H. Hughes, *The Simple Rules: Gain or Loss—How Do Parties See Potential Settlements?*, 1 NEWSLETTER OF THE AM. ACAD. OF ADR ATT'YS 6 (2003).

are better situated to shoulder or spread the risk. This is not a question of whom should be sacrificed when misconduct occurs nor is it a question of deciding who should carry this risk between two equally situated parties. A few unsuspecting disputants should not be forced to incur the costs associated with poor mediator behavior, especially when the alternatives are considered.

B. Misguided Risk-Shifting

Risk-shifting is misguided for five reasons. First, it may make disputants more reluctant to engage in mediation. Second, it may increase the risk that the legislatures and the courts will begin to regulate the field or greatly increase the current level of regulation of mediators. Third, it reduces the deterrent effect that potential tort liability may have on misbehavior. Fourth, it prevents the marketplace from helping to correct errant behavior or weed out bad mediators. And, fifth, mediator immunity prevents the development of the common law and the attendant standards of conduct for mediators.[314]

First, mediator immunity may chill parties' willingness to mediate. I think it is safe to assume that parties to mediation are overwhelmingly ignorant of the existence of immunity provisions that protect mediators, let alone understand the ramifications of such protections. As to the knowledge of the general public about mediator immunity, I can only extrapolate from my inquiries within the mediator community in my home state of New Mexico. Having been told that New Mexico had a provision for mediator immunity, I sent my research assistants to the books to search for the rule. Finding none, I began to ask my fellow practitioners. The overwhelming response was a palms-up gesture and a questioning look. A minority felt we had some provision, but only one or two were fairly certain. With some knowledgeable guidance, we eventually found the provision for full immunity buried in the local rules for the Second Judicial District for the

314 *Cf*. Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should Be Embraced and Broadened*, 2003 J. DISP. RESOL. 135, 162 (2003):

> As super contracts, mediated agreements in strict mediation confidentiality jurisdictions are effectively exempt from the established standards for the enforcement of agreements: contract common law. These standards evolved over centuries to protect parties from abuses or injustices in the enforcement of agreements. Strict mediation confidentiality essentially deprives mediation participants of many of the protections embodied in contract law principles.

court-annexed ADR program.[315] It is the only provision in New Mexico. If the professionals in the community are not well versed about immunity, certainly the general public is even more ignorant.

Next, mediators who are aware of mediator immunity do not educate parties in mediation. Although many states have immunity for mediators in one form or another, I would guess that no mediator has ever added this line to his or her opening monologue: "And, if I am negligent during this mediation and do something that might give rise to a claim for misconduct, the law prohibits you from suing me to recover your damages." Or even a simple: "If something goes wrong in this mediation, you have no cause of action against me." I am aware of no disclaimer of liability in agreements to mediate. Mediator immunity may be one of the best-kept secrets within the profession.

It seems for the most part that we have been able to hide mediator immunity from disputants. Other than the few reported cases discussed earlier,[316] there appear to be no cases dealing with immunity. There may have been instances where parties have sought to make a claim against a mediator, but who have been dissuaded by astute counsel who has stuck his or her nose into the books before filing suit. In any case, if parties generally become aware that mediators are immune and that the risk of a bad mediator falls completely upon them, I believe there is a substantial chance that some parties may be reluctant to mediate. This development would not be good for the profession.

If I am accused of hysteria, it is certainly no different from the hysteria of immunity proponents when they argue that court-annexed programs will have no mediators without the protection of mediator immunity. Such a conclusion rests upon pure conjecture; no data exists to show that court-annexed programs thrive where immunity exists and do not thrive in the absence of this protection. Only eighteen states have broad-based or court-annexed programs with immunity provisions, and many other programs cover only extremely narrow areas of practice. If the argument for immunity were true, then those court-annexed programs without such protection would not survive and those with immunity provisons would prosper. This does not seem to be the case. In New Mexico, we have a thriving mediation community

315 N.M. 2D J. DIST. R. LR2-601(E).

316 *See supra* text accompanying notes 114-16.

and court-annexed programs exist under both sets of conditions. California has a very large mediation community and many mature mediation programs, even though the only immunity provision in California can be found in a mediation program for attorney fee disputes.[317]

Second, continued or expanded mediator immunity may increase the risk of regulation of the profession to a level greatly in excess of what currently exists. If immunity laws foil disputants from obtaining relief from mediator misconduct, they may well turn their efforts to the legislature and press for regulation. If they cannot file a lawsuit to recover for their losses, their human need for vindication and retribution may be transformed into a need to prevent others from suffering a similar fate. It would only take one or two "poster child" cases of mediator coercion or intimidation to move the legislature in this direction, especially with a profession that is so lightly regulated currently. The problem would be further exacerbated if a case arose in a jurisdiction with no administrative process to discipline or sanction mediators who misbehave.[318]

No states currently license mediators and only a few have significant statewide certification programs; states do little or no regulating of the profession. Most mediators complete training programs of thirty-two or forty hours before beginning to mediate, but this is more of a community norm than a requirement. In most states, it is possible to hang out a shingle and start mediating without any formal training.

Mediation benefits from a diverse community where access is relatively simple and inexpensive. Most practitioners seek an atmosphere of inclusiveness where individuals from many profes-

317 CAL. BUS. & PROF. CODE § 6200(f) (West 2003).

318 Of the slight majority of states that have some immunity provision, only six have disciplinary processes. *See* Fla. 15th J. Cir., Palm Beach Cty., Admin. Order No. 3.015-6/01 (creating a Mediator Grievance Review Committee that reviews written complaints about mediators and conducts fact-gathering proceedings to recommend appropriate action); GA. ADR R. APP. C (creating process to review complaints that may result in sanctions, including additional training, restriction of types of cases to be mediated in the future, continuing education, mentoring by an experienced mediator/mentor, suspension for specified term, or removal from registration); N.H. REV. STAT. ANN. § 328-C:7 (West 2003) (creating disciplinary process for certified marital mediators where discipline may include a written warning and temporary or permanent suspension); N.C. GEN. STAT. § 7A-38.2 (2004); OKLA. STAT. tit. 12, § 1837 (2004) (creating a decertification process for mediators); S.C. CIR. CT. ADR R. 12 (providing for any sanction the Supreme Court deems appropriate for violation of the rules or ethical standards).

sions and with varied skill-sets are encouraged to become mediators to infuse the practice with new methodologies and to enrich the continuing dialogue about the future course of the profession. Regulation will greatly dampen this effect, as it tends to be exclusionary and anticompetitive. It is the nature of the regulative process to create qualifications of training or education for entry,[319] to quantify the qualities of the profession so that tests can be designed and administered,[320] and to require certain conduct for continued membership in the profession, such as compliance with standards of conduct and continuing education.[321] Unless the qualifications reflect current norms for training, any regulation will only limit who enters and increase the price to those who seek to enter. More than likely, the burden for entry would increase dramatically. It is possible that regulation could limit entry to members of several professions that require years of education and qualifying exams, such as attorneys, counselors, and psychologists. Regulation along these lines would prohibit many qualified individuals from mediating and substantially increase the cost of entry for those who do seek the appropriate degrees to qualify.

Further, considering the attitude of legislators these days toward any new taxes, a significant portion of the cost of any additional bureaucracy may end up resting upon the shoulders of individual mediators through certification fees or taxes. The additional costs required to maintain this bureaucracy, when added to the costs of qualifying, will further raise the cost of entry to the profession, resulting in the possible exclusion of many talented potential mediators.

Regulation would have two impacts on the profession, one more direct and immediate and the other less direct, but possibly more injurious to our field. First, if large areas of practice are limited to certain professionals, the underlying nature of mediation would change substantially. For instance, if only attorneys are allowed to mediate,[322] the model could become more nar-

[319] Robert Kry, *The "Watchman For Truth": Professional Licensing And The First Amendment*, 23 SEATTLE U. L. REV. 885, 887 (2000).

[320] *See id.*

[321] *Id*.

[322] For a general discussion of the turf battles arising between attorneys and others through the use of statutes prohibiting the unauthorized practice of law, see Jacqueline Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Pro-*

rowly focused and evaluative.[323] Certainly, this trend is not desirable. Second, regulation could severely injure what little diversity currently exists in the field by discouraging members of groups who have been traditionally underrepresented, such as racial and ethic minorities, individuals with disabilities, and gays and lesbians. If diversity declines (or fails to improve), the quality and richness of the dialogue within the field will also suffer. Without the cacophony of voices that this field now encourages, we will all be the worse.

The trend toward regulation is completely anathema to most in the field who desire to remain inclusionary, to keep the costs down for entry into the field, and to avoid the need for governmental regulation. While immunity will not be the cause of regulation, I think immunity will contribute to the push for the regulation of our field. All in all, regulation is not a trend worth encouraging and mediator immunity may be one irritant that encourages such a trend.

Third, mediator immunity is misguided because it removes any deterrent that exists because of the potential for tort liability.[324] Although this impact might be minimal for most mediators, a case can be made along two lines of reasoning. If a mediator becomes overly concerned with his or her track record and the percentage of cases settled, it may be only one small step from encouraging settlement to coercion. As in the case of the Misbe-

fessional Monopoly from a Problem-Solving Perspective, 7 HARV. NEGOT. L. REV. 235, 258 (2002).

323 *Cf*. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2002); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66 (1991).

324 For a general discussion of the deterrent effect of tort liability, see Beatrice A. Beltran, Note, *Posner and Tort Law as Insurance*, 7 CONN. INS. L.J. 153, 187-88 (2000-01).

> Much of the criticism regarding tort law's ineffectiveness as a deterrence mechanism is also based on the unreasonable requirement that tort law provide an absolute level of deterrence. The critics would do well to view tort law as providing a significant level, though not an absolute level, of deterrence. The two competing levels of deterrence involve: the "strong" form of the deterrence argument—which assumes that tort law does in fact deter as thoroughly as economic models suggest—and the more "moderate" form of the argument—which assumes that tort law provides a significant amount of deterrence, yet considerably less than the economists' formulae tend to predict.

Id. *See also* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

having Mediator and the Pasty Participant, the allegations against the mediator may have arisen from a pressure to settle as many cases as possible. It may have arisen from a need to settle the "big one." This pressure can be exacerbated in cases where mediators can work with contingent fees or incentives if the case settles. The lack of the disincentive for errant behavior provided by tort liability will exacerbate the shifting of risk to the innocent and unprotected disputant.

Further, the deterrent effect of tort liability may encourage the merely negligent mediator to continue his or her education and professional improvement to decrease the likelihood of malpractice and to avoid any future problems. Like the Negligent Neutral we met at the beginning, tort liability for negligence may well provide the incentive to sharpen his or her mediation skills. It may aid his or her understanding of the line between legal information, which the mediator gave in the beginning, and legal advice, which arguably the mediator provided near the end of the mediation by allowing the parties to proceed without consulting their attorneys. Without the deterrence tort liability provides, some mediators may brush off the need and expense of continued learning and improvement. It may well be those marginal mediators who most need the help and guidance that continuing education provides.

Fourth, although there is a nascent market for mediator services and only a small percentage of mediators rely on a full-time income from mediation fees, the market can have a beneficial impact on our profession. The potential for liability may push many mediators to purchase malpractice insurance, thus spreading the risk of misconduct among all mediators. Further, the insurance companies can loss-rate the mediators and raise the rates for poor mediators or deny them coverage. Further, uninsured mediators who misbehave may be pushed out of the profession. This would not be an unfortunate circumstance.

This principle can extend to court-annexed mediation programs. If the courts or the state purchase insurance to cover the pool of mediators, the addition of an extra set of eyes from the insurance company that monitors the errors and omissions policy will aid the administrators of the court-annexed program to weed out misbehaving or underperforming mediators. This market-driven process may well work better than a disciplinary process.

It will also reimburse disputants damaged by mediator misbehavior, something that a complaint department could never do.

Mediator immunity will impede the usefulness of the markets because mediators will have no inclination to purchase malpractice insurance. Instead of waiting for the legislatures to regulate on a large scale, the markets, through malpractice insurance, can help to weed out bad mediators while providing a system that can provide adequate compensation for parties who unfortunately draw a negligent mediator.

Finally, mediator immunity prevents the common law from aiding in the development of adequate and detailed standards of conduct for mediators. If mediators are immune from suit for their misconduct, the common law cannot help to delineate the line separating acceptable from wrongful behavior. Courts provide a slow but persistent method to address the evolution of mediation on a case-by-case basis, allowing for a much lengthier and informed discussion on what constitutes good mediation and, conversely, what constitutes bad mediation.

The argument is much broader than it may seem at first blush. The profession can hardly agree on what mediation is, let alone what is good mediation and what is bad mediation. We cannot agree about what it takes to be a good mediator or how we properly train individuals to be good mediators. When faced with a few bad cases, is it appropriate as a profession to turn these large-scale decisions over to the legislatures to rebound back with poorly-written regulations? Are we ready to open up these sticky questions to such a broad-based inquiry? When considering issues of mediator qualifications and regulation (which is the only way that legislators can make these distinctions), legislators will be making decisions about what is good mediation, what is bad mediation, and what it takes to be a good mediator.

For these five reasons, mediator immunity is misguided. It may increase the reluctance of people to engage in mediation. If there are "poster child" cases where immunity provisions prohibit recovery from mediator misconduct, pressure for regulation may increase. Immunity will remove the deterrent effect arising from potential tort liability, thus increasing the potential for wrongful conduct and the resulting pressure for regulation. Finally, mediator immunity prevents the markets through insurance and the courts through the common law from helping to

define the boundaries between acceptable and unacceptable practice.

Conclusion

Although the history of judicial immunity is somewhat troublesome and disconcerting, it is a model of clarity and consistency when compared to the recent developments in mediator immunity. In order for the courts to justify mediator immunity in *Wagshal v. Foster* and *Howard v. Drapkin*, it was necessary to either misconstrue the fundamental differences between judges and mediators or ignore the standard tests applied to judicial immunity and jump to a needs-based argument that is clearly self-interested and poorly informed. With regards to statutes and rules, those that promulgate immunity have ignored the substantial problems that will eventually arise from mediator immunity, such as a risk of regulation, reluctance on the part of disputants to mediate, and the deleterious impact on the development of the practice by way of the common law. Although arguments have been advanced that immunity is necessary to insure a supply of mediators for court-annexed programs, there appears to be no empirical support for this position. Nor is there any anecdotal support either; court-annexed programs are flourishing where no immunity exists. In the final measure, there is nothing to support immunity for mediators other then the naked self-interest of the courts and mediators.

APPENDIX:
STATE TREATMENT OF MEDIATOR IMMUNITY

Format of Appendix

STATE NAME

CASE LAW, STATUTE, or RULE: (citation to case, statute or rule)
Category: (type of mediation covered, w/ brief description)
Degree of Immunity: (full, limited, or none, with pertinent terms)
Language: (statutory or rule language)
Comment: (details of particular note)

ALABAMA

None

ALASKA

STATUTE: ALASKA STAT. § 47.12.450(h) (Michie 2003).
Category: Specialized program for victim-offender mediation for delinquent minors by community dispute resolution centers.
Degree of Immunity: Full immunity for duties "within the official capacity of the individual."
Language: "An individual who is a member or an agent of the board of directors or a mediator at a community dispute resolution center is immune from suit in a civil action based upon the exercise or performance of or the failure to exercise or perform a discretionary function or a discretionary duty within the official capacity of the individual. A community dispute resolution center is immune from suit in a civil action based upon an act or failure to act for which an individual is granted immunity under this subsection."
Comment: The commissioner of health and social services may recognize a community mediation service as a community dispute resolution center to provide mediation services after meeting certain detailed standards and procedures (§ 47.12.450(b)), but the term "community dispute resolution center" is not otherwise defined in the statutes.

LOCAL RULE: U.S. DIST. CT. D. ALASKA R. CIV. 16.2(h)(1).
Category: Specialized program for court-annexed mediation in the District of Alaska.
Degree of Immunity: Full; court rule awards quasi-judicial immunity.

Language: "Any private person serving as a neutral under this rule is deemed to be performing a quasi-judicial function and is entitled to the immunities and protections that the law accords to persons serving in that capacity."

ARIZONA

STATUTE: ARIZ. REV. STAT. ANN. § 12-2238(E) (West 2003).

Category: General statute found in the evidence chapter of the state's laws.

Degree of Immunity: Limited. Does not extend to "intentional misconduct or reckless disregard."

Language: "A mediator is not subject to civil liability except for those acts or omissions that involve intentional misconduct or reckless disregard of a substantial risk of a significant injury to the rights of others."

Comment: Immunity for mediators for this general civil program is limited, but immunity provisions for appellate mediation and for attorney discipline are absolute. See below.

COURT RULE: ARIZ. R. CIV. APP. P. 30(o).

Category: Specialized appellate mediation program.

Degree of Immunity: Absolute immunity.

Language: "Appellate mediators, the settlement conference attorney and all other court employees involved in the Program shall be absolutely immune from suit for all conduct in the course of their official duties."

Comment: Immunity provisions in Arizona are inconsistent. See note above under ARIZ. REV. STAT. ANN. § 12-2238(E).

COURT RULE: ARIZ. SUP. CT. R. 48(l).

Category: Specialized program for the mediation of disputes involved with admission and discipline of attorneys.

Degree of Immunity: Full immunity.

Language: "Members of the board, commission, hearing committees or hearing officers, mediators, the peer review committee, the ethics committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause panelists, bar counsel and staff shall be immune from suit for any conduct in the course of their official duties."

Comment: Immunity provisions in Arizona are inconsistent. See note above under ARIZ. REV. STAT. ANN. § 12-2238(E).

ARKANSAS

STATUTE: ARK. CODE ANN. § 16-7-207 (Michie 2003).
Category: General.
Degree of Immunity: Limited. Immunity does not extend to willful or wanton misconduct.
Language: "No impartial third party administering or participating in a dispute resolution process shall be held liable for civil damages for any statement or decision made in connection with or arising out of the conduct of a dispute resolution process unless such person acted in a manner exhibiting willful or wanton misconduct."
Comment: Immunity is extended to impartial third parties, not just mediators.

CALIFORNIA

CASE LAW: Howard v. Drapkin, 271 Cal. Rptr. 893 (Ct. App. 1990); Goad v. Erwin, 2003 WL 22753608 (Ct. App. 2003).
Comment: *See supra* part II.A.

STATUTE: CAL. BUS. & PROF. CODE § 6200(f) (West 2003).
Category: Specialized program for mediation of attorney fee disputes.
Degree of Immunity: Full immunity. Immunity shall be the same as that "which attaches in judicial proceedings."
Language: "In any arbitration or mediation conducted pursuant to this article by the State Bar or by a local bar association, pursuant to rules of procedure approved by the board of governors, an arbitrator or mediator, as well as the arbitrating association and its directors, officers, and employees, shall have the same immunity which attaches in judicial proceedings."
Comment: Under this article, participation in arbitration shall be voluntary for the client but mandatory for the attorney if arbitration is commenced by the client (§ 6200(c)).
LOCAL RULE: U.S. DIST. CT. E.D. CAL. R. CIV. § 16-271(f).
Category: Specialized program for court-annexed mediation in the Eastern District of California.
Degree of Immunity: Full.
Language: "All persons serving as Neutrals under this Local Rule are deemed to be performing quasi-judicial functions and shall be immune to the extent provided by 28 U.S.C. § 655(c) and applicable authorities."

Comments: 28 U.S.C. § 655(c) provides for quasi-judicial immunity for arbitrators.

COLORADO

STATUTE: COLO. REV. STAT. ANN. § 13-22-305(6) (West 2003).
Category: General program, under the state Dispute Resolution Act, whether or not an action has been filed.
Degree of Immunity: Limited. Immunity does not extend to willful or wanton misconduct.
Language: "The liability of mediators shall be limited to willful or wanton misconduct."

STATUTE: COLO. REV. STAT. ANN. § 13-22-507 (West 2003).
Category: Specialized program for resolution of disputes under the Colorado International Dispute Resolution Act.
Degree of Immunity: Uncertain. Does not immunize mediators from civil liability, but exempts mediators from service of process while participating in international dispute resolutions in Colorado.
Language: "None of the arbitrators, mediators, conciliators, witnesses, parties, or representatives of the parties involved in the arbitration, mediation, or conciliation of an international dispute pursuant to this part 5 shall be subject to service of process on any civil matter while such persons are present in this state for the purpose of participating in the arbitration, mediation, or conciliation of that international dispute."
Comment: This statute does not appear to limit liability of mediators for negligence or misconduct, but to facilitate individuals coming to Colorado for purposes of resolving international disputes. However, industrious defense counsel should consider pleading it in the face of a later claim of misconduct. Because this statute does not directly create mediator immunity, it has not been counted in the totals stated in the main text.

COURT RULE: COLO. R. CIV. P. 251.32(e).
Category: Specialized program for mediation of attorney discipline matters.
Degree of Immunity: Full for conduct in the course of official duties.
Language: "Persons performing official duties under the provisions of this Chapter, including but not limited to . . . mediators appointed by the Supreme Court pursuant to

C.R.C.P. 251.3(c)(11) . . . shall be immune from suit for all conduct in the course of their official duties."

CONNECTICUT

None

DELAWARE

STATUTE: DEL. CODE ANN. tit. 11, § 9505(b) (2001).

Category: Specialized program for victim-offender mediation.

Degree of Immunity: Limited. Immunity does not extend to willful or wanton misconduct.

Language: "State employees and employees and volunteers of a victim-offender mediation program are immune from suit in any civil action based on any proceedings or other official act performed in their capacity as employees or volunteers, except in cases of willful or wanton misconduct."

Comment: The victim-offender mediation program, as an entity, is also immune from civil liability, except in cases of willful or wanton misconduct by employees or volunteers or in cases where board members act in bad faith (§9505(c)).

COURT RULE: DEL. SUP. CT. R. CIV. P. 16.1(n).

Category: General superior court rules (with minor, detailed exceptions) for civil actions subject to Alternative Dispute Resolution.

Degree of Immunity: Limited. Immunity does not extend to acts that are in bad faith, with malicious intent, or that exhibit a willful or wanton disregard of parties' rights, safety, or property.

Language: "All ADR Practitioners, when serving as an arbitrator, mediator or neutral assessor, shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in ADR, unless an act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another."

COURT RULE: DEL. CH. CT. R. 95(c).

Category: Specialized program for private mediation of business and technology disputes.

Degree of Immunity: Limited. Immunity does not extend to those acts done in bad faith, with malicious intent, or that

exhibit a willful or wanton disregard of parties' rights, safety, or property.

Language: "Mediators shall be immune from civil liability for or resulting from any act or omission done or made in connection with efforts to assist or facilitate a mediation, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another."

COURT RULE: DEL. CH. CT. R. 174.

Category: Specialized program for mediation of disputes involving judicial and attorney ethics.

Degree of Immunity: Limited. Immunity does not extend to those acts done in bad faith, with malicious intent, or that exhibit a willful, wanton disregard of parties' rights, safety, or property.

Language: "Designated mediators shall be immune from civil liability for or resulting from any act or omission done or made while engaged in efforts to assist or facilitate a mediation, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another."

COURT RULE: DEL. CT. COM. PL. CIV. R. 16.1(n).

Category: Specialized program for mandatory court-annexed ADR of disputes in Superior Court for actions of less than $15,000.

Degree of Immunity: Limited. Immunity does not extend to those acts done in bad faith, with malicious intent, or that exhibit a willful or wanton disregard of parties' rights, safety, or property.

Language: "All ADR Practitioners, when serving as an arbitrator, mediator or neutral assessor, shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in ADR, unless an act or omission was made or done in bad faith with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another."

DISTRICT OF COLUMBIA

CASE LAW: Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994).

Comment: For a full discussion of this case, *see supra* Part II.B.

LOCAL RULE: U.S. DIST. CT. D.D.C. CIV. R. § 84.3(c).
Category: Specialized program for court-annexed mediation in the District of Columbia.
Degree of Immunity: Full for lawyers serving as mediators.
Language: "All lawyers serving as mediators in the Court's Mediation Program are performing quasi-judicial functions and shall be entitled to absolute quasi-judicial immunity for acts performed within the scope of their official duties."

FLORIDA

STATUTE: FLA. STAT. ANN. § 44.107(1) (West 2004).
Category: General program for court-ordered mediation (with limited exceptions) (*see* § 44.102(2)(a) for listing of exceptions).
Degree of Immunity: Full immunity "to the same extent as a judge."
Language: "Arbitrators serving under § 44.103 or § 44.104, mediators serving under § 44.102, and trainees . . . shall have judicial immunity in the same manner and to the same extent as a judge."

STATUTE: FLA. STAT. ANN. § 44.201(6) (West 2003).
Category: Specialized program authorizing the establishment of Citizen Dispute Settlement Centers within the state's judicial districts.
Degree of Immunity: Limited. Immunity of participants of a Citizen Dispute Settlement Center is not extended to acts that are in bad faith, have a malicious purpose, or exhibit a willful or wanton disregard of parties, even though the act or omission occurs in the scope of employment.
Language: "No officer, council member, employee, volunteer, or agent of a Citizen Dispute Settlement Center shall be held liable for civil damages for any act or omission in the scope of employment or function, unless such person acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of the rights, safety, or property of another."
Comment: This section governs the operation of Citizen Dispute Settlement Centers and is not necessarily a mediation statute. The degree of protection for employees and volunteers is limited and does not match the absolute immunity granted mediators in § 44.107(1).

STATUTE: FLA. STAT. ANN. § 627.7015 (5) (West 2004).

Category: Specialized program for mediation of disputed property insurance claims.

Degree of Immunity: Full immunity as referenced in § 44.107, above.

Language: "Mediators are deemed to be agents of the department and shall have the immunity from suit provided in § 44.107."

*Comment*s: Florida has several specialized mediation programs, some of which provide for full immunity and others that limit immunity.

STATUTE: FLA. STAT. ANN. § 723.038 (9) (West 2004).

Category: Specialized program for mediation of mobile home park lot tenancies.

Degree of Immunity: Full, to the same extent as a judge.

Language: "A mediator appointed pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge."

*Comment*s: Florida has several specialized mediation programs, some of which provide for full immunity and others that limit immunity.

COURT RULE: FLA. BAR R. 14-7.1

Category: Specialized program for mediation for disputes involving attorney grievances.

Degree of Immunity: Full, "for all acts in the course of their official duties."

Language: "The members of the standing committee, mediators, arbitrators, staff of the Florida Bar, and appointed voluntary counsel assisting the committee, mediators, and arbitrators, shall have absolute immunity from civil liability for all acts in the course of their official duties."

*Comment*s: Florida has several specialized mediation programs, some of which provide for full immunity and others that limit immunity.

LOCAL RULE: Fla. 9th J. Cir. Admin. Order 2001-34.

Category: Specialized program for mediation of all small claims cases in Orange County.

Degree of Immunity: Full immunity as referenced in § 44.107, above.

Language: "Dispute Resolution Services shall appoint any

mediators certified in the area of County Civil Mediation by the Florida Supreme Court. Pursuant to section 44.102(5)(a), Florida Statutes, mediators serve as volunteers in Orange County for all County Civil Cases. These mediators shall have judicial immunity in the same manner and to the same extent as a judge as provided in section 44.107, Florida Statutes."

GEORGIA

COURT RULE: GA. ADR R. VII(C).

Category: General program for court-annexed or court-referred mediation.

Degree of Immunity: Limited. Immunity does not extend to acts that are grossly negligent and made with malice or in willful disregard of the safety or property of any party.

Language: "No neutral in a court-annexed or court-referred program shall be held liable for civil damages for any statement, action, omission or decision made in the course of any ADR process unless that statement, action, omission or decision is 1) grossly negligent and made with malice or 2) is in willful disregard of the safety or property of any party to the ADR process."

Comment: Mediator immunity in local courts is governed by the State Rule.

HAWAII

COURT RULE: HAW. APP. CONF. PROG. R. 9.

Category: Specialized program for meditation of civil appeals.

Degree of Immunity: Absolute immunity for conduct in the course of official duties.

Language: "Mediators selected in accordance with Rule 5 of these Appellate Conference Program Rules shall be absolutely immune from suit for all conduct in the course of their official duties."

Comment: Mediators are selected from a "rotating list" or by joint selection of the parties (HAW. APP. CONF. PROG. R. 5). The mediator's role and authority are to "(1) facilitate the voluntary resolution of cases; (2) assist the parties in simplifying, clarifying, and, when possible, reducing the issues raised on appeal; and (3) extend deadlines such as the deadline for ordering transcripts or filing of briefs and the record

on appeal, when appropriate." (HAW. APP. CONF. PROG. R. 6(a)).

COURT RULE: HAW. PROB. R. EX. A. MEDIATION R. 9.

Category: Specialized program for meditation of disputes involving probate.

Degree of Immunity: Full immunity.

Language: "Mediators selected by the parties or assigned by the court pursuant to Rule 4 of these Mediation Rules shall be absolutely immune from suit for all conduct in the course of their official duties."

LOCAL RULE: U.S. DIST. CT. D. HAW. R. 88.1 (j).

Category: Specialized program of the U.S. District Court for voluntary mediation of disputes in district court.

Degree of Immunity: Full immunity.

Language: "All persons serving as mediators under this rule shall be deemed to be performing quasi-judicial functions and shall be entitled to all of the privileges, immunities, and protections that the applicable law accords to persons serving in such capacity."

LOCAL RULE: U.S. BANKR. CT. D. HAW. R. 9019-2 (d).

Category: Specialized program of the U.S. Bankruptcy Court for voluntary mediation of adversary proceedings and contested matters in bankruptcy court.

Degree of Immunity: Full immunity.

Language: "All persons serving as mediators under this rule shall be deemed to be performing quasi-judicial functions and shall be entitled to all of the privileges, immunities, and protections that the applicable law accords to persons serving in such capacity."

IDAHO

LOCAL RULE: U.S. DIST. CT. D. IDAHO CIV. R. 16.5 (g).

Category: Specialized program for mediation of disputes in Bankruptcy Court.

Degree of Immunity: None. A provision granting immunity for arbitrators specifically rejects immunity for mediators.

Language: "All persons serving as arbitrators under this local rule are deemed to be performing quasi-judicial functions and are entitled to the immunities and protections that the

law accords to persons serving in such capacity. Mediators are not afforded this same protection."

*Comment*s: This is the only provision of its kind that I could locate that specifically rejects immunity.

ILLINOIS

STATUTE: 225 ILL. COMP. STAT. ANN. 100/4(B) (West 2003).

Category: Specialized program for mediating disputes involving licensing of podiatrists.

Degree of Immunity: Limited to conduct not involving "willful or wanton misconduct."

Language: "While serving upon any . . . mediation committee . . . considering such matters of peer review or any review committee sanctioned by the profession or sponsored by its association, a podiatric physician shall not be liable for civil damages as a result of his or her acts, omissions or decisions in connection with his or her duties on such committees or boards, except in cases involving willful or wanton misconduct."

Comment: This specialized program provides limited protection, while the court-annexed programs from the state's supreme court rule provide immunity "to the same extent as a judge."

COURT RULE: ILL. SUP. CT. R. 99(b)(1).

Category: Specialized supreme court rule for the establishment of mediation programs by the judicial circuits.

Degree of Immunity: Full immunity "to the same extent as a judge."

Language: "(1) Each judicial circuit electing to establish a mediation program shall adopt rules for the conduct of the mediation proceedings. A person approved by the circuit to act as a mediator under these rules shall have judicial immunity in the same manner and to the same extent as a judge."

Comment: Outlines rules to be followed by local Illinois court circuits which have established a mediation program, and mandates that court-approved mediators have judicial immunity in the same manner and to the same extent as a judge.

LOCAL RULE: ILL. 17TH J. CIR. CT. ARBIT. R. 2.08 (III)(P).

Category: Specialized program for court-ordered mediation for civil cases in Boone and Winnebago Counties.

Degree of Immunity: Full. The rule invokes Supreme Court Rule 99(b)(1) that creates immunity to the same extent as a judge.
Language: "Mediators conducting mediation pursuant to these rules shall have such immunity as may from time to time be provided by law."

LOCAL RULE: ILL. 18TH J. CIR. CT. R. 15.18(I)(K).
Category: Specialized rule for court-ordered mediation for civil cases in DuPage County.
Degree of Immunity: Full immunity "to the same extent as a judge."
Language: "A mediator, approved and certified by this Circuit and acting pursuant to these rules, shall have judicial immunity in the same manner and to the same extent as a judge, under the authority conferred by Supreme Court Rule 99(b)(1) as amended, October 10, 2001."
Comment: The only mediators entitled to immunity under this provision are those presiding over court-ordered mediation.

LOCAL RULE: ILL. 19TH J. CIR. R. 11.13(n).
Category: Specialized program for court-ordered mediation for civil cases in Lake and McHenry Counties.
Degree of Immunity: Full, "to the same extent as a judge."
Language: "An approved mediator shall have judicial immunity in the same manner and to the same extent as a judge."

INDIANA

STATUTE: IND. CODE ANN. § 4-21.5-3.5-4 (West 2003).
Category: Specialized program for mediation of conflicts in administrative proceedings.
Degree of Immunity: Full immunity "to the same extent as a judge."
Language: "A mediator, co-mediator, or team mediator appointed and acting under this chapter [Chapter 3.5] has immunity in the same manner and to the same extent as a judge having jurisdiction in Indiana."

COURT RULE: IND. ADR R. 1.5.
Category: General coverage for all civil and domestic litigation.
Degree of Immunity: Full immunity "to the same extent as a judge."
Language: "A registered or court approved mediator; arbitrator; person acting as an advisor or conducting, directing, or as-

sisting in a mini-trial; a presiding person conducting a summary jury trial and the members of its advisory jury; and a private judge; shall each have immunity in the same manner and to the same extent as a judge in the State of Indiana."

Comment: Rule 8.3 of the ADR Rules requires a written agreement to mediate that acknowledges immunity.

LOCAL RULE: U.S. DIST. CT. S.D. IND. R. ADR § 1.3.

Category: Specialized program for court-annexed mediation in the U.S. District Court for the Southern District of Indiana.

Degree of Immunity: Full.

Language: "To the extent permitted under applicable law, each Mediator shall have immunity in the performance of his or her duties under these Rules, in the same manner, and to the same extent, as would a duly appointed Judge."

LOCAL RULE: U.S. BANKR. CT. N.D. IND. R., Order 2001-02 (1.2).

Category: Specialized program for court-annexed mediation in the U.S. Bankruptcy Court for the Northern District of Indiana.

Degree of Immunity: Full.

Language: "All persons servings as neutrals in any of the Court's ADR Programs are entitled to immunities and protections that the law accords to said persons, to the greatest extent possible while serving in such capacity."

IOWA

STATUTE: IOWA CODE ANN. § 13.16(1) (West 2003).

Category: Specialized program for farmer-lender mediation.

Degree of Immunity: Limited. Immunity does not extend to acts done in bad faith, with malicious purpose, or exhibiting willful and wanton disregard of others.

Language: "A member of the farm mediation staff, including a mediator, employee, or agent of the service, or member of a board for the service, is not liable for civil damages for a statement or decision made in the process of mediation, unless the member acts in bad faith, with malicious purpose, or in a manner exhibiting willful and wanton disregard of human rights, safety, or property."

STATUTE: IOWA CODE ANN. § 679.13 (West 2003).

Category: Mediation of various minor disputes listed in § 679.5(1) and mediated by dispute resolution centers.

Degree of Immunity: Limited. Immunity does not extend to acts done in bad faith, with malicious purpose, or exhibiting willful and wanton disregard of others.

Language: "No mediator, employee or agent of a center, or member of a center's board may be held liable for civil damages for any statement or decision made in the process of dispute resolution unless the mediator, employee, agent or member acted in bad faith, with malicious purpose or in a manner exhibiting willful and wanton disregard of human rights, safety or property."

STATUTE: IOWA CODE ANN. § 679C.4 (West 2003).

Category: General mediation statute, but the immunity provision does not cover mediations involving collective bargaining agreements. *See* § 20.21.

Degree of Immunity: Limited. Immunity does not extend to acts done in bad faith, with malicious purpose, or exhibiting willful or wanton disregard of others.

Language: "A mediator or a mediation program shall not be liable for civil damages for a statement, decision, or omission made in the process of mediation unless the act or omission by the mediator or mediation program is made in bad faith, with malicious purpose, or in a manner exhibiting willful or wanton disregard of human rights, safety, or property. This section shall apply to mediation conducted before the worker's compensation commissioner and mediation conducted pursuant to chapter 216."

Comment: Grants qualified immunity identical to that of § 679.13 to mediators or mediation programs involved in mediation, including mediation conducted before the workers' compensation commissioner and mediations before the Civil Rights Commission (*see* § 216).

KANSAS

STATUTE: KAN. STAT. ANN. § 5-513 (West 2003).

Category: General statute for mediation of a broad array of conflicts. *See* § 5-501(b).

Degree of Immunity: Limited. Immunity does not extend to cases where mediator acts with gross negligence, maliciousness, or in willful disregard of the rights of a party.

Language: "No neutral person, staff member, or member of a governing board of an approved program may be held liable for civil damages for any statement or decision made in the process of dispute resolution unless such person acts, or fails to act, in a manner constituting gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety or property of any party to the process of dispute resolution."

Comment: This provision applies to "registered and approved" dispute resolution programs, individuals, and personnel. § 5-501(b). Application requirements for programs and individuals are provided in § 5-507.

KENTUCKY

COURT RULE: KY. SUP. CT. R. 3.815(10).

Category: Specialized program for mediation of disputes involving attorneys. *See* 3.815 (1) & (2)(E).

Degree of Immunity: Full, based upon duty to hold mediator harmless.

Language: "By agreeing to the procedures authorized herein, the parties further agree to indemnify and hold harmless the hearing officer, arbitrator, mediator, or presiding officer or panel concerning any action arising out of the procedures set forth by this rule and for any and all conduct of the hearing officer, arbitrator, mediator or presiding officer or panel presiding over the procedures herein."

Comment: Unique provision that requires parties to hold the mediator harmless, instead of just establishing immunity. May not prevent suit, as immunity does, but ultimately should have the same affect.

LOUISIANA

None

MAINE

STATUTE: ME. REV. STAT. ANN. tit. 4, § 18-B (3) (West 2004).

Category: General statewide court-annexed program.

Degree of Immunity: Full within scope of duties.

Language: "A person serving as an ADR provider under contract with the Judicial Department or as the Director of the Court Alternative Dispute Resolution Service is immune

from any civil liability, as are employees of governmental entities, under the Maine Tort Claims Act, for acts performed within the scope of the provider's or the director's duties."

Comment: The immunity provided by this section is different than that found in tit. 20-A § 7207-C (below), where the immunity for mediators of special education disputes matches that provided to state employees under the State Tort Claims Act. *See* tit. 14 § 8104–B (4). However, it is the same as the provision for mediation of disputes involving recreational vehicle manufacturers and dealers, below.

STATUTE: ME. REV. STAT. ANN. tit. 10, § 1440(5) (West 2003).

Category: Specialized program for mediation of disputes involving recreational vehicle manufacturers and dealers.

Degree of Immunity: Limited. Immunity extends to acts or omissions that are done in good faith, with a "clear and convincing" standard of proof necessary to overcome the presumption of good faith.

Language: "A mediator or arbitrator is immune from civil liability for any good faith act or omission within the scope of the mediator's or arbitrator's performance of powers and duties under this section. Every act or omission is presumed to be a good faith act or omission. This presumption may be overcome only by clear and convincing evidence."

Comment: The immunity provided by this section is different than that found in tit. 20-A § 7207-C (below), where the immunity for mediators of special education disputes matches that provided to state employees under the State Tort Claims Act in tit. 14 § 8104–B (4). However, it is the same as the general court-annexed program of tit. 4 § 18-B(3).

STATUTE: ME. REV. STAT. ANN. tit. 20-A, § 7207-C(3) (West 2003).

Category: Specialized program for mediation of disputes involving special education.

Degree of Immunity: Full. Although the immunity matches that extended to state employees under the Maine Tort Claims Act (tit. 14 § 8104-B(4)), there is immunity for all discretionary functions.

Language: "The State shall train impartial mediators. For the purposes of this section, while carrying out their official duties, mediators are considered state employees and are enti-

tled to the immunity provided state employees under the Maine Tort Claims Act."

Comment: The immunity granted in this provision differs from tit. 10 § 1440(5), above.

MARYLAND

None

MASSACHUSETTS

None

MICHIGAN

STATUTE: MICH. COMP. LAWS § 691.1557a (2000).

Category: Specialized program for the creation of Community Dispute Resolution Centers to provide mediation services as an alternative to the judicial processes. *See* § 691.1553.

Degree of Immunity: Limited. Immunity does not extend to mediator acts that are in bad faith, malicious, or that exhibit wanton and willful disregard for the rights of the parties.

Language: "A mediator of a community dispute resolution center shall not be held liable for civil damages for any act or omission in the scope of his or her employment or function as a mediator, unless he or she acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of the rights, safety, or property of another."

Comment: "Community dispute resolution center" is not otherwise defined in the Act, but § 691.1553 states that the purpose of such program centers is "to provide conciliation, mediation, or other forms and techniques of voluntary dispute resolution to persons as an alternative to the judicial process."

MINNESOTA

STATUTE: MINN. STAT. ANN. § 518.1751(5) (West 2003).

Category: Specialized program for resolution of parenting time disputes. *See* § 518.1751(1).

Degree of Immunity: Full immunity if "acting under this section."

Language: "A parenting time expeditor is immune from civil liability for actions taken or not taken when acting under this section."

Comment: A parenting time expeditor is a neutral person authorized, under § 518.1751(1b)(c), to use mediation to resolve disputes involving parenting time.

STATUTE: MINN. STAT. ANN. § 583.26(7)(a) (West 2003).

Category: Specialized program for the mandatory mediation of farmer-lender disputes.

Degree of Immunity: Full immunity "within the scope of the position as mediator."

Language: "A mediator is immune from civil liability for actions within the scope of the position as mediator. A mediator does not have a duty to advise a creditor or debtor about the law or to encourage or assist a debtor or creditor in reserving or establishing legal rights. This subdivision is an addition to and not a limitation of immunity otherwise accorded to a mediator under law."

Comment: Although the statute refers to other immunity provisions, Minnesota does not appear to grant mediators immunity in any other circumstances. *See* Schaffer v. Agribank, 1997 WL 40739 (Minn. Ct. App. 1997).

MISSISSIPPI

None

MISSOURI

None

MONTANA

COURT RULE: MONT. R. APP. PROC. 54(d).

Category: Specialized program for the mandatory mediation of selected appeals.

Degree of Immunity: Full immunity.

Language: "Mediators shall be selected or appointed as provided in this subsection and shall enjoy such judicial immunity as the Montana Supreme Court would enjoy if performing the same functions."

Comment: Application of Rule 54 is limited to appeals for workers compensation (54(a)(1)), domestic relations (54(a)(2)), and money judgments (54(a)(3)). Domestic relations excluded from this provision include "actions for termination of parental rights, paternity disputes, adoptions, and all juve-

nile and contempt proceedings when the excluded matters constitute the only issues on appeal." (54(a)(2)).

NEBRASKA

STATUTE: NEB. REV. STAT. § 25-2915 (2003).
Category: Specialized program for a broad array of civil disputes referred through dispute resolution centers.
Degree of Immunity: Limited. Immunity does not extend to acts of willful or wanton misconduct.
Language: "No mediator, staff member, or member of a governing board of an approved center may be held liable for civil damages for any statement or decision made in the process of dispute resolution unless such person acted in a manner exhibiting willful or wanton misconduct."

STATUTE: NEB. REV. STAT. § 48-168(2)(b) (2003).
Category: Specialized program for the mediation of worker's compensation disputes.
Degree of Immunity: Limited. Immunity does not extend to acts of willful or wanton misconduct.
Language: "No staff member or mediator shall be held liable for civil damages for any statement or decision made in the process of dispute resolution unless such person acted in a manner exhibiting willful or wanton misconduct."

NEVADA

None

NEW HAMPSHIRE

COURT RULE: N.H. SUPER. CT. R. 170(E).
Category: General program for the mandatory mediation of actions in the superior court.
Degree of Immunity: Full immunity, because mediators are "performing quasi-judicial functions."
Language: "The litigants and counsel must recognize that the neutrals will not be acting as legal advisors or legal representatives. They must further recognize that, because the neutrals are performing quasi-judicial functions and are performing under the auspices of the Court, each such neutral has immunity from suit . . . ."
Comment: This section notes that neutrals are performing

"quasi-judicial functions" but nevertheless grants full immunity as though the neutral acts in a full judicial capacity.

NEW JERSEY

STATUTE: N.J. STAT. ANN. § 2A:34-12.6(a) (West 2003).

Category: Specialized program for the mediation of disputes within the Parents' Education Program.

Degree of Immunity: Limited. Immunity does not extend to program representatives' actions that are fraudulent, reckless, willful, wanton, or grossly negligent.

Language: "Notwithstanding any other provision of law to the contrary, no person serving as a program representative in the "Parents' Education Program" established pursuant to section 3 of P.L. 1999, c. 111 (C.2A:34-12.3) shall be liable for damages resulting from any exercise of judgment or discretion in connection with the person's duties unless the actions are fraudulent or evidence a reckless disregard for the duties imposed by the position. Nothing in this section shall be deemed to grant immunity to any program representative causing damage by that person's willful, wanton or grossly negligent act of commission or omission."

Comment: This section does not mention mediation or dispute resolution as part of program representatives' duties. However, one of the purposes of the program is "to assist parents in resolving issues which may arise during the divorce . . . process." § 2A:34-12.3(c).

NEW MEXICO

LOCAL RULE: N.M. 2D J. DIST. R. LR2-601(E).

Category: Specialized program contained in the local rules of the Second Judicial District for court-annexed alternative dispute resolution.

Degree of Immunity: Full within the scope of the court's appointment.

Language: "Attorneys and other persons appointed by the court to serve as settlement facilitators, arbitrators, mediators or in other such roles pursuant to the rules governing this district's court-annexed alterative dispute resolution programs, are appointed to serve as arms of the court and as such are immune from liability for conduct within the scope of their appointment."

Comment: This provision grants immunity only to court-appointed mediators assigned to "court-annexed alternative dispute resolution programs."

NEW YORK

LOCAL RULE: N.Y. SUP. CT. COMM. DIV. ADR R. 6 (New York County).

Category: Specialized ADR program in the New York County Supreme Court Commercial Division.

Degree of Immunity: Full, while serving in the capacity of a Neutral.

Language: "Any person designated to serve as Neutral pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity."

Comment: *Available at* http://www.courts.state.ny.us/comdiv/ADR_Rules.htm.

LOCAL RULE: N.Y. SUP. CT. APP. DIV. CT. R., Part 1220, App. A(5)(d).

Category: Specialized program for mediation of attorney-client disputes.

Degree of Immunity: Limited. Immunity does not extend to acts or omissions that involve willful misconduct.

Language: "The mediator will not be liable for any act or omission while serving as an approved volunteer mediator except for willful misconduct. Attorneys serving as volunteer mediators in this program are entitled to the protections afforded to State-sponsored volunteers within the meaning of subdivision (1) of section 17 of the Public Officers Law."

Comment: *See generally* N.Y. PUB. OFF. Law § 17 (McKinney 2003) regarding defense and indemnification of state officers and employees. The statute provides immunity to volunteers serving in state-sponsored programs. Many of the New York court mediators serve as volunteers and are presumed to be covered by this law.

LOCAL RULE: U.S. DIST. CT. S. & E.D.N.Y. R. § 83.11(g).

Category: Specialized program for court-annexed mediation in the federal courts.

Degree of Immunity: Uncertain.

Language: "Mediators shall be immune from liability or suit with

respect to their conduct as such to the maximum extent permitted by applicable law."

Comment: This provision appears to provide full immunity, but other court rules above limit immunity of mediators. There is no indication about which law, state or federal, to apply to this question. Because the question of immunity is not clear, this provision was not included in the specialized counts that categorized provisions based upon whether they provided full or limited immunity.

See also General Order M-143 of U.S. Bankruptcy Court for the Southern District of New York Local Rules, which provides for full immunity.

NORTH CAROLINA

STATUTE: N.C. GEN. STAT. § 7A-38.1(j) (2003).

Category: General program for mandatory pretrial mediated settlement conferences in superior court civil actions. § 7A-38.1(a).

Degree of Immunity: Full immunity, but subject to administrative disciplinary actions.

Language: "Mediator [sic] and other neutrals acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2."

Comment: Mediators and other neutrals are granted civil immunity but are still subject to discipline under § 7A-38.2.

STATUTE: N.C. GEN. STAT. ANN. § 7A-38.4A(h) (West 2004).

Category: General program for court-annexed mediation of district court actions involving equitable distribution, alimony, or support.

Degree of Immunity: Full, but subject to administrative disciplinary actions.

Language: "Mediators and other neutrals acting under this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court under G.S. 7A-38.2."

STATUTE: N.C. GEN. STAT. § 20-301.1 (b)(3) (2004).

Category: Specialized program for mediation of disputes arising under the motor vehicle dealers and manufacturers law.

Degree of Immunity: Full, to the same extent as a judge.

Language: "A mediator acting pursuant to this subdivision shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice. "

STATUTE: N.C. GEN. STAT. § 150B-23.1(h) (2004).

Category: Specialized program for prehearing settlement conferences of administrative proceedings.

Degree of Immunity: Full immunity "to the same extent as a judge."

Language: "A mediator acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice."

Comment: Some inconsistency is apparent because this section neglects to subject mediators to administrative discipline as in § 7A-38.1(j).

LOCAL RULE: N.C. R. BURKE COUNTY 12.12.

Category: Specialized program for mediation of disputes in Burke County.

Degree of Immunity: Full, to the same extent as a judge.

Language: "Mediators and other neutrals acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice. . . ."

*Comment*s: Provision also refers to a discipline procedure for mediator misconduct.

LOCAL RULE: N.C. ADR R. DAVIDSON COUNTY 5(J).

Category: Specialized program for mediation of disputes in Davidson County.

Degree of Immunity: Full, "to the same extent as a judge."

Language: "A Mediator/Arbitrator acting pursuant to these Rules shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, and as provided by N.C.G.S. 57A-38.1(J)."

LOCAL RULE: N.C. ADR R. MECKLENBURG COUNTY FAM. CT. DIV. 4(B)(10).

Category: Specialized program for mediation of equitable distri-

bution and other family financial disputes in Mecklenburg County.

Degree of Immunity: Full, "to the same extent as a judge."

Language: "A neutral acting pursuant to these Rules shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice."

Comment: Rule 5 of the same rules requires the parties to enter into an agreement to mediate which provides immunity of the mediator.

LOCAL RULE: U.S. DIST. CT. E.D.N.C. ADR R. 101.3 (k).

Category: Specialized federal program for mediation of disputes in the Eastern District.

Degree of Immunity: Full, "to the same extent as a judge."

Language: "A mediator appointed by the court pursuant to these local rules shall have judicial immunity in the same manner and to the same extent as a judge."

NORTH DAKOTA

STATUTE: N.D. CENT. CODE § 6.09.10-04.1 (2003).

Category: Specialized program for mediation of farmer-lender disputes.

Degree of Immunity: Full immunity while "attempting to reach a settlement."

Language: "The board, commissioner, administrator, staff, negotiators, and mediators are not subject to any liability arising from any actions undertaken regarding a farmer, creditor, or other person in attempting to reach a settlement."

Comment: This section was amended in 1989 to extend mediator immunity to "other person[s]" in addition to farmers and creditors. Laws 1989, ch. 109, § 5 (1989).

OHIO

The following local court rules do not contain immunity provisions, but are included as a illustration of dealing with risk of mediator misconduct. Each rule requires mediators to maintain liability insurance as one of the minimum qualifications to take part in the court-annexed program.

LOCAL RULE: OHIO CUYAHOGA COUNTY C.P. DOM. REL. R. 32(E)(4).

Category: Program in Cuyahoga County for mediation of domestic relations disputes.

Degree of Immunity: None. Mediators must procure insurance to cover civil liability.

Language: "Mediators shall have the following minimum qualifications: . . . . (4) Maintenance of appropriate liability insurance specifically covering the activities of the individual as a mediator."

LOCAL RULE: OHIO FRANKLIN COUNTY C.P. DOM. REL. R. 22(5).

Category: Program in Franklin County for mediation of domestic relations disputes.

Degree of Immunity: None. Mediators must procure insurance to cover civil liability.

Language: ". . . [A] mediator should possess the following qualifications: . . . . (5) Maintenance of appropriate liability insurance specifically covering the activities of the individual as a mediator."

LOCAL RULE: Ohio Ct. Order 22, LUCAS DOM. REL. R 18.04(D).

Category: Program in Lucas County for mediation of domestic relations disputes.

Degree of Immunity: None. Mediators must procure insurance to cover civil liability.

Language: "Any mediator employed by the court, or with whom the Court makes referrals, shall have the following minimum qualifications: . . . . (D) Maintenance of appropriate liability insurance specifically covering the activities of the individual as a mediator."

OKLAHOMA

STATUTE: OKLA. STAT. ANN. tit. 12, § 1805(E) (West 2004).

Category: Specialized program for mediation of disputes of "small social or economic magnitude" (tit. 12 § 1801) within guidelines established by the Administrative Director of the Courts. *See* tit. 12 §§ 1803(A) & (D)(2).

Degree of Immunity: Limited. Immunity does not extend to actions resulting from gross negligence, malicious purpose, or willful disregard of the rights of a party.

Language: "No mediator, employee, or agent of a mediator shall be held liable for civil damages for any statement or decision made in the process of mediating or settling a dispute unless the action of such person was a result of gross negligence

with malicious purpose or in a manner exhibiting willful disregard of the rights, safety, or property of any party to the mediation."

STATUTE: OKLA. STAT. ANN. tit. 22, § 991a(A)(1)(m) (West 2003) (as amended by 2004 Okla. Sess. Law Serv. 143 (West)).

Category: Specialized program for victim/offender reconciliation.

Degree of Immunity: Full.

Language: "Volunteer mediators and employees of a victim/offender reconciliation program shall be immune from liability. . . ."

OREGON

STATUTE: OR. REV. STAT. § 36.210(1) (2003).

Category: General program. *See* § 36.100–36.238.

Degree of Immunity: Limited. Immunity does not extend to acts or omissions that are "done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard" of another.

Language: "Mediators, mediation programs and dispute resolution programs providing services under ORS 36.100 to 36.238 and mediators, mediation programs and other community programs providing dispute resolution services that comply with the standards established under ORS 36.175, 107.755 or 107.775 are not civilly liable for any act or omission done or made while engaged in efforts to assist or facilitate a mediation or in providing other dispute resolution services, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another."

Comment: Limited immunity is consistently reflected in other statutes. See below. For purposes of the tallying of statutes, § 36.210(1)-(2) were considered as one statute.

STATUTE: OR. REV. STAT. § 36.210(2) (2003).

Category: Companion statute to § 36.210(1), above. This statute covers disclosure of confidential communications.

Degree of Immunity: Limited. Immunity does not extend to acts or omissions that are done in bad faith, with malicious intent, or exhibiting a willful or wanton disregard of another.

Language: "Mediators, mediation programs and dispute resolu-

tion programs are not civilly liable for the disclosure of a confidential mediation communication unless the disclosure was made in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another."

Comment: This provision applies specifically to mediator actions involving the disclosure of confidential communications. For purposes of the tallying of statutes, § 36.210(1)-(2) were considered as one statute.

STATUTE: OR. REV. STAT. § 36.264 (2003).

Category: General program.

Degree of Immunity: Limited. Immunity does not extend to acts or omissions that are done in bad faith, with malicious intent, or exhibiting a willful or wanton disregard of another.

Language: "Mediators and mediation services shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or facilitate a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another."

LOCAL RULE: U.S. DIST. CT. D. OR. CIV. R. § 16.4(e)(2)(C).

Category: Specialized program for court-annexed mediation in the U.S. District Court for the District of Oregon.

Degree of Immunity: Full for court-referred mediation.

Language: "During the conduct of court directed mediation, mediators act as officers of the court and have judicial immunity."

PENNSYLVANIA

STATUTE: 63 PA. CONS. STAT. § 818.11(c) (2004).

Category: Specialized program for mediation of disputes involving vehicle manufacturers, distributors, and dealers.

Degree of Immunity: Limited. Immunity extends to acts or omissions that are done in in good faith, with a "clear and convincing" standard of proof necessary to overcome the presumption of good faith.

Language: "A mediator or arbitrator is immune from civil liability for any good faith act or omission within the scope of the mediator's or arbitrator's performance of his powers and duties under this section. Every act or omission of a mediator

or arbitrator is presumed to be a good faith act or omission. This presumption may be overcome only by clear and convincing evidence."

RHODE ISLAND

None

SOUTH CAROLINA

LOCAL RULE: S.C. CIR. CT. ADR R. 8(i).

Category: Specialized program for court-annexed mediation in Charleston, Florence, Horry, Lexington, and Richland Counties.

Degree of Immunity: Full, for mediations conducted under the rules.

Language: "The mediator shall not be liable to any person for any act or omission in connection with any mediation conducted under these rules."

LOCAL RULE: S.C. FAM. CT. MEDIATION R. 7(i).

Category: Specialized program for court-annexed mediation in family court in Florence and Richland Counties.

Degree of Immunity: Full, for mediations conducted under the rules.

Language: "The mediator shall not be liable to any person for any act or omission in connection with any mediation conducted under these rules."

Comment: Same immunity language as in prior local rule.

LOCAL RULE: U.S. DIST. CT. D.S.C. CIV. R. § 16.10(J).

Category: Specialized program for court-annexed mediation in the U.S. District Court for the District of South Carolina.

Degree of Immunity: Full.

Language: "The mediator shall not be liable to any person for any act or omission in connection with any mediation conducted under these Local Civil Rules."

SOUTH DAKOTA

STATUTE: S.D. CODIFIED LAWS § 54-13-20 (Michie 2003).

Category: Specialized program for mandatory mediation of farmer-lender disputes. *See* § 54-13-10.

Degree of Immunity: Limited. Immunity only covers actions

done "in good faith, in a reasonable and prudent manner," and within the scope of official functions.

Language: "Any person serving as a mediator or ag finance counselor pursuant to this chapter is immune from civil liability in any action brought in any court in this state on the basis of any act or omission resulting in damage or injury if the individual was acting in good faith, in a reasonable and prudent manner, and within the scope of such individual's official functions and duties as a mediator or ag finance counselor pursuant to this chapter."

TENNESSEE

STATUTE: TENN. CODE ANN. § 16-20-105(b) (2004).

Category: Specialized program for victim-offender mediation centers.

Degree of Immunity: Limited. Immunity does not extend to willful or wanton misconduct by employees and volunteers of the mediation centers.

Language: "Employees and volunteers of a center are immune from suit in any civil action based on any proceedings or other official acts performed in their capacity as employees or volunteers, except in cases of willful or wanton misconduct."

Comment: Members of the board of directors of a mediation center are also granted limited immunity, but only to the extent of "official acts performed in good faith as members of the board." §16-20-105(a).

STATUTE: TENN. CODE ANN. § 63-1-138(b) (2004).

Category: Specialized program for mediation of disputes involving the health-related boards in the state department of health.

Degree of Immunity: Limited. Immunity only to a "deliberative privilege and the same immunity as provided by law for the boards."

Language: "The members of the screening panels, mediators and arbitrators have a deliberative privilege and the same immunity as provided by law for the boards. . . ."

Comment: This provision applies to screening panels for the board of examiners in psychology, osteopathic examination, veterinary medical examiners, occupational and physical therapy examiners, and the Tennessee emergency medical

services board. § 63-1-138(a). Members of the screening panels are chosen from members of the relevant boards. § 63-1-138(d).

STATUTE: TENN. CODE ANN. § 63-4-115(g) (2004).

Category: Specialized program for mediation of disputes involving the licensure of chiropractors.

Degree of Immunity: Limited. Immunity only to a "deliberate privilege and the same immunity as provided by law for the board."

Language: "The members of the screening panels, mediators and arbitrators have a deliberative privilege and the same immunity as provided by law for the board. . . ."

Comment: Board members are immune from civil liability for actions that are "in good faith and without malice." § 63-4-118.

STATUTE: TENN. CODE ANN. § 63-6-214 (i)(3) (2004).

Category: Specialized program for mediation of disputes involving licensing of doctors and surgeons.

Degree of Immunity: Limited. Immunity only to a "deliberate privilege and the same immunity as provided by law for the board."

Language: "The members of the screening panels, mediators and arbitrators have a deliberative privilege and the same immunity as provided by law for the board. . . ."

STATUTE: TENN. CODE ANN. § 63-7-115 (c)(3) (2004).

Category: Specialized program for mediation of disputes involving the licensing of nurses.

Degree of Immunity: Limited. Immunity only to a "deliberative privilege and the same immunity as provided by law for the board."

Language: "The members of the screening panels, mediators and arbitrators have a deliberative privilege and the same immunity as provided by law for the board. . . ."

COURT RULE: TENN. SUP. CT. R. 31 § 12.

Category: General program for court-annexed mediation, with limited exceptions. *See* § 2(d).

Degree of Immunity: Full judicial immunity.

Language: "Activity of Rule 31 Neutrals in the course of Rule 31 ADR proceedings shall be deemed the performance of a ju-

dicial function and for such acts Rule 31 Neutrals shall be entitled to judicial immunity."

Comment: A "Neutral" is any person who acts as a neutral in a mediation. *See* § 2(l). A conflict exists among the immunity standards in Tenn. Code Ann. §§ 16-20-105(b), 63-4-115(g), and this supreme court rule. One statute protects all activities that are in good faith and without malice, the other extends to all conduct that is not willful or wanton, while the Supreme Court Rule provides mediators with judicial immunity.

TEXAS

STATUTE: TEX. CIV. PRAC. & REM. CODE ANN. § 154.055(a) (Vernon 2004).

Category: General program for court-annexed mediation and other forms of voluntary processes.

Degree of Immunity: Limited. Provision only protects volunteers who do "not act with wanton or wilful disregard of the rights, safety, or property of another."

Language: "A person appointed to facilitate an alternative dispute resolution procedure under this subchapter or under Chapter 152 relating to an alternative dispute resolution system established by counties, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and wilful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party. For purposes of this section, a volunteer impartial third party is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred."

UTAH

STATUTE: UTAH CODE ANN. § 78-2a-6(4) (2004).

Category: Specialized program for appellate mediation.

Degree of Immunity: Full.

Language: "When acting as mediators, the Chief Appellate Mediator and other professional staff of the Appellate Media-

tion Office shall be immune from liability pursuant to Title 63, Chapter 30, Utah Governmental Immunity Act."

COURT RULE: UTAH R. J. ADMIN. 4-510(13).

Category: General program for court-annexed mediation in the District Courts.

Degree of Immunity: Full, but the trial judge can sanction the mediator for conduct which raises "a substantial question as to the impartiality of the ADR provider."

Language: "An ADR provider acting as a mediator or arbitrator in cases under the ADR program shall be immune from liability to the same extent as judges of this state, except for such sanctions the judge having jurisdiction of the case may impose for a violation of URCADR Rule 104 which raises a substantial question as to the impartiality of the ADR provider and the conduct of the ADR proceeding involved."

VERMONT

None

VIRGINIA

STATUTE: VA. CODE ANN. § 8.01-576.9 (Michie 2004).

Category: General program for court-annexed mediation for mediators certified by the Judicial Council.

Degree of Immunity: Limited. Immunity does not extend to acts or omissions done in bad faith, with malicious intent, or exhibiting willful, wanton disregard of others.

Language: "With respect to liability, when mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, then the mediator, mediation program for which the certified mediator is providing services, and a mediator co-mediating with a certified mediator shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator."

Comment: Like § 8.01-581.23 (below), this provision notes that it is "not intended to abrogate any other immunity that may be

applicable to a mediator," but no other provisions or common law exist on this issue.

STATUTE: VA. CODE ANN. § 8.01-581.23 (Michie 2003).

Category: General program for mediation for mediators certified by the Judicial Council or who serve through the statewide mediation program established under § 2.2-1001(2).

Degree of Immunity: Limited. Immunity does not extend to acts or omissions done in bad faith, with malicious intent, or exhibiting willful, wanton disregard of others.

Language: "When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, or who is trained and serves as a mediator through the statewide mediation program established pursuant to § 2.2-1001(2), then that mediator, mediation programs for which that mediator is providing services, and a mediator co-mediating with that mediator shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator."

Comment: Like § 8.01-576.9, above, this provision notes that it is "not intended to abrogate any other immunity that may be applicable to a mediator," but no other provisions or common law exist on this issue.

WASHINGTON

STATUTE: WASH. REV. CODE § 7.75.100(2) (2004).

Category: Specialized program for mediation of disputes by authorized dispute resolution centers.

Degree of Immunity: Limited. Immunity applies to employees and volunteers of dispute resolution centers and does not extend to acts of willful or wanton misconduct.

Language: "Employees and volunteers of a dispute resolution center are immune from suit in any civil action based on any proceedings or other official acts performed in their capacity as employees or volunteers, except in cases of wilful or wanton misconduct."

Comment: Statute also grants qualified immunity to members of

the board of directors of a dispute resolution center (§ 7.75.100(1)). Statute also grants immunity to the dispute resolution center, as an entity, except in cases of willful or wanton misconduct by its employees or volunteers or in cases of official acts performed in bad faith by members of its board. (§ 7.75.100(3)). A conflict exists between the immunity standards established by this statute and the admission to practice rule below. The statute provides immunity for all acts except those of a willful or wanton nature, while the rule only provides protection for acts in good faith.

COURT RULE: WASH. ADMISSION TO PRACTICE R. 16(e)(1).

Category: Specialized program for mediation of disputes involving attorneys and their clients, other attorneys, and other professionals.

Degree of Immunity: Limited. Immunity does not extend to actions done in bad faith.

Language: "No cause of action shall accrue in favor of any person, arising from any action or proceeding pursuant to these rules, against the Bar Association, or its officers or agents (including but not limited to its staff, members of the Board of Governors, mediators, or any other individual acting under authority of these rules) provided only that the Bar Association, officer or agent shall have acted in good faith."

Comment: The mediation program is maintained and administered by the Washington State Bar Association. R. 16(b). A conflict exists between the immunity standards established by this admission to practice rule and the statute (above). The statute provides immunity for all acts except those of a willful or wanton nature, while the rule only protection for good-faith acts.

WEST VIRGINIA

COURT RULE: W. VA. R. PRAC. & PROC. FAM. CT. MED. 45.

Category: Specialized program for court-annexed mediation of family court matters.

Degree of Immunity: Full immunity "to the same extent as a family court judge."

Language: "Mediators and premediation screeners shall have immunity in the same manner and to the same extent as a family court judge."

COURT RULE: U.S. DIST. CT. N.D. W. VA. R. CIV. PROC. 16.06(f).

Category: General federal program for mediation of civil cases in the Northern District of West Virginia.

Degree of Immunity: Full immunity "to the same extent as a judicial officer."

Language: "A person acting as a mediator under these rules shall have immunity in the same manner and to the same extent as a judicial officer."

COURT RULE: W. VA. TR. CT. R. 25.13.

Category: General program for mediation of civil cases in the circuit courts.

Degree of Immunity: Full immunity "to the same extent as a circuit judge."

Language: "A person acting as a mediator under these rules shall have immunity in the same manner and to the same extent as a circuit judge."

Comment: This rule covers mediation of civil cases in "circuit courts, including appeals and administrative appeals, but excluding "domestic relation matters." *See* R. 25.01.

WISCONSIN

STATUTE: WIS. STAT. ANN. § 93.50(2)(c) (West 2003).

Category: Specialized program for mediation of farmer-lender disputes.

Degree of Immunity: Full within the scope of mediators' powers and duties.

Language: "Mediators and arbitrators are immune from civil liability for any act or omission within the scope of their performance of their powers and duties under this section."

Comment: A conflict exists in the immunity provisions of the state statutes. This farmer-lender statute provides for full immunity, but the motor vehicle statute (below) only provides a presumption of good faith.

STATUTE: WIS. STAT. ANN. § 218.0138 (West 2003).

Category: Specialized program for mediation of disputes between motor vehicle dealers, salespersons, and sales finance companies.

Degree of Immunity: Limited. Immunity extends to acts or omissions that are done in good faith, with a "clear and convinc-

ing" standard of proof necessary to overcome the presumption of good faith.

Language: "A mediator or arbitrator is immune from civil liability for any good faith act or omission within the scope of the mediator's or arbitrator's performance of his or her powers and duties under s. 218.0136. . . . Every act or omission of a mediator or arbitrator is presumed to be a good faith act or omission. This presumption may be overcome only by clear and convincing evidence."

Comment: A conflict exists in the immunity provisions of the state statutes. This motor vehicle statute only provides a presumption of good faith, while the farmer-lender statute (above) provides for full immunity.

STATUTE: WIS. STAT. ANN. § 655.465(6) (West 2003).

Category: Specialized program for mediation of disputes involving health care issues.

Degree of Immunity: Limited. Immunity extends to acts or omissions that are done in good faith, with a "clear and convincing" standard of proof necessary to overcome the presumption of good faith.

Language: "(a) A mediator is immune from civil liability for any good faith act or omission within the scope of the mediator's performance of his or her powers and duties under this subchapter. (b) It is presumed that every act or omission under par. (a) is a good faith act or omission. This presumption may be overcome only by clear and convincing evidence."

WYOMING

STATUTE: WYO. STAT. ANN. § 1-43-104 (Michie 2003).

Category: General civil procedure rule for mediation.

Degree of Immunity: Limited. Immunity only for acts done in good faith.

Language: "Mediators are immune from civil liability for any good faith act or omission within the scope of the performance of their power and duties."

STATUTE: WYO. STAT. ANN. § 11-41-105(d) (Michie 2003).

Category: Specialized program for mediation of farmer-lender disputes.

Degree of Immunity: Limited. Immunity only for acts done in good faith.

Language: "Mediators, and University of Wyoming financial

analysts and extension personnel to the extent they participate in mediations under this chapter, are immune from civil liability for any good faith act or omission within the scope of the performance of their powers and duties under this chapter."