PREFACE

In the Fall of 1998, the Department of Dispute Resolution Services of the Supreme Court of Virginia received a grant from the State Justice Institute to develop a set of guidelines to assist Virginia mediators in avoiding the unauthorized practice of law (UPL) when providing mediation services. The effort to secure this grant was in part a response to a 1996 Henrico County, Virginia Circuit Court case which found that a non-attorney mediator had engaged in the unauthorized practice of law by drafting legal documents and by giving legal advice to his mediation clients. This case engendered a great deal of concern within Virginia's non-attorney mediator community and led to a training conference sponsored by the Department of Dispute Resolution Services in March of 1997. This conference was designed to provide mediators with information on the UPL rules in Virginia, attorney ethics, and mediator ethics and to help them avoid illegally practicing law or violating ethical standards when conducting mediations.

It became apparent at the conclusion of the conference that a comprehensive set of guidelines that more clearly defined when mediation activities crossed the line and constituted the practice of law was needed. Thus, the purpose of the State Justice Institute project was to conduct a national research study on UPL as it relates to mediation and to develop instructive guidelines that would help mediators in Virginia understand the contours of legal practice and thus avoid practicing law when mediating disputes.

The Guidelines on Mediation and UPL project officially got underway in August of 1998. Shortly thereafter a survey (Appendix A) was sent to approximately 180 bar associations and alternative dispute resolution offices in all 50 states. The purposes in conducting this survey were to explore how the various states have addressed the potential problems of UPL and mediation and to use the information generated by the survey in the creation of UPL Guidelines for Virginia mediators. The results of this survey are reported in Appendix B to this report.

While the UPL/mediation survey was being formulated and mailed, an advisory committee was formed to provide direction to the Department of Dispute Resolution Services in the creation of the Guidelines. The committee was comprised of members of the Virginia State Bar, judges, lawyers, and mediators from throughout the Commonwealth of Virginia. This committee met monthly throughout the Fall of 1998 and Spring of 1999. The members of the committee are listed below.

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The Report that follows is organized into three chapters. Chapter 1 is an introduction that traces the historical development of UPL rules and helps define the specific UPL issues that are relevant to mediation. Chapters 2 and 3 comprise the Guidelines themselves. Chapter 2 discusses the difference between legal information and legal advice and gives specific examples of which mediator activities are permissible and which may constitute the practice of law. Chapter 3 discusses the issue of mediators drafting agreements for disputants without contravening the various statutes, UPL rules, and ethical standards that govern mediators in Virginia. The *Standards of Ethics for Court-Certified Mediators*, the Dispute Resolution Proceedings statute in the Code of Virginia and the Virginia Rules of Professional Conduct for attorneys (See Chapter I) prohibit **mediators** from giving legal advice or otherwise practicing law during mediation. As a result, the Guidelines make no distinction between the activities of attorney and non-attorney mediators. Conduct by non-attorney mediators that would constitute the unauthorized practice of law would constitute unethical mediation practice or professional misconduct if engaged in by attorney-mediators. Thus, the Guidelines set forth a single standard applicable to both attorney and non-attorney mediators.

Hopefully, this Report and the accompanying Guidelines will provide some insight with respect to the ongoing debate over what activities constitute the practice of law in the mediation context. Where applicable, specific examples are given and suggestions are offered to assist mediators in avoiding UPL or unethical practice. The Guidelines were prepared according to the UPL and ethical rules currently existing in Virginia and should not be read to apply outside of this context.

Chapter 1: Overview Of UPL And Mediation

SECTION 1. INTRODUCTION

The American Bar Association,[1] as well as some state bar associations throughout the country,[2] have recognized that mediation is a law-related activity. Lawyers who practice mediation may be subject to the rules of professional responsibility that govern attorney conduct in their respective states. Because disputing parties typically bring legal disputes into mediation, mediators may be called upon to provide law-related information to the parties or to provide legal evaluations of the parties' positions. When these law-related activities occur during mediation, they may raise for all mediators issues of unethical mediation practice, conflicts of interest for attorney-mediators, and issues of the unauthorized practice of law (UPL) for non-attorney mediators. This chapter discusses the historical development of UPL enforcement, the approaches used by the various states in defining the practice of law, and how UPL and mediation are regulated in Virginia.

SECTION 2. THE LEGAL AND HISTORICAL CONTEXT OF UPL ENFORCEMENT

During the United States' first 100 years of existence as an independent nation, the legal profession was largely unregulated. Colonial era restrictions on admissions to the bar and on those who could appear before tribunals were lifted by most of the newly formed states. Coinciding with the organization of professional bar associations at the state and local levels following the Civil War, states began to pass UPL legislation restricting the law-related activities of non-lawyers. Most of these early statutes were limited in scope and merely prohibited court appearances by persons who had not been admitted to the bar.[3]

The Depression era of the 1930s saw a significant increase in the enforcement of UPL statutes and in the passage of new, more expansive prohibitions against UPL. The new laws in many jurisdictions were, by today's standards, broadly worded and prohibited the unauthorized practice of law without defining precisely what was meant by that phrase. The public policy rationale for more expansive UPL enforcement was the protection of the public and the preservation of the lawyers' professional independence, which was also thought to benefit clients.[4] More recently, the American Bar Association Commission on Nonlawyer Practice has recommended a somewhat narrower approach to protecting the public from nonlawyers engaged in law-related activities. This ABA commission recommends that states consider regulating UPL when a nonlawyer activity poses a serious risk to a consumer's life, health, safety, or economic well-being.[5]

Since the passage of more expansive and non-specific UPL statutes following the Depression, courts have struggled to define the unauthorized practice of law on a case by case basis. In attempting to reach a workable definition of UPL, courts and bar associations in the various states have usually adopted one of five different "tests."[6]

The "Commonly Understood" Test

The "commonly understood" test[7] defines the practice of law as being comprised of activities that lawyers have traditionally performed. The leading case that adopts this approach is *State Bar v. Arizona Land Title & Trust Co*.[8] In that case, the Arizona Supreme Court held that the practice of law consists of those activities, "whether performed in court or in a law office, which lawyers customarily

have carried on from day to day through the centuries."[9] Under this test, no distinction is drawn between litigation and court-related activities and activities that involve giving legal advice and drafting legal instruments.[10]

The "commonly understood" test is subject to a number of exceptions recognized by courts. For example, some courts permit non-lawyers to perform activities usually performed by lawyers if those activities are incidental to the non-lawyers' professions.[11] The justification for this exception is that too broad a definition of the practice of law would severely limit the common business practices of other professionals, including real estate agents, accountants, and investment counselors, and therefore would not serve the public interest.[12]

In *Commonwealth v. Jones & Robins, Inc*.[13], the Supreme Court of Virginia placed its imprimatur on this line of reasoning by holding that real estate agents can prepare contracts for the sale of real property. The court reasoned that to deny real estate agents this ability would severely impact their business and would run counter to the long-standing practice among real estate agents of preparing sales contracts.[14]

Another exception to the "commonly understood test" allows non-lawyers to provide services that are commonly understood as the practice of law so long as those services do not involve difficult or complex questions of law.[15] For example, in *Agran v. Shapiro*,[16] a California appellate court ruled that the preparation of simple income tax forms was not the practice of law. Similarly, the Minnesota Supreme Court has held that only the resolution of *complex* tax questions constitutes the practice of law.[17]

The "Client Reliance" Test

A second test used in defining the practice of law asks whether a client believes that he or she is receiving legal services. Under this approach, a person is practicing law if others believe that the person is engaged in the traditional role of giving legal advice.[18] The focus of this test is on whether the client relied on the services rendered and thus requires an inquiry into the client's state of mind.

In *State Bar v. Arizona Land Title & Trust Co*[19] the Supreme Court of Arizona noted that "reliance by the client on advice or services rendered . . . [is pertinent] in determining whether certain conduct is the purported or actual practice of law."[20] In that case, the court held that certain activities of real estate title companies constituted the practice of law both because they were activities that lawyers have traditionally performed and because customers of title companies rely on those activities as legal services.

In his *Williamette Law Review* article on party empowerment and mediation,[21] Donald Weckstein defines legal advice "as the application of general principles or statements of law to a particular person's transactions or activities, with the mutual expectation of influencing that person's legal behavior."[22] Thus, under this definition, both client reliance and the intent of the purported attorney are relevant in determining whether a person has engaged in the practice (or unauthorized practice) of law.

The "Application of Law to the Facts" Test

Another test used by courts to define UPL identifies the practice of law as relating the general body of legal knowledge to the facts of a particular case or to the specific legal problems of a client.[23] Some courts, for example, have approved of the sale of "divorce kits" on the ground that they merely provide legal information to purchasers.[24] Other courts have concluded that the selection of

certain forms to include in divorce kits necessarily involves the giving of legal advice because it involves the application of law to a particular problem (divorce).[25]

Presumably under this test, merely stating what the law is on a general legal topic would not constitute UPL. A person engages in the practice of law only when he or she takes a generally applicable legal principle, applies it to the facts of a specific case, and thereby reaches a legal conclusion. However, as the cases mentioned above illustrate, stating a general legal principle in the context of a dispute involving that same principle may be viewed by a court as applying law to fact.

The "Affecting Legal Rights" Test

A fourth test used by courts to define the practice of law is the "affecting legal rights" test.[26] Under this test, a person engages in the practice of law if he or she provides services that affect another's legal rights.[27] Thus, the drafting of contracts - or settlement agreements - clearly affects the legal rights of those bound by the contracts. Likewise, providing legal information or advice, to the extent that someone acts upon the information or advice, also affects legal rights. Because almost any activity from investment advice to counseling forgiveness and reconciliation can potentially affect someone's legal rights, this test is among the broadest of the approaches used by courts to define UPL.[28]

The "Attorney-Client Relationship" Test

The fifth test used by courts to determine what constitutes the practice of law focuses on the existence of an attorney-client relationship.[29] According to this test, there must be a personal relationship tantamount to that of attorney and client before the practice of law is implicated.[30] An example of such a test can be found in the Unauthorized Practice Rules of the Supreme Court of Virginia.[31] Subsection B of Part Six provides that "it is from the relation of attorney and client that any practice of law must be derived."

SECTION 3. UPL IN THE CONTEXT OF MEDIATION

Mediation is a process for resolving disputes. Some of those disputes have already ripened into lawsuits by the time they reach mediation; others have not yet resulted in a lawsuit but may end up in litigation if not successfully mediated. In either case, legal norms are likely to play an important role in the dispute. If one of the parties has already filed suit, then that party, and probably the other as well, has already defined the dispute in legal terms, thus calling for the resolution of legal issues. Even if a lawsuit has not yet been filed, one or both of the disputants are likely to have preconceived ideas about the proper legal resolution of the issues involved.

As parties enter into the mediation process, they often ask questions or raise issues about their legal rights and responsibilities. They may ask their mediator to assist them in evaluating or clarifying their legal positions. Similarly, mediators may find it useful to ask reality-testing questions of the parties that implicate legal issues. The providing of legal information and the asking of reality-testing questions are valuable to the mediation process in that these activities promote informed and considered decision-making by the parties. If a settlement is reached, the mediator may be asked or may take it upon herself to assist the parties in committing the agreement to writing, which is useful in helping the parties clearly articulate, remember and remain committed to the settlement reached during the mediation. The effectiveness of the mediation process is thus served when the mediator is permitted to provide appropriate legal information and to memorialize the parties' settlement.

Depending upon how the practice of law is defined in a given jurisdiction, a typical mediation session may involve a range of activities by the mediator that approaches the practice of law. The following are the two most common categories of mediator activities that may potentially involve the practice of law:

- Applying law to facts
- Drafting settlement agreements that may be viewed as legal instruments

Mediation practitioners, state bar ethics committees, and academic commentators are currently engaged in a heated debate over the question of whether any or all of the activities listed above constitute the practice of law. Representative of one side of this debate is Professor Carrie Menkel-Meadow.[32] Professor Menkel-Meadow argues that when a mediator evaluates the strengths and weakness of a client's case by applying legal principles to specific facts he or she is engaged in the practice of law.[33] She is concerned that mediation clients may be injured by reliance on erroneous information given to them by non-lawyer mediators,[34] and she believes that current ADR guidelines and rules of ethics do not adequately address the practice of law issues inherent in mediation.[35]

On the opposite side of the spectrum, Donald Weckstein[36] encourages mediators - both lawyers and non-lawyers alike - to actively evaluate the strengths and weaknesses of the disputing parties' cases by applying legal principles to the facts in the mediation.[37] He argues that "legal advice" should be construed narrowly for UPL purposes and that it requires both the mediator and the person receiving the advice to have a mutual expectation that the advice given will influence the recipient's behavior.[38]

Under his approach, a non-lawyer mediator would be free to employ a wide range of evaluative techniques during mediation without engaging in the practice of law.

SECTION 4. THE VIRGINIA RULES ON MEDIATION AND THE PRACTICE OF LAW

The Virginia appellate courts have not yet weighed in on the question of what mediator activities constitute the practice of law. The issue of the unauthorized practice of law was also not considered by the Joint Virginia State Bar - Virginia Bar Association Joint Committee on ADR during the development of the dispute resolution proceedings statutes (Section 8.01-576.4 *et seq. of the Code of Virginia*). However, a variety of court rules, state statutes, standards of ethics, and Virginia State Bar legal ethics opinions have addressed the unauthorized practice of law generally, and some of these rules deal directly with issue of mediation and the practice of law.

Court Rules and Their Interpretation

Supreme Court of Virginia Rule Part 6, § I serves as the primary source for regulating the unauthorized practice of law in the Commonwealth. In addition, § 54.1-3904 of the *Code of Virginia* makes it a misdemeanor to practice law without being authorized or licensed to do so. Finally, the Supreme Court of Virginia has made clear that courts of the Commonwealth have the inherent power to enjoin the unauthorized practice of law when it occurs.[39]

Part 6, § I (B) states that "the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply

his possession and use of legal knowledge." (See Appendix B for the full text of the Rule). In addition, this Rule provides that a person is practicing law whenever

1. One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires [or]
2. One, other than a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

The case law on UPL in Virginia is largely undeveloped. In only two cases has the Supreme Court of Virginia addressed the unauthorized practice of law. In one case, the court approved of real estate agents preparing simple contracts of sale, options, and leases.[40] In the second case, the court held that an association of credit providers could not act as an intermediary in employing lawyers on behalf of creditors whom it was representing in the collection of debts.[41] Thus, Virginia appellate courts have been largely silent on UPL issues and have never specifically addressed UPL as it relates to mediation.

Selected State Statutes Governing Mediation in Virginia

Section 8.01-581.21 *et. seq.* is the original mediation statute in the *Code of Virginia*. (See Appendix C for the full text of the statute) This statute defines mediation, describes the confidentiality of mediation, and establishes civil immunity for mediators. In 1991, the Virginia State Bar-Virginia Bar Association Joint Committee on Dispute Resolution, with the assistance of the Department of Dispute Resolution Services of the Supreme Court of Virginia, began exploring the possibility of introducing legislation to enable the courts to refer matters to alternative dispute resolution proceedings and to provide dispute resolution mechanisms in court-connected settings. Overwhelmingly passed in 1993, *Code of Virginia* § 8.01-576.4 et seq. (See Appendix D) enables judges to order appropriate civil cases to a free dispute resolution evaluation session so that the parties may explore whether they wish to use an alternative dispute resolution proceeding in their case.

Section 8.01-576.5 authorizes courts to refer any contested civil matter or selected issues in a civil matter to a dispute resolution evaluation session. The dispute resolution evaluation session is a preliminary orientation meeting in which a neutral helps the parties assess the case and decide whether to pursue a dispute resolution option or continue with adjudication. Attorneys for any party may be present during the evaluation session.

The primary goals of the evaluation session are to provide the parties an opportunity to communicate openly about the issues in dispute and the possibility of resolving the matter through a non-adversarial method, as well as to educate them about the dispute resolution options available to them. With this information, the parties may choose voluntarily to proceed with a dispute resolution process such as mediation. The judge continues to set a date for the parties to return to court in accordance with its regular docket and procedure, irrespective of the referral to an evaluation session.

Section 8.01-576.9 describes certain ethical standards of neutrals, including that they may not coerce the parties into entering a settlement agreement and that they must remain neutral and free from conflicts of interest. Section 8.01-576.8 discusses the qualification of neutrals and Section 8.01-576.10 discusses the confidentiality of dispute resolution proceedings. Section 8.01-576.11 describes the effect of a written settlement agreement. If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other

written contract. Upon request of all parties and consistent with law and public policy, the court shall incorporate the written agreement into the terms of its final decree disposing of the case. While this statute does not specifically state whether mediators are authorized to prepare settlement agreements on behalf of the parties, 'dispute resolution services' is defined in Section 8.01-576.4 as including *drafting agreements.*

Section 8.01-576.12 states that the court shall vacate a mediated agreement or an order incorporating or resulting from such agreement, where: (1) the agreement was procured by fraud or duress, or is unconscionable, (2) if property or financial matters are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information, (3) there was evident partiality or misconduct by the neutral, prejudicing the rights of any party.

For purposes of this section, "misconduct" includes failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (1) the neutral does not provide legal advice, (2) any mediated agreement will affect the legal rights of the parties, (3) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (4) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement or should waive his opportunity to do so.

Prior to this legislation, judges in Virginia made referrals of cases to mediation on an ad hoc basis. Mediation services were offered primarily by a few court service units and community mediation centers. The establishment of the Department of Dispute Resolution Services,[42] coupled with new legislation that empowered judges to refer cases to dispute resolution evaluation sessions, marked a critical turning point in the development of consistent and integrated court-connected mediation.

Mediator Standards of Ethics

In Virginia, mediators may choose to be certified by the Judicial Council of Virginia. If certified, they are eligible to receive case referrals from Virginia courts. In order to gain certification, potential mediators must meet the requirements adopted by the Judicial Council of Virginia, which are set forth in its Guidelines for the Training and Certification of Court-Referred Mediators. (See Appendix E) Certified mediators must also comply with the Standards of Ethics and Professional Responsibility for Certified Mediators adopted by the Judicial Council of Virginia. (See Appendix F) The Standards set out basic ethical and professional responsibilities for certified mediators.

On October 20, 1997, the Judicial Council adopted revisions to its original 1993 *Standards of Ethics*. While the original *Standards* provided important guidance on ethical principles, the need for more specific and comprehensive ethical rules became clear with recent concerns regarding mediator conduct. The revisions are the product of the research and efforts of the Dispute Resolution Services Ethics Committee. This subsection discusses the *Standards* that are most relevant to the issue of mediation and the unauthorized practice of law.

Prior to the commencement of the mediation, Section D(2)(a) of the *Standards* states that a mediator must inform the parties in writing that (1) the mediator does not provide legal advice, (2) any mediated agreement will affect their legal rights, (3) they are encouraged to seek legal counsel, and (4) they should have any draft agreement reviewed by independent counsel before signing it.

Section E of the *Standards* provides that mediators must encourage and respect the self-determination of the parties and may not coerce any party into an agreement or make decisions for any party. Section F states that mediators may only give information in areas in which they are qualified by training or experience and that information must be provided in a manner that does not

affect the mediator's impartiality or the parties' self-determination. Section G again stresses impartiality and provides that mediators shall avoid any conduct that gives even the appearance of partiality toward one of the parties.

Section J of the *Standards* relates to settlement agreements. In general, it provides that mediators may offer suggestions to the parties but may not recommend particular solutions nor engage in any action that affects mediator impartiality or the self-determination of the parties. Specifically, this section requires mediators to determine that (1) the parties have considered all ramifications of their agreement, (2) the parties have considered the interests of other persons affected by the agreement who are not party to it, and (3) the parties have entered into the agreement voluntarily. Finally, this section states that if a mediator has concerns that any party does not fully understand the terms of the agreement or its ramifications, then the mediator should raise these concerns with the parties or withdraw from the mediation in the case of manifest injustice.

Virginia Rules of Professional Conduct

On January 25, 1999 the Supreme Court of Virginia, following the recommendation of the Virginia State Bar, adopted a new set of ethical rules to govern attorney conduct in Virginia. The new *Virginia Rules of Professional Conduct* take effect on January 1, 2000 and will replace the existing *Virginia Code of Professional Responsibility*. (See Appendix G) Unlike the previous Code, the new Rules contain explicit provisions governing the professional conduct of attorneys acting as third party neutrals and as mediators.[43]

Rule 2.10 is the general rule governing alternative dispute resolution proceedings.[44] This rule provides, among other things, that a lawyer acting as a third party neutral does not represent either party,[45] and it prohibits a lawyer acting as a third party neutral from subsequently representing either of the parties in a matter related to the dispute resolution proceeding.[46] Comment 3 to this rule states that a third party neutral may not offer the parties legal advice but may offer a neutral evaluation if requested by the parties.

Rule 2.11 deals specifically with mediation as a type of alternative dispute resolution proceeding. It allows a lawyer-mediator to provide legal information to the parties[47] and to offer an evaluation of, for example, the strengths and weaknesses of positions, the value and costs of alternatives to settlement, or the barriers to settlement.[48] Comment 8 to this rule cautions lawyer-mediators to "restrict the use of evaluative techniques by the lawyer-mediator to situations where the parties have given their informed consent to the use of such techniques and where a neutral evaluation will assist, rather than interfere with the ability of the parties to reach a mutually agreeable solution to their dispute."

Legal Ethics and UPL Opinions Relating to Mediation

The Virginia State Bar maintains two standing committees that issue opinions on mediation and UPL issues. The Standing Committee on Legal Ethics issues opinions that govern the conduct of attorneys licensed to practice law in Virginia, and the Standing Committee on the Unauthorized Practice of Law issues opinions regarding the practice of law by non-attorneys.

Several of the UPL Opinions promulgated by the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law may be relevant to non-attorney mediators. For example, a number of UPL Opinions relate to the preparation of legal or quasi-legal documents by non-attorneys. In UPL Opinions 150 and 151 (1993), the Committee stated that the preparation by a collection agency's lay employees of a "form warrant in debt" that includes both a factual memorandum and the warrant

itself constitutes the unauthorized practice of law. The Committee ruled that these "form warrants" are pleadings that may only be prepared by a licensed attorney. Pleadings are uniformly recognized as legal instruments and may not be drafted by lay persons.

The status of the lay person preparing the legal document also may be relevant to whether that person is illegally practicing law. For example in UPL Opinion 125 (1988), the Committee approved of lay employees of the Virginia Department of Transportation filling in "form deeds" prepared by the attorney general's office. The Committee apparently based its decision on the status of the employees as "regular" employees. The Committee quoted the provision from Supreme Court Rule Part 6, § I (B)(2), which allows "a regular employee acting for his employer" to prepare legal instruments. The Committee noted that whether a DOT consultant could prepare such deeds depended on whether the consultant was a "regular employee." By analogy, a mediator, who is typically contracted by the Office of the Executive Secretary on a per case basis to provide services to the courts, may not rely on the "regular employee" provision of this rule to permit the preparation by the mediator of legal instruments.

In another document opinion, the Committee ruled that an accountant does not illegally practice law when he or she fills in blank forms for a Commonwealth's Attorney that relate to the forfeiture of drug-related assets. In UPL Opinion 182 (1995), the accountant filled in the name and address of the defendant, the property seized, and the trial date. The documents then were reviewed and signed by the Commonwealth's Attorney. The Committee approved of this practice, perhaps because the information supplied by the accountant was factual (as opposed to legal) and the documents were always reviewed by a licensed attorney before they were filed with the court.

Whether the lay person preparing a legal instrument is subject to licensing requirements may determine whether he or she will be permitted to do so. In UPL Opinion 61 (1985), the Committee interpreted *Commonwealth v. Jones & Robins, Inc*.,[49] as not authorizing a business broker to prepare purchase agreements for businesses. The Committee noted that unlike real estate agents who are subject to licensing requirements (and who may prepare sale contracts), business brokers are not similarly regulated. Thus, the Committee opined that business brokers who prepare contracts of sale do so in violation of *Commonwealth v. Jones & Robins, Inc*. Likewise, in Virginia, mediators do not have to be licensed in order to mediate. Mediators may voluntarily seek *certification* by meeting the training and experience requirements adopted by the Judicial Council. Consequently, courts or the UPL Committee might view mediator document production activities as unregulated and without the protection of licensure requirements.

Finally, the UPL Committee has ruled that preparation of court orders by lay persons constitutes the unauthorized practice of law. According to the Committee in UPL Opinion 58 (1984), preparing court orders requires the exercise of legal skill and judgment and should not be undertaken by non-attorneys. This opinion is of particular relevance in those Virginia jurisdictions where court-referred mediators routinely prepare court orders at the court's request.

The UPL Committee, like the Legal Ethics Committee, has made a distinction in its opinions between legal advice and legal information. For example, in UPL Opinion 131 (1989), the Committee stated that non-attorneys may provide general information about legal matters (i.e. religious freedom) to members of the general public through seminars, publications, responses to letters, and telephone inquiries. In UPL Opinion 104 (1987), the Committee approved of an attorney licensed in a foreign jurisdiction publishing articles containing general legal information in a Virginia newspaper. The Committee stated that "general legal information is distinguished from specific legal advice to specific clients with regard to their respective problems."

In addition to the UPL Opinions just mentioned, the Legal Ethics Committee has addressed the issue of whether mediation by attorneys constitutes the practice of law and thus whether attorneys who engaged in mediation were subject to the former *Virginia Code of Professional Responsibility*. In Legal Ethics Opinion (LEO) 1368 (1990), the Committee ruled that a lawyer who mediated a dispute and who drafted a settlement agreement did not engage in the practice of law. (See Appendix H)

Nevertheless, the Committee stated that "providing legal information, albeit not legal advice, and assisting individuals to reach agreement on such issues as division of property, contractual obligations, liability and damages, by definition, entails the application of legal knowledge and training to the facts of the situation." Therefore, attorneys who engage in mediation are subject to the *Code of Professional Responsibility* (now the *Virginia Rules of Professional Conduct*) while carrying out their mediation activities.

Legal Ethics Opinion 1368 suggests that providing legal information and even drafting settlement agreements during a mediation session does not constitute the practice of law. In fact, the Ethics Committee noted that an attorney who acts as a mere scrivener for disputing parties by committing their oral agreement to writing does not engage in the practice of law. Like LEO 1368, the Guidelines that follow address the two types of mediator activities that most commonly implicate the potential practice of law - applying law to facts and drafting mediated agreements.

Chapter 2: Legal Information

SECTION 1. INTRODUCTION

The purpose of this section is to provide mediators with guidance on how to avoid giving disputants legal advice and thereby engaging in unethical mediation practice, the unauthorized practice of law, or both. While adhering to these Guidelines should provide some measure of protection against charges of UPL or unethical practice, mediators should note that what constitutes legal advice is highly contextual and may vary according to the nature and type of the statements made by the mediator, the manner in which law-related information is provided to the parties, the purposes for which it is provided, and the expectations of the disputing parties. Furthermore, even when providing permissible legal information, mediators must be careful to give information only in those areas in which they are knowledgeable because of their training or experience.[50]

The Guidelines that follow are necessarily general in nature because the determination of what constitutes impermissible legal advice must, in most instances, be made on a case-by-case basis. Moreover, although the Guidelines are meant to be instructive, the determination of what constitutes UPL is made not by the Department of Dispute Resolution Services but by the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law, the Attorney General's office, and ultimately by the courts. Mediators who are unsure of whether an anticipated course of conduct may be considered unethical practice or the unauthorized practice of law should proceed with caution and should seek advice from the Virginia State Bar.

SECTION 2. LEGAL AND ETHICAL PROHIBITIONS AGAINST LEGAL ADVICE

Supreme Court of Virginia Rule Part 6, § I (B)(1) states that an attorney-client relationship exists and one is deemed to be practicing law whenever "one undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal

principles to facts or purposes or desires." However, the rule does not prohibit giving legal information to disputing parties, nor does it apply to mediators who are not being compensated (either directly or indirectly). While the UPL rules do not prohibit legal advice by uncompensated mediators, they must still comply with the ethical and statutory prohibitions against giving legal advice discussed below.

The crux of Supreme Court of Virginia Rule Part 6, § I(B)(1) is its prohibition against non-attorneys applying general legal principles to specific facts, purposes, or desires and then communicating legal advice to other persons. The term "legal advice" has not been precisely defined in Virginia. At a minimum, however, the following would appear to constitute legal advice in the mediation context:

At a minimum, a mediator provides legal advice whenever, in the mediation context, he or she applies legal principles to facts in a manner that (1) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges, or recommends a course of action by a disputant or disputants as a means of resolving a legal issue.

Mediators should be aware that other conduct not included within this definition may also constitute the giving of legal advice and that the previous definition sets forth the minimum standard to which mediators should adhere.[51]

Like Supreme Court of Virginia Rule Part 6 §I(B)(1), the Virginia Standards of Ethics and Professional Responsibility for Certified Mediators ("mediator ethics") also prohibit mediators from giving legal advice. In fact, the ethical standards require mediators to inform the parties in writing, prior to the commencement of the mediation, that the mediator does not provide legal advice.52 This provision reflects the requirements of Code of Virginia § 8.01-576.12 relating to court-referred cases, which states that a court shall set aside a mediated settlement agreement upon a showing of misconduct by the neutral. As defined in this code section, misconduct "includes the failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice."

Although an attorney qualified to practice law in Virginia and serving as a mediator could not be charged with the unauthorized practice of law for giving legal advice during mediation, the attorney-mediator would violate mediator ethics if he or she gave legal advice, and any resulting settlement agreement could be challenged and set aside by a court on the ground of mediator misconduct. The attorney also would be subject to professional discipline by the Virginia State Bar for violating Rule 2.11 of the Virginia Rules of Professional Conduct ("Virginia Rules"), which prohibits a lawyer-mediator from giving legal advice during mediation.53 Finally, a lawyer-mediator who gave legal advice to one or both of the parties during mediation may have engaged in dual representation in violation of Rule 1.7.[54]

Thus, neither lawyer nor non-lawyer mediators may give legal advice to the disputing parties during mediation. Non-lawyers who do so have engaged in unethical mediation practice, which may lead to decertification and are subject to criminal prosecution or civil action for UPL. Lawyer-mediators who provide legal advice have likewise engaged in unethical mediation practice which may lead to decertification and are subject to discipline by the Virginia State Bar.

SECTION 3 THE RATIONALE FOR DEFINING LEGAL ADVICE AS PREDICTING THE RESOLUTION OF LEGAL ISSUES OR DIRECTING ACTION

The Committee on Mediation and UPL spent the better part of five months discussing the question of what constitutes legal advice in Virginia. The Guidelines that follow are the product of that debate and of the Committee's efforts to achieve a workable definition of legal advice. The Committee started with the premise that Supreme Court of Virginia Rule Part 6, § I (B)(1) requires, as one of its elements, the application of law to fact before a statement can be considered the practice of law in Virginia. This requirement is found in many court decisions defining the practice of law and is one of the more common "tests" for the practice of law used in other states. The Committee also recognized that Supreme Court of Virginia Rule Part 6, § I (B)(1) requires that to practice law one must "advise another" by applying general legal principles to specific facts. Because this language has not been interpreted by the appellate courts in Virginia, the Committee had no clear guidance on the meaning of the term "legal advice."

The definition of legal advice that emerged from the Committee was the product of much discussion and reflected an analysis of various considerations. The Committee considered and ultimately rejected a definition of legal advice that would have defined legal advice broadly to include the rendering of any legal opinion or conclusion.55 The Committee also rejected a narrow definition that would have only included a formal attorney client relationship that resulted in urging, recommending or counseling a particular course of action. Ultimately, the Committee decided on a more practical approach that would allow all mediators some level of flexibility in techniques and style but also draw a line where activity would be unethical and/or illegal. As a starting point, the definition of legal advice outlined above includes the provision from Supreme Court of Virginia Rule Part 6, § I (B)(1) that requires the application of legal principles to facts. However, under the definition, the giving of "legal advice" also requires that one predict a specific resolution of a legal issue or direct the decision-making of a disputant. These components were included in the definition of legal advice for two reasons.

First, the Committee recognized that an important aspect of a lawyer's role is his or her ability to apply law to specific facts and predict how a court may rule on a particular legal question in order to influence a client's actions. Thus, in the mediation context, the practice of law consists of more than merely evaluating legal issues, assessing strengths and weaknesses of positions, or discussing barriers to settlement, all of which may be permissible under both mediator ethics and the Virginia Rules. Rather, the Committee believed that mediators should not predict the specific resolution of legal issues because such activity is part of a lawyer's function as adviser and counselor and could give rise to an implicit lawyer/client relationship. Moreover, predicting the specific resolution of legal issues may be incompatible with the role of a neutral and is generally not good mediation practice. Although the definition of legal advice adopted by the Committee prohibits mediators from predicting a specific resolution of a legal issue, providing a range of possible outcomes may be permissible under the definition.

Secondly, the Committee agreed that recommending a course of action to the parties would constitute unethical mediation practice because it would interfere with the self-determination of the parties and the impartiality of the mediator. Moreover, the Committee viewed the conduct of directing, urging, or recommending as activities typically performed by and expected of attorneys and thus embodied in the concept of giving legal advice that would be unauthorized practice of law and unethical mediation if performed by a mediator. With this background in mind, the following

sections attempt to define the boundary between providing permissible legal information and providing impermissible legal advice.

SECTION 4. DISTINGUISHING LEGAL INFORMATION FROM LEGAL ADVICE

NOTE: The following sections include examples that are to be read in the context of the general Rule regarding what constitutes legal advice on page 13.

*A mediator may provide legal resource and procedural information to disputants.

Mediators sometimes need to provide disputants with copies of relevant Virginia statutes or court cases. Providing copies of statutes, such as § 20-124.3 dealing with child custody, is permissible and does not constitute legal advice. Likewise, providing disputants with reference information that will enable them to find a particular court case or statute in a library is also permissible. The Virginia State Bar, the American Bar Association, and other legal associations produce informational brochures or pamphlets on many areas of the law. Mediators are certainly free to provide disputants with copies of these documents without engaging in unethical mediation practice or the unauthorized practice of law. Providing relevant legal materials to the parties facilitates settlements by assisting the disputants in making fully-informed decisions.

Disputing parties are frequently uninformed about local court procedures regarding their cases. To the extent that mediators by training and experience are familiar with local procedures regarding scheduling, required fees, or the steps necessary to have a mediated agreement entered as a court order, they may provide this information to the parties without contravening the unauthorized practice rules or the ethical prohibitions against legal advice. Particularly in the court-referred or community mediation context, a mediator may serve as the primary informational resource available to the parties for this type of information.

*A mediator may make statements declarative of the law.

Mediators may make statements that are declarative of the state of the law on a given legal topic and these statements are generally permissible. However, as noted previously, the manner in which law-related information is provided to the parties, the purposes for which it is provided, and the expectations of the disputing parties can transform an otherwise permissible statement into legal advice by essentially predicting the resolution of a legal issue relevant to the dispute at hand. Mediators may rely on their training, experience, or even their own analysis of statutes or case law when making these declarations. Like any private citizen, mediators are free to expound upon the law so long as their statements do not otherwise constitute the practice of law.56 However, what may be a permissible statement declarative of the law in one context may constitute unethical mediation practice or legal advice in another. Mediators must carefully consider whether, under the totality of the circumstances, a law-related statement is likely to have the effect of predicting a specific resolution of a legal issue or of directing the actions of the parties. Under this totality of the circumstances analysis, statements made by a mediator in the presence of the disputants' attorneys are less likely to influence or direct their actions than if made outside of the attorneys' presence.[57]

Below are some examples of statements declarative of the law that probably would not be considered legal advice. Mediators are cautioned that these statements, while accurate, contain

exceptions and limitations. They are presented here for illustrative purposes only and should not be relied upon as definitive pronouncements concerning the state of the law for any legal subject area.

In the context of a divorce mediation:

- "Under the statutes, a person who is not seeking current spousal support but who wants the ability to get it in the future must expressly reserve the right to future spousal support in the settlement agreement and in the appropriate court order."[58]
- "In Virginia, custody involves two major components: with whom will the child primarily reside and who is responsible for making decisions concerning the upbringing of the child."[59]

In the context of a personal injury dispute:

- "In Virginia, a plaintiff is usually barred from recovering damages in a negligence suit if the plaintiff was guilty of any negligence that contributed to his or her injuries."[60]
- "Generally, the statute of limitations in Virginia for personal injury claims is two years."[61]

In the context of a commercial contract dispute:

- "Generally speaking, a contract for the lease of goods that exceeds $1000 must be in writing to be enforceable."[62]

Although making general statements declarative of the law is a permissible activity, mediators may not have the training or expertise necessary to make the types of statements mentioned above. Mediators who make statements declarative of the law should do so only if they are competent to make such statements and are sure that they are accurate and complete. In addition, the mediator must be sure that any statement made does not interfere with either the self-determination of the parties or the impartiality of the mediator.

*A mediator may ask reality-testing questions that raise legal issues.

A helpful and often-used technique for assisting disputing parties in reaching a settlement is to ask the parties questions that are designed to cause them to reflect on the viability, fairness, or the strengths and weaknesses of their respective positions. Whether labeled as "raising issues" or "reality testing," this technique sometimes involves asking the parties to reflect on the legal ramifications of their case.

Reality testing questions do not, by themselves, constitute legal advice so long as they do not predict resolutions of legal issues or direct decision-making. With this caveat in mind, mediators are free to ask reality-testing questions of disputing parties even if those questions are designed to cause reflection by the parties on legal issues relevant to their dispute.

Below are two brief mediation scenarios where the use of reality-testing questions might be appropriate. Several possible questions are listed, and they are labeled as permissible or impermissible depending upon whether they may constitute legal advice. Impermissible questions are those that predict the specific resolution of a legal issue. They would probably constitute legal advice and therefore UPL and unethical mediation practice.

Bill and Mary are separated and intend to get a divorce. They have sought mediation to assist them in resolving some issues involving child custody and the distribution of assets. Mary states that she wants to relocate to Florida with the couple's two children. Bill objects to Mary's relocation and wants the children to remain in Virginia. Bill also claims one half ownership in some stock that Mary received as an inheritance last year from her grandfather. The stock is currently held in a joint brokerage account under both Mary and Bill's names.

Permissible	**Impermissible**
"Have you both considered whether a court would allow Mary to take the children to Florida?"	"Mary, do you realize that the court that would hear this case would not allow you to take the children to Florida over Bill's objection?"
"How would the stock be apportioned under the equitable distribution statute?"	"Bill, have you considered giving up on the stock issue since a court probably would view the asset as separate property?"

Three years ago, Ken and Nicole were involved in a traffic accident. Ken ran a stop sign and was hit by Nicole, who was exceeding the speed limit by about 10 miles per hour. Both vehicles received minor damage and Nicole incurred $750 in medical expenses. Ken was uninsured when the accident occurred and was forced to pay for the repairs of his vehicle. On the other hand, Nicole never received compensation from Ken for her medical bills. Because she does not want to file suit unless absolutely necessary, Nicole has persuaded Ken to enter into mediation at a local community mediation center. Both Ken and Nicole blame each other for the accident.

Permissible	**Impermissible**
"What is the statute of limitations for your claims?"	"Nicole, do you realize that the two year statute of limitations for personal injury claims has expired and that if the statute was raised by Ken as an affirmative defense, a court would dismiss your lawsuit?"
"Do either of you know what the Virginia rules are regarding negligence and contributory negligence?"	"Ken, have you considered that your own contributory negligence would prevent you from recovering damages from Nicole in court?"

The key difference between the two sets of questions above is that the impermissible questions predict specific resolutions of legal issues, while the permissible questions are open-ended and do not suggest resolutions that are based on the application of law to specific facts. Again, the impermissible questions predict resolutions of legal issues by applying specialized knowledge of legal subjects to the unique facts of the disputants. These types of questions may constitute legal advice and should be avoided by mediators.

In this area, perhaps more than any other, the boundary between permissible questions and those that cross the line into legal advice is very narrow. The phrasing of the questions and the context are crucial. Open-ended questions that do not suggest an answer are almost always usually safe. On the other hand, leading questions that apply law to fact are problematic and may constitute legal advice since they are more likely to predict specific legal resolutions or direct or recommend a course of action.

*A mediator may inform the disputing parties about the mediator's experiences with a particular court or type of case.

Occasionally, mediators find it helpful to relate their experiences with case outcomes to disputants in an effort to assist them in reaching a settlement. For example, a mediator who has been involved in a great many landlord/tenant disputes in a particular jurisdiction and who possesses substantial experience may communicate her observations about the outcomes of such disputes to the parties in an effort to assist them in assessing the strengths and weaknesses of their positions. A mediator should be able to identify the basis for his or her observations, such as personal experience or empirical research.

Mediators are sometimes called upon to give disputants a sense for what the legal damages might be in their case. If through personal observation or empirical research a mediator is sufficiently familiar with jury awards in a given type of dispute and in a particular location, then the mediator may make those observations known to the parties without giving legal advice. These activities, by themselves, do not involve predictions of specific legal outcomes but rather may constitute the giving of empirical information.

Good mediation practice would suggest that mediators avoid making case outcome predictions when relating empirical observations or experiences to the parties. Parties should be told that courts reach decisions based on the facts and applicable law in each case and that no two cases are identical. Parties should also be told that the mediator is simply relating his or her experiences as a court observer and not predicting how the court will rule. The danger in making even experience-based predictions of case outcomes is that such predictions may interfere with the rights of the parties to self-determination and may create the perception that the mediator is biased.

*A mediator may inform the disputing parties about the enforceability of a mediated agreement.

When contemplating the preparation of a written agreement during mediation, parties frequently ask mediators what legal effect such an agreement will have. Section 8.01-576.11 of the Code of Virginia states that mediated agreements are enforceable like any other contract. Mediators are free to refer the parties to this code section or to summarize it contents for them. However, whether a mediated agreement constitutes a valid and enforceable contract is matter of state contract law. Like any purported contract, a mediated agreement may not meet the requirements necessary to be enforceable. Thus, mediators should not advise the parties as to whether their particular agreement is enforceable as a valid contract. Advising the parties about the enforceability of a specific agreement is tantamount to predicting the resolution of a legal issue, and as the below Guideline makes clear, may be considered giving legal advice.

*A mediator may not make specific predictions about the resolution of legal issues or direct the decision-making of any party.

In general, the line between legal information and legal advice is crossed whenever a mediator applies legal principles to facts in the mediation and predicts the specific resolution of a legal issue or otherwise makes statements that direct the actions of the parties. Using the permissible statements declarative of the law discussed previously on pages 16-17, the following italicized statements,

communicated to one or both of the parties following the otherwise permissible statements, would probably constitute legal advice if made by a mediator for compensation:

In the context of a divorce mediation:

- "Under the statutes, a person who is not seeking current spousal support but who wants the ability to get it in the future must expressly reserve the right to future spousal support in the settlement agreement and in the appropriate court order. ***If you want to be able to get spousal support in the future, you should require a provision in the settlement agreement that permits such a possibility."***
- "In Virginia, custody involves two major components: with whom will the child primarily reside and who is responsible for making decisions concerning the upbringing of the child. ***You can resolve this dispute by simply calling your arrangement joint custody and stating that the child's primary residence will be with the mother."***

In the context of a personal injury dispute:

- "In Virginia, a plaintiff is barred from recovering damages in a negligence suit if the plaintiff was guilty of any negligence that contributed to his or her injuries. ***Because you were contributorily negligent, you would not be able to recover damages if this case were to proceed to trial."***
- "The statute of limitations in Virginia for personal injury claims is two years. ***As a result, your claim is barred and would not be heard by a Virginia court."***

In the context of a commercial contract dispute:

- "Generally speaking, a contract for the lease of goods that exceeds $1000 must be in writing to be enforceable." ***Since your agreement was in writing, you would have no problem getting a court to enforce it."***

Each of the italicized statements listed above applies law to facts in the mediation and either predicts a specific legal resolution or suggests a course of action. Other examples of legal advice include predicting that a court would not award certain damages (e.g. punitive damages) because the plaintiff could not prove malice or predicting that a party would lose a lawsuit because he or she could not prove an essential element of the claim. Mediators can avoid giving legal advice by carefully limiting their law-related statements to general principles of law that do not predict the resolution of legal issues and that do not urge, direct, or influence the parties to the dispute.

SECTION 5. CONCLUSION

Many of the potential problems with the unethical practice of mediation or the unauthorized practice of law addressed in this section rarely arise in everyday mediation. Mediators who adopt a facilitative approach to mediation will seldom find themselves in the position of questioning whether a particular statement may constitute legal advice. On the other hand, mediators whose style and practice tends more toward the evaluative end of the mediation spectrum may need to consider more carefully whether the questions that they raise or the statements that they make during mediation are permissible legal information or impermissible legal advice. Furthermore, if mediators choose to provide legal information to the disputants, they should do so only if they are confident that they

have the necessary training and experience and that the information is complete and will not be viewed as coercive, directive, or biased in favor of one of the parties.[63]

Whatever style of mediation they adopt, mediators must keep in mind that in order to avoid potential problems with unauthorized practice or with charges of misconduct, they should always inform the disputing parties in writing at the start of the mediation process that (1) mediators are prohibited from giving legal advice, (2) a settlement agreement may affect the legal rights of the parties, (3) the parties are encouraged to seek independent legal counsel, and (4) a mediated agreement should be reviewed by independent counsel before the parties sign the agreement.[64] Complying with these Guidelines should help protect mediators in Virginia from allegations that they engaged in UPL, unethical mediation practice, or a violation of the Virginia Rules of Professional Conduct.

Chapter 3: PREPARING MEDIATED AGREEMENTS

SECTION 1. INTRODUCTION

Once parties to a mediation have reached agreement on some or all of the issues in dispute, most desire to memorialize their agreement in the form of a written document.[65] Sometimes this document is entitled a "Memorandum of Understanding;" in other cases, it may be called a "Settlement Agreement" or a "Mediated Agreement." The purpose of this section of the Guidelines is to provide mediators with guidance on how to assist parties in committing their agreement to writing without contravening the Virginia UPL rules, mediator ethics, or in the case of attorney-mediators, the Virginia Rules of Professional Conduct. As with the previous chapter on legal advice, the Department of Dispute Resolution Services does not have the final say on what agreement preparation activities may constitute the practice of law. That determination is left to the Virginia State Bar, the Attorney General's office, or the courts.

SECTION 2. THE LEGAL CONTEXT OF MEDIATED AGREEMENTS

Supreme Court of Virginia Rule Part 6, § I(B)(2) provides that a person is practicing law whenever "one, other than a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business." Unlike Part 6, § I(B)(1) discussed in the previous section on legal advice, the above subsection of the rule does not require that a person prepare the legal instrument for compensation. Thus, even volunteer mediators who are not being compensated for their services are subject to the rule on drafting legal instruments.[66] Furthermore, since most court-connected mediators are contracted by the Office of the Executive Secretary to provide services to the courts on a per case basis, they are not "regular employees" of the disputing parties and so cannot avoid the rule on that basis.

Finally, agreements prepared by mediators are probably not the "contracts incident to the regular course of conducting a licensed business" referred to in the rule. This particular provision was adopted by the Supreme Court of Virginia to address the preparation of sales contracts by real estate agents - a practice explicitly approved of by the court in Commonwealth v. Jones & Robins, Inc.[67] Unlike real estate agents, mediators in Virginia (even court-certified mediators) are not licensed. Mediators do not have to pass a licensure exam, nor is licensure mandatory to practice the mediation

profession. Moreover, in the real estate profession, sales contracts, which include a provision for the agent's commission, are necessary to insure that the real estate agent receives compensation for his or her services. In the mediation context, it could be argued that written agreements resulting from the mediation are not required for mediator compensation.

However, in Jones & Robins, Inc., the Supreme Court of Virginia was concerned that prohibiting real estate agents from preparing sales contracts would run counter to their long-standing practice of providing this service, would be impractical, and would be detrimental to the real estate business. These same concerns would also be evident if mediators were denied the ability to prepare written agreements for disputing parties. Although it is possible that a court could construe a mediated agreement as a "contract incident to the regular course of conducting a licensed business," mediators would be prudent not to rely on this provision in order to claim an exemption from the UPL rule.

Despite the Supreme Court of Virginia rule prohibiting laypersons from preparing legal instruments, the Virginia mediation statutes refer to the preparation of written agreements by non-attorney mediators. In defining the various terms used in the dispute resolution chapter of the Code of Virginia § 8.01-576.4 states that "'dispute resolution services' includes screening and intake of disputants, conducting dispute resolution proceedings, drafting agreements, and providing information or referral services" (emphasis added). Furthermore, § 8.01-576.11 contemplates that written agreements would emerge from mediation sessions by providing that such agreements are "enforceable in the same manner as any other written contract." Finally, in defining misconduct by neutrals, § 8.01-576.12 states that upon the motion of a party, a court "shall vacate a mediated agreement reached in a dispute resolution proceeding" if the neutral fails to inform the disputants in writing of certain specified information (emphasis added).

Thus, while the Virginia mediation statutes appear to authorize the preparation by mediators of written agreements that may be enforceable as contracts, contracts are legal instruments, and the Unauthorized Practice of Law rules from the Supreme Court of Virginia prohibit non-attorneys from drafting legal instruments. To further complicate matters, the Virginia State Bar has authorized attorney-mediators to act as scriveners in committing mediated agreements to writing.[68] However, the State Bar's Legal Ethics Committee has cautioned attorney-mediators that if they provide agreement-writing services beyond those of a scrivener, then they have engaged in the practice of law.[69] Moreover, a conflict of interest would arise under the Virginia Rule of Professional Responsibility 2.10 (e), which states that "a lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute."

It appears that the Virginia mediation statutes, particularly § 8.01-576.4, authorize non-attorney mediators to prepare written agreements for disputing parties so long as they, like attorney-mediators, limit their drafting services to those of a scrivener. This harmonizing of the UPL rules and the mediation statutes gives mediators the flexibility to assist the parties in committing their mediated agreements to writing but stops short of allowing mediators to draft instruments in which they include legally operative terms not requested or contemplated by the parties during the mediation process. Allowing mediators to prepare written agreements for the parties facilitates the efficient resolution of disputes and minimizes the costs to the parties, who may not desire or be able to afford their own attorneys.

This approach is consistent with the conclusion of the State Bar's Legal Ethics Committee that "to the extent that the [lawyer]-mediator is engaged by the parties as a scrivener of the agreement reached during the mediation process, such tasks do not constitute the practice of law."[70] Likewise, when non-attorney mediators act as scriveners for the parties in committing their mediated agreements to writing, they have not engaged in the practice of law. However, like the Legal Ethics Committee, the

Guidelines on Mediation and UPL Committee also believes that non-attorney mediators have engaged in the practice of law if their agreement preparation activities extend beyond acting as a scrivener for the parties.

A broad reading of § 8.01-576.4 would place no limits on the agreement writing activities of mediators and would essentially allow them to practice law when drafting written agreements. However, such a construction of this statute would render inoperative the entire mechanism for regulating the practice of law in the context of mediated agreement preparation. Although § 8.01-576.4 has not been construed by Virginia's appellate courts, the Committee on Guidelines on Mediation and UPL does not believe that the Virginia legislature intended this broad interpretation of the statute. Therefore, these Guidelines take the approach that both attorney and non-attorney mediators may act only as scriveners of the agreement. The Guidelines that follow help define what is meant by that term of art.

SECTION 3. ROLE OF THE MEDIATOR IN PREPARING WRITTEN AGREEMENTS

* Acting as a scrivener, a mediator may prepare settlement agreements and memoranda of understanding for the parties.

The Code of Virginia states that mediated agreements are legally enforceable as contracts.[71] Whether a contract is formed between disputing parties when they reach an agreement to settle their dispute is matter of state contract law. Generally speaking, however, a contract is formed whenever each party agrees to a settlement and promises that something will or will not be done for the benefit of another.[72] Thus, the particular form that a written agreement takes does not necessarily determine its enforceability as a contract. Documents entitled "Memoranda of Understanding," Settlement Agreements," or merely "Agreements" may all be enforceable if they meet the conditions for the formation of contracts under the laws of the Commonwealth of Virginia.

Regardless of the document's title, mediators in Virginia are permitted to assist the parties in committing their agreement to writing. A mediator may take an active role in preparing the agreement for the parties if they want the mediator to perform this function. The mediator may simply copy the agreement as dictated by the parties or may choose particular words or phrases to include in the agreement so long as the parties indicate that the language chosen by the mediator accurately reflects their desires. A mediator is also free to ask questions of the parties to clarify their agreement and may properly raise issues for their consideration. Likewise, a mediator may assist the parties in organizing their agreement by, for example, creating subsections in the document and placing the subsections in a logical order.

Mediators who prepare written agreements for disputing parties should strive to use the parties' own words whenever possible and in all cases should write agreements in a manner that comports with the wishes of the disputants. Mediators should not use language that one or both of the parties do not understand, and they should always allow the parties to review the written agreement carefully and make any changes that the parties believe are appropriate. As the *Code of Virginia*[73] and the Standards of Ethics and Professional Responsibility for Certified Mediators[74] require, mediators must always inform the parties in writing that mediated agreements should be reviewed by independent counsel before they are signed or that the parties should waive their opportunity for independent review.

* Unless required by law, a mediator should not add provisions to an agreement beyond those specified by the disputants.

Mediators are most likely to run afoul of UPL or ethical rules in drafting agreements when they attempt to include provisions in them that are not contemplated or requested by the parties themselves. In drafting settlement agreements for the parties, mediators should avoid the use of legal "boilerplate" and legal terms of art. These terms have legal consequences resulting from judicial interpretation and may favor one party over the other. The use of such terms may affect the parties in unintended ways and should be avoided.

Below are some examples of phrases or clauses that if included by a mediator in a written agreement may increase the likelihood that the Virginia State Bar, the Attorney General's office, or a court would view the preparation of the mediated agreement as the practice of law. Most of the examples are standard contractual terms used by attorneys for specific purposes and may be inappropriate for mediators to include in written agreements.

Merger Clauses

- A and B agree that this Agreement contains the entire understanding between them and that no additional agreements regarding marital property rights have been made. They agree that this Agreement is a full and complete settlement of all property rights between them from the time of their marriage until the date of this Agreement.
- A and B agree that any and all previous agreements regarding marital property rights are hereby superceded by this Agreement and that this Agreement contains the entire understanding between them.

Binding Effect Clauses

- All provisions of this Agreement shall be binding upon the respective heirs, next of kin, executors, agents, assigns, and administrators of the parties.

Choice of Law Clauses

- This agreement is made under and shall be governed in all aspects by the laws of the Commonwealth of Virginia.

Remedies Clauses

- In the event that either of the parties to this Agreement commits a material breach of the Agreement, the party in breach agrees to pay the non-breaching party's attorneys fees and other reasonable costs associated with the breach.

Severability Clauses

- The parties agree that if any part of this Agreement shall be deemed legally defective, inoperative, or unenforceable, the remaining portions of the agreement shall continue to bind the parties and shall remain in full force and effect.

Although mediators should not ordinarily, on their accord, add the above terms to mediated agreements, they may include the concepts embodied in them if requested by the parties. Section E of the *Standards of Ethics and Professional Responsibility for Certified Mediators* states that consistent with the self-determination of the parties, a mediator may raise issues for the parties to consider. In the agreement context, § J of the *Standards* makes clear that a mediator may suggest options for the parties to consider when reaching an agreement. Thus, a mediator is not precluded from raising issues or suggesting options to the parties, but the mediator may not add provisions, particularly boilerplate provisions, to a written agreement that the parties themselves have not fully explored and requested. If the parties ask a mediator to include a provision in the written agreement like one of those listed above, the mediator should use plain language and should avoid legal terminology or terms of art with which he or she is not familiar.[75] Not only does legal boilerplate increase the likelihood that the preparation of the agreement will be considered an impermissible activity, but boilerplate may favor one of the parties over the other and thus may constitute a violation of mediator ethics.

In some cases, a statute or a court may require that a certain provision be included in a written agreement. For example, § 8.01-576.11 of the *Code of Virginia* states that a court order which incorporates a written agreement involving the support of a child must include the statutory child support guidelines worksheet and any written reasons for deviating from the guidelines. This particular provision contemplates that mediators may complete child support worksheets and mandates their attachment to a subsequent court order. Thus, mediators who complete these worksheets for the parties have not prepared a legal instrument and have not engaged in the practice of law.[76]

Similarly, § 20-124.5 provides that as a condition for granting any custody or visitation order, a court must require any party to the agreement to give 30 days written notice of an intention to relocate. This code section allows courts to dictate the form that such notice must take, and many courts require that the 30 day relocation notice provision be placed in the custody or visitation order itself. Consequently, in order to have a mediated custody agreement incorporated into a court order, a mediator may be required to include the 30-day relocation notice provision in the written agreement. A mediator who includes a standard relocation notice required by a local court in a mediated agreement has not engaged in the practice of law.

* Mediators may use a court-approved form when preparing a written agreement.

A mediator probably would not be found to have engaged in the practice of law by utilizing a court-sponsored or approved form when preparing a written agreement for the parties. Generally speaking, the preparation of court orders is considered the practice of law.[77] However, it is standard practice for some courts in the Commonwealth to provide agreement forms to court-certified mediators that contain the appropriate language and signature lines to either order the dismissal of the court case pursuant to the agreement or, in some cases, to convert the agreement itself into a court order. Using such forms probably does not constitute the practice of law by mediators. Even if it does, the practice is authorized and supervised by the courts and presumably carries less risk to the public than normally associated with laypersons preparing court orders.[78]

* A mediator may include standard provisions in written agreements relating to the mediation process itself.

If a mediator deems it appropriate, he or she may include provisions in a written agreement that are intended to provide information to the parties about the mediation process. For example, provisions stating that the mediator does not give legal, financial, or tax advice may be included. Provisions that explain confidentiality79 or which state that the agreement may affect legal rights or that encourage the parties to have the agreement reviewed by independent counsel[80] are likewise permissible. In essence, provisions that are designed to inform the parties about the mediation process and which are not part of the substantive agreement between the parties may be included in a written agreement prepared by a mediator.

SECTION 4. CONCLUSION

Mediators are neutrals whose function is to help parties resolve their disputes. If parties to a mediation agree to resolve their dispute, part of a mediator's role may be to help them put their agreement in written form. When parties are willing and able to write their own agreement, self-determination is maximized. However, some disputants may prefer that the mediator memorialize the terms of their agreement and others may view the preparation of a written agreement as a natural extension of the mediator's facilitative role.

The Guidelines in this chapter allow mediators in Virginia to take an active role in preparing written agreements for disputing parties if the parties so desire. Mediators may assist the parties in framing the terms of their agreement, they may help them choose appropriate words or phrases, and they may provide an organizational framework for the agreement. The Guidelines allow mediators flexibility and prohibit only the addition by them of terms that do not make up part of the agreement between the disputants or that may have unanticipated legal consequences. Following these Guidelines should help protect mediators from charges that they engaged in the practice of law or unethical mediation practice in preparing mediated agreements.

END NOTES

1. See ABA Model Rules of Professional Conduct 2.2 (lawyers acting as intermediaries) and 5.7 (Responsibilities Regarding Law-Related Services).
2. See e.g., Va State Bar Comm. on Legal Ethics, Op. 1368 (1990)(the practice of mediation closely resembles the practice of law and therefore attorney-mediators are subject to the Virginia Rules of Professional Conduct).
3. American Bar Association, NonLawyer Activity in Law-Related Situations: A Report with Recommendations (1995).
4. Barlow F. Christensen, The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors - Or Even Good Sense?, 1980 American Bar Foundation Journal 159 (1980).
5. Supra note 3, at 9.
6. See generally Andrew S. Morrison, Is Divorce Mediation the Practice of Law? A Matter of Perspective, 75 California Law Review 1093 (1987).
7. Id. at 1096.
8. 366 P.2d 1 (Ariz. 1961).
9. Id. at 9.
10. Morrison, supra note 6, at 1096.

11. Opinion of the Justices, 194 N.E. 313 (Mass. 1935).
12. Morrision, supra note 6, at 1097.
13. 41 S.E.2d 720 (Va. 1947).
14. This decision was subsequently codified in Virginia Unauthorized Practice Rule Part 6-103(3), which authorizes real estate agents to prepare sales contracts.
15. Morrison, supra note 6, at 1098; see Agran v. Shapiro, 273 P.2d 619 (Cal. App. 1954) (preparation of simple income tax returns was not the practice of law); Gardner v. Conway, 48 N.W.2d 788 (Minn. 1951)(resolution of complex tax questions was the practice of law). But see State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863, 871 (Conn. 1958)(rejecting the routine/complex dichotomy and holding that a trust officer who drafts certain instruments may be engaged in UPL even though no difficult legal questions are involved).
16. 273 P.2d 619 (Cal. App. 1954).
17. Gardner v. Conway, 48 N.W.2d 788 (Minn. 1951).
18. Morrison, supra note 6, at 1103.
19. 366 P.2d 1 (Ariz. 1961).
20. Id. at 9.
21. Donald T. Weckstein, In Praise of Party Empowerment - And of Mediator Activism, 33 Willamette Law Review 501 (1997).
22. Id. at 543-44.
23. Morrison, supra note 6, at 1104.
24. See, e.g. Oregon State Bar v. Gilchrist, 538 P.2d 913 (Or. 1975).
25. See, e.g. Florida Bar v. Stupica, 300 So. 2d 683 (Fla. 1974).
26. Morrison, supra note 6, at 1105.
27. See Palmer v. Unauthorized Practice Committee, 438 S.W.2d 374 (Tex. Civ. App. 1969).
28. See Morrison, supra note 6, at 1106.
29. Morrison, supra note 6, at 1107.
30. See State Bar v. Cramer, 249 N.W.2d 1 (Mich. 1976).
31. Sup. Ct. of Va. R. Part 6, § I.
32. Professor Menkel-Meadow is a professor at Georgetown Law Center and is the co-director of the Center for Conflict Resolution at UCLA law school.
33. Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities, 38 South Texas Law Review 407, 424 (1997).
34. Carrie Menkel-Meadow, Is Mediation the Practice of Law?, Alternatives, May 1996, at 60, 61.
35. Supra note 33, at 451-53.
36. Professor Weckstein is a professor of law at the University of San Diego.
37. Donald T. Weckstein, In Praise of Party Empowerment - And of Mediator Activism, 33 Willamette Law Review 501, 543-44 (1997).
38. Id. at 543-44.
39. See Richmond Assoc. of Credit Men v. Bar Assoc. of Richmond, 167 Va. 327, 189 S.E. 153 (1937); Va. Sup. Ct. Rule Part 6, § I.
40. Commonwealth v. Jones & Robins, Inc., 186 Va. 30, 41 S.E.2d 720 (1947).
41. Richmond Assoc. of Credit Men v. Bar Assoc. of Richmond, 167 Va. 327, 189 S.E. 153 (1937).
42. The Department of Dispute Resolution Services is a department within the Supreme Court of Virginia's Office of the Executive Secretary. It is responsible for developing dispute resolution alternatives and for certifying court-referred mediators in Virginia.
43. See Rule 2.10 (Third Party Neutral) and Rule 2.11 (Mediator).

44. Comment 1 to Rule 2.10 states that "dispute resolution proceedings . . . include mediation, conciliation, early neutral evaluation, non-binding arbitration, and non-judicial settlement conferences."
45. Rule 2.10 (a)("The third party neutral does not represent any party.").
46. Rule 2.10 (e)("A lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.").
47. Rule 2.11 (c)("A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent.").
48. Rule 2.11 (d)(lawyer-mediator may offer evaluation "only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.").
49. 186 Va. 30, 41 S.E.2d 720 (1947).
50. Subsection F of the Standards of Ethics and Professional Responsibility for Certified Mediators in Virginia states that "a mediator shall give information only in those areas where qualified by training or experience."
51. The conduct referred to in this section is consistent with existing Rules including the Standards of Ethics for Court-Certified Mediators, the Virginia Rules of Professional Conduct, and the Code of Virginia.
52. Virginia Standards of Ethics and Professional Responsibility for Certified Mediators, § D(2)(a)(1).
53. Comment 7 to Rule 2.11 (Mediator) provides that a lawyer-mediator may not give legal advice. Comment 3 to Rule 2.10(Third Party Neutral) states that a lawyer acting as a third party neutral also may not give legal advice.
54. Unless a lawyer obtains informed consent from both parties, Rule 1.7 of the Virginia Rules of Professional Conduct prohibits the lawyer from representing a client when such representation will be directly adverse to the interests of another client. While the Virginia Rules (2.2) permit dual representation under certain circumstances, Rule 2.10(e) prohibits a lawyer-mediator from representing either party to a mediation.
55. Cf. Virginia Rule of Professional Conduct 2.10, Comment 3 ("A lawyer serving as a third party neutral shall not offer any of the parties legal advice . . . [but] may, however, offer neutral evaluations, if requested by the parties."); Rule 2.11 (d)("A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess barriers to settlement.").
56. See New York County Lawyer's Ass'n v. Dacy, 234 N.E.2d 459 (N.Y. 1967); Oregon State Bar v. Gilchrist, 538 P.2d 913 (Or. 1975).
57. Cf. Virginia State Bar Comm. on the Unauthorized Practice of Law, Op. 107 (1987)(It is permissible for a non-Virginia attorney to advise a Virginia attorney who may then render the advice to a client if he deems it acceptable.).
58. Va. Code § 20-109(C).
59. Va. Code § 20-124.1.
60. Fein v. Wade, 210 S.E.2d 29 (Va. 1950).
61. Va. Code § 8.01-243(A).
62. Va. Code § 8.2A-201(1).
63. Virginia Standards of Ethics and Professional Responsibility for Certified Mediators, § E.
64. Va. Code § 8.01-576.12(3).
65. Good mediation practice suggests that parties who reach an agreement should commit their agreement to writing. Oral agreements may be difficult to prove if the need should arise. Although Virginia Code § 8.01-581.22 provides that "a mediated agreement" shall not be kept

confidential, § 8.01-576.10 states only that a "written settlement agreement" shall not be kept confidential. Although these statutes have not been construed by the courts, it is possible that a court could rely on § 8.01-576.10 and decide that an oral agreement must remain confidential. Parties can avoid proof and confidentiality problems by memorializing their agreement in writing.

66. See, e.g., Va. Comm. On Unauthorized Practice of Law, Op. 119 (1988) (activities which are otherwise the unauthorized practice of law remain such even if done on a pro bono basis).
67. 186 Va. 30, 41 S.E.2d 720 (1947).
68. Va. Comm. on Legal Ethics, Op. 1368 (1990).
69. See id.
70. Va. Comm. on Legal Ethics, Op. 1368 (1990).
71. Va. Code § 8.01-576.11.
72. See, e.g., Blake Co. v. Smith & Son, 147 Va. 960, 133 S.E. 685 (1926). Please note that the law governing the formation of contracts is complex and that the rule stated above is subject to exceptions and limitations. It provided only for illustrative purposes and should not be relied upon as a complete statement of the law of contracts in Virginia.
73. § 8.01-576.12.
74. § D(2)(a)(4).
75. If the parties and /or their attorneys request that specific boilerplate provisions be included in a mediated agreement, good practice would suggest that the mediator request the parties to provide the exact language desired as well as attribute those provision(s) to the individual(s) requesting it in the agreement itself.
76. Providing information to the parties on how to calculate child support under the Guidelines or on the statutory reasons for deviating from them would not constitute the practice of law. Similarly, using a commercially available computer program to calculate child support does not constitute the practice of law.
77. See 1-A Interiors, Inc. v. Meer Street Investment Assoc., 10 Va. Cir. 93 (Va. Beach 1987). In that case, the Virginia Beach Circuit Court held that the preparation of a court order by a non-lawyer who was also a party to the case was the unauthorized practice of law. Without much explanation, the court stated that the preparation of a court decree necessarily involves the exercise of professional legal judgment and can only be undertaken by a licensed attorney.
78. The routine practice by many courts in Virginia is to allow mediators to prepare written agreements on forms that are entered as court orders in non-complex civil matters, e.g. those not involving equitable distribution.
79. For example, § I(c) of the Standards of Ethics and Professional Responsibility for Court-Certified Mediators provides that mediated agreements shall not be confidential unless otherwise agreed by the parties in writing.
80. This provision is one of several that mediators must inform the parties of in writing prior to the commencement of the mediation. Va. Code § 8.01-576.12.

Appendix A: Summary Of Research Findings

At the outset of this project, a survey was designed to gather information from all 50 states on the subject of mediation and the unauthorized practice of law. The survey, which follows this summary, was mailed to approximately 180 bar associations and mediation groups across the country. Associations representing twenty-eight states (56 percent) responded to the survey.

Responded	**Did Not Respond**
Alabama	Alaska
Arizona	Delaware
Arkansas	District of Columbia
California	Georgia
Colorado	Indiana
Connecticut	Iowa
Florida	Kentucky
Hawaii	Louisiana
Idaho	Maine
Illinois	Massachusetts
Kansas	Nevada
Maryland	New Jersey
Michigan	New Mexico
Minnesota	New York
Mississippi	Oklahoma
Missouri	Pennsylvania
Montana	Rhode Island
Nebraska	South Carolina
New Hampshire	Tennessee
North Carolina	Washington
North Dakota	West Virginia
Ohio	Wyoming
Oregon	
South Dakota	
Texas	
Utah	
Vermont	
Wisconsin	

The vast majority of responding states indicated that they do not have any formal or informal rules regarding UPL and mediation and that they are unaware of any court cases or ethics opinions in their states that deal with this issue. Below is a summary of the responses from those few states that have addresses the issue of mediation and UPL, either through ethics or UPL opinions, court rules, or guidelines.

Survey Results

Alabama

The Alabama State Bar has issued two informal ethics opinions that relate to mediation and UPL. In the first opinion, an attorney for the state bar advised a non-lawyer mediator that completing Alabama's child support guidelines was probably the unauthorized practice of law. In the second opinion, an assistant general counsel for the Alabama State Bar opined that "early neutral evaluation" by a retired judge who held only special (inactive) membership in the state bar did not constitute the practice of law.

Florida

Florida has established rules for court-appointed mediators and is in the process of drafting new rules. Rule 10.037(c) of the proposed rules states that "a mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute." However, the rule goes on to state that "a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense." Also, the comment to this rule allows mediators to assist the parties in drafting settlement agreements.

Maryland

The Maryland Court of Appeals has provisionally approved a set of rules applicable to court-referred mediation. The rules distinguish between neutral case evaluation, which requires the services of a lawyer, and mediation, which can be practiced by non-lawyers. With regard to mediation, the rules simply state that mediators are not to give legal advice. No definition of legal advice is provided in the rules.

North Carolina

The North Carolina Bar is the process of approving a set of guidelines governing mediation and UPL. Although these guidelines are finished, they have not yet been formally adopted. The guidelines were unavailable at the time this report was prepared.

Oregon

In Formal Opinion No. 1991-101, the Oregon State Bar stated that the drafting of settlement agreements for others during mediation would constitute the practice of law.

Texas

The State Bar of Texas' Ethical Guidelines for Mediators state that a mediator should not give legal advice (Rule 11). Again, no definition of legal advice is provided in the guidelines. The guidelines also state that a mediator should encourage the *parties* to reduce their agreements to writing (Rule 14).

Reported Mediation / UPL Decisions

As these responses indicate, the unauthorized practice of law by non-attorney mediators has been formally or informally addressed by only seven (including Virginia) of the responding states. Of these, only Virginia and North Carolina have attempted to create rules or guidelines to assist non-attorney mediators in avoiding the unauthorized practice of law. If the unauthorized practice of law by mediators was a wide-spread problem, it seems likely that more of the responding states would have received complaints and would have acted to address the problem. Of course, the summaries reported above include only those states that responded to the survey. However, an exhaustive search of the relevant literature and of the electronic legal databases (LEXIS and WESTLAW) revealed only a single reported court decision on the alleged unauthorized practice of law by a non-attorney mediator.

In Werle v. Rhode Island Bar Association,[1] the Rhode Island Bar Association sent plaintiff Werle a cease and desist letter after determining that a brochure advertising his family mediation business contravened Rhode Island's unauthorized practice statutes. The brochure advertised that Werle, a psychologist, would offer mediation to divorcing couples and would assist them in reaching an agreement on property division, support, and child custody. Werle sued the Rhode Island Bar and the members of its UPL Committee under 42 U.S.C. § 1983, claiming that they had deprived him of his First and Fourteenth Amendment rights by ordering him not to advertise or to engage in his mediation practice.

The First Circuit Court of Appeals held that the defendants were entitled to immunity under section 1983. Either the defendants were entitled to the absolute immunity afforded to prosecutors exercising their discretionary function, or they were entitled to qualified immunity because a reasonable person could conclude that Dr. Werle's services constituted the unauthorized practice of law.

Conclusion

Although the decision in Werle did not define what constitutes the unauthorized practice of law by a non-attorney mediator, it did afford immunity from suit to members of the Rhode Island Bar Association who concluded that a psychologist could not engage in divorce mediation under Rhode Island law without also practicing law illegally. The decision is now 14 years old, and divorce mediation by non-attorney mediators has become commonplace in almost all states. The mediation services that Dr. Werle advertised - property division, support, and child custody are now commonly undertaken by non-attorney mediators both in Virginia and elsewhere.

The challenge in regulating the unauthorized practice of law by non-attorney mediators is to craft rules that recognize the value of the services provided by these persons (both in divorce settings and otherwise) and that provide them the flexibility to engage in meaningful mediation practice. At the same time, the public must also be protected from inaccurate and potentially harmful legal services rendered by untrained and unqualified mediators. The Unauthorized Practice of Law Guidelines for Virginia Mediators developed during this project attempted to tread this very narrow path.

1. 755 F.2d 195 (1st Cir. 1985).

Appendix B: Rules of the Supreme Court of Virginia

Section I. Unauthorized Practice Rules and Considerations

INTRODUCTION

The right of individuals to represent themselves is an inalienable right common to all natural persons. But no one has the right to represent another; it is a privilege to be granted and regulated by law for the protection of the public.

The Supreme Court of Virginia has the inherent power to make rules governing the practice of law in the Commonwealth of Virginia. The Court has promulgated the definition of the practice of law. See "PRACTICE OF LAW IN THE COMMONWEALTH OF VIRGINIA," *infra*.

The public is best served in legal matters by lawyers. A client is entitled to be served disinterestedly by a lawyer who is not motivated or influenced by any allegiance other than to the client and our system of justice.

The services of a lawyer are essential and in the public interest whenever the exercise of professional legal judgement is required. The essence of such judgement is the lawyer's educated ability to relate the general body and philosophy of law to a specific legal problem. The public is better served by those who have met rigorous educational requirements, have been certified of honest demeanor and good moral character, and are subject to high ethical standards and strict disciplinary rules in the conduct of their practice.

By statute, any person practicing law without being duly authorized or licensed is guilty of a misdemeanor. The Attorney General of Virginia may leave the prosecution to the local attorney for the Commonwealth, or he may in his discretion institute and conduct such proceedings.

The courts of the Commonwealth have the inherent power, apart from statute, to inquire into the conduct of any person to determine whether he is illegally engaged in the practice of law, and to enjoin such conduct. The State Corporation Commission of Virginia may order the dissolution of any corporation or revoke its certificate of authority to transact business in the Commonwealth upon a finding that any officer, member, agent or employee thereof has been engaged in the unauthorized practice of law.

Any fees charged by a person engaged in the unauthorized practice of law are not collectible in court.

Any lawyer who aids a non-lawyer in the unauthorized practice of law is subject to discipline and disbarment. A lawyer has an affirmative duty to report unprivileged knowledge of such misconduct by another lawyer to the appropriate District Committee, and to discontinue his representation of a client when he discovers that his employment furthers the unauthorized practice of law by the client. Advisory opinions on the unauthorized practice of law, therefore, are as much intended to assist lawyers in fulfilling their ethical responsibilities as to inform and deter those who are engaged, or would engage, in such practice in derogation of the public's interest in a trained and regulated legal profession.

With the increase in the complexity of our society and its laws, the independence and integrity of a strong legal profession, devoted disinterestedly to those requiring legal services, are crucial to a free and democratic society. Allegiance to this principle, rather than the preservation of economic benefits for lawyers, is the basis upon which the Virginia State Bar, as the Administrative agency of the Supreme Court of Virginia, carries forward the responsibility for the discipline of lawyers and the investigation of persons practicing law in the Commonwealth without proper authority.

Practice of Law in The Commonwealth of Virginia

(A) No non-lawyer shall engage in the practice of law in the Commonwealth of Virginia or in any manner hold himself out as authorized or qualified to practice law in the Commonwealth of Virginia except as may be authorized by rule or statute.

(B) *Definition of the Practice of Law.* - The principles underlying a definition of the practice of law have been developed through the years in social needs and have received recognition by the courts. It has been found necessary to protect the relation of attorney and client against abuses. Therefore, it is from the relation of attorney and client that any practice of law must be derived.

The relation of attorney and client is direct and personnel, and a person, natural or artificial, who undertakes the duties and responsibilities of an attorney is nonetheless practicing law though such person may employ others to whom may be committed the actual performance of such duties.

The gravity of the consequences to society resulting from abuses of this relation demands that those assuming to advise or to represent others shall be properly trained and educated, and be subject to a peculiar discipline. That fact, and the necessity for protection of society in its affairs and in the ordered proceedings of its tribunals, have developed the principles which serve to define the practice of law.

Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever -

1. One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
2. One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.
3. One undertakes, with or without compensation, to represent the interest of another before any tribunal - judicial, administrative, or executive - otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.

(C) *Definition of 'Non-Lawyer'.* - The term "non-lawyer" means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia.

However, the term "non-lawyer" shall not include foreign attorneys who provide legal advice or services in Virginia to clients under the following restrictions and qualifications:

1. Such foreign attorney must be admitted to practice and in good standing in any state in the United States; and
2. The services provided must be on an occasional basis only and incidental to representation of a client whom the attorney represents elsewhere; and
3. The client must be informed that the attorney is not admitted in Virginia.

A lawyer who provides services not authorized under this rule must associate with an attorney authorized to practice in Virginia.

Nothing herein shall be deemed to overrule or contradict the requirements of Rules of this Court regarding foreign attorneys admitted to practice in the courts of the Commonwealth of Virginia including the association of counsel admitted to practice before the courts of this Commonwealth.

A lawyer who provides services as authorized under this rule, or who is admitted pro hac vice under Rule 1A:4 shall, with regard to such services or admission, be bound by the disciplinary rules set forth in the Virginia Code of Professional Responsibility.

Failure of the foreign attorney to comply with the requirements of these provisions shall render the activity by the attorney in Virginia to be the unauthorized practice of law.

(D) The unauthorized Practice rules which follow represent a nonexclusive list of specific types of practice which would violate these rules.

Cross references. - For penalty provisions for the unauthorized practice of law, see § 54.1-3904. For authority of Attorney General to institute proceedings, see § 2.1-124. For unauthorized practice of law opinions, see the Legal Ethics and Unauthorized Practice Opinions Volume of the code of Virginia.

Editor's note. - The unauthorized practice considerations and rules which follow are derived from the Virginia Rules of Court, Part Six, § I; 171 Va. xvii (1938); 216 Va. 1062 (1976). Part Six, § IV, Paragraph 10 of the Rules of Court prescribes the procedures governing petitions for and promulgating and publication of advisory unauthorized practice of law opinions by the council of the Virginia State Bar. Section Ia (now Section I) of the Rules was originally published as an Appendix to Paragraph 10 of Section IV. See 221 Va. 381 (1980). The designation for each UPL advisory opinion as "Rule 6.1-1, Rule 6.1-2" etc., has been amended; they are now designated "unauthorized Practice Rule 1," etc. Unauthorized Practice Rules 8 and 9 were published at 221 Va. 1147 (1981). Unauthorized Practice Rules 6 and 7 were adopted by the Supreme Court on Oct. 16, 1981, effective Jan. 1, 1982, but were not originally published in the Virginia Reports. The amendment, effective September 18, 1996, adopted September 18, 1996, in subdivision (C), added the last sentence of the introductory paragraph, added subdivisions (1) through (3), and added the concluding paragraphs.

Law review. - For article, "Virginia: the Unauthorized Practice of Law Experience," see 19 U.Rich. L. Rev. 499(1985).

Representation of client at bankruptcy proceeding. - Appearance on behalf of a client at a § 341 bankruptcy proceeding constitutes the practice of law in Virginia. Duncan v. Garrett (In re Tanksley), 174 Bankr. 434 (Bankr. W. D. Va. 1994).

Applied in Commonwealth Virginia State Bar v. Jones & Robins, Inc., 186 Va. 30, 41 S.E.2d 720 (1947); NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965).

Appendix C: Code of Virginia

Chapter 21.2 - Mediation

§ 8.01-581.21. Definitions. - As used in this chapter:

"Mediation" means the process by which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between the mediator and any party or parties, until such time as a resolution is agreed to by the parties or the parties discharge the mediator.

"Mediation Program" means a program through which mediators or mediation is made available and includes the director, agents and employees of the program.

"Mediator" means an impartial third party selected by agreement of the parties to a controversy to assist them in mediation.

§ 8.01-581.22. Confidentiality; exceptions. - All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation which relates to the controversy being mediated, whether made to the mediator or a party, or to any other person if made at a mediation session, is confidential. However, a mediated agreement shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator and a party to the mediation for damages arising out of the mediation, or (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation.

§ 8.01-581.23. Civil immunity. - Mediators and mediation programs 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.

Appendix D: Code of Virginia

Chapter 20.2 - Dispute Resolution Proceedings

§ 8.01-576.4. Definitions. - As used in this chapter:

"Conciliation" means a process in which a neutral facilitates settlement by clarifying issues and serving as an intermediary for negotiations in a manner which is generally more informal and less structured than mediation.

"Court" means any juvenile and domestic relations district court, general district court, circuit court, or appellate court, and includes the judges and any intake specialist to whom the judge has delegated specific authority under this chapter.

"Dispute resolution proceeding" means any structured process in which a neutral assists disputants in reaching a voluntary settlement by means of dispute resolution techniques such as mediation, conciliation, early neutral evaluation, nonjudicial settlement conferences or any other proceeding leading to a voluntary settlement conducted consistent with the requirements of this chapter. The term includes the evaluation session.

"Dispute resolution program" means a program that offers dispute resolution services to the public which is run by the Commonwealth or any private for-profit or not-for-profit organization, political subdivision, or public corporation, or a combination of these.

"Dispute resolution services" includes screening and intake of disputants, conducting dispute resolution proceedings, drafting agreements and providing information or referral services.

"Evaluation session" means a preliminary meeting during which the parties and the neutral assess the case and decide whether to continue with a dispute resolution proceeding or with adjudication.

"Intake specialist" means an individual who is trained in analyzing and screening cases to assist in determining whether a case is appropriate for referral to a dispute resolution proceeding.

"Mediation" means a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.

"Neutral" means an individual who is trained or experienced in conducting dispute resolution proceedings and in providing dispute resolution services.

§ 8.01-576.5. Referral of disputes to dispute resolution proceedings. - While protecting the right to trial by jury, a court, on its own motion or on motion of one of the parties, may refer any contested civil matter, or selected issues in a civil matter, to a dispute resolution evaluation session in order to encourage the early settlement of disputes through the use of procedures that facilitate (i) open communication between the parties about the issues in the dispute, (ii) full exploration of the range of options to resolve the dispute, (iii) improvement in the relationship between the parties, and (iv) control by the parties over the outcome of the dispute. The court shall set a date for the parties to return to court in accordance with its regular docket and procedure, irrespective of the referral to an evaluation session. The parties shall notify the court, in writing, if the dispute is resolved prior to the return date.

Upon such referral, the parties shall attend one evaluation session unless excused pursuant to §8.01-576.6. Further participation in a dispute resolution proceeding shall be by consent of all parties. Attorneys for any party may be present during a dispute resolution proceeding.

§ 8.01-576.6. Notice and opportunity to object. - When a court has determined that referral to a dispute resolution evaluation session is appropriate, an order of referral to a neutral or to a dispute

resolution program shall be entered and the parties shall be so notified as expeditiously as possible. The court shall excuse the parties from participation in a dispute resolution evaluation session if, within fourteen days after entry of the order, a written statement signed by any party is filed with the court, stating that the dispute resolution process has been explained to the party and he objects to the referral.

§ 8.01-576.7. Costs. - The evaluation session shall be conducted at no cost to the parties. Unless otherwise provided by the statute or agreed to by the parties and the neutral, the court may set a reasonable fee for the services of any neutral to whom a case is referred by the court as provided in §8.01-576.8. Prior to setting the rate and method of payment pursuant to this chapter, the court shall determine whether any of the parties is indigent. If it is determined that one or more of the parties is indigent and no agreement as to payment is reached between the parties, the court shall refer the case to a dispute resolution program that offers services at no charge to the parties or to a neutral who has agreed to accept cases on a pro bono or volunteer basis. If it is determined that neither of the parties is indigent, and the parties have not selected a dispute resolution program that offers services at no cost nor agreed with the neutral as to another method of payment, the judge may assess the fees of the neutral as costs of suit.

§ 8.01-576.8. - Qualifications of neutrals; referral. - A neutral who provides dispute resolution services other than mediation pursuant to this chapter shall provide the court with a written statement of qualifications, describing the neutral's background and relevant training and experience in the field. A mediator who desires to receive referrals from the court shall be certified pursuant to guidelines promulgated by the Judicial Council of Virginia. A dispute resolution program may satisfy the requirements of this section on behalf of its neutrals by providing the court with a written statement of the background, training, experience and certification, as appropriate, of any neutral who participates in its program.

The court shall maintain a list of neutrals and dispute resolution programs which have met the requirements of this section. The list may be divided among the areas of specialization or expertise maintained by the neutrals. At the conclusion of the evaluation session, or no later than ten days thereafter, parties electing to continue with the dispute resolution proceeding may: (i) continue with the neutral who conducted the evaluation session, (ii) select any neutral or dispute resolution program from the list maintained by the court to conduct such proceedings, or (iii) pursue any other alternative for voluntarily resolving the dispute to which the parties agree. If the parties choose to proceed with the dispute resolution proceeding but are unable to agree on a neutral or dispute resolution program during that period, the court shall refer the case to a neutral or dispute resolution program on the list maintained by the court on the basis of a fair and equitable rotation, taking into account the subject matter of the dispute and the expertise of the neutral, as appropriate.

§ 8.01-576.9. Standards and duties of neutrals; confidentially; liability. - A neutral selected to conduct a dispute resolution proceeding under this chapter may encourage and assist the parties in reaching a resolution of their dispute, but may not compel or coerce the parties into entering into a settlement agreement. A neutral has an obligation to remain impartial and free from conflict of interests in each case, and to decline to participate further in a case should such partiality or conflict arise. Unless expressly authorized by the disclosing party, the neutral may not disclose to either party information relating to the subject matter of the dispute resolution proceeding provided to him in confidence by the other. In reporting on the outcome of the dispute resolution proceeding to the referring court, the neutral shall indicate only the terms of any agreement reached or the fact that no agreement was reached. The neutral shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the dispute resolution proceeding, unless the parties otherwise agree.

However, where the dispute involves the support of minor children of the parties, the parties shall disclose between themselves and to the neutral the information to be used in completing the child support guidelines worksheet required by §20-108.2. The guidelines computations and any reasons for deviation shall be incorporated in any written agreement between the parties.

With respect to liability, the provisions of §8.01-581.23 shall apply in claims arising out of services rendered by any neutral.

§ 8.01-576.11. Effect of written settlement agreement. - If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. Upon request of all parties and consistent with law and public policy, the court shall incorporate the written agreement into the terms of its final decree disposing of a case. In cases in which the dispute involves support for the minor children of the parties, an order incorporating a written agreement shall also include the child support guidelines worksheet and, if applicable, the written reasons for any deviation from the guidelines. The child support guidelines worksheet shall be attached to the order.

§ 8.01-576.12. Vacating orders and agreements. - Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a dispute resolution proceeding pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where:

1. The agreement was procured by fraud or duress, or is unconscionable;
2. If the property or financial matters are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or
3. There was evident partiality or misconduct by the neutral, prejudicing the rights of any party

For purposes of this section, "misconduct" includes failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice, (ii) any mediated agreement will effect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement or should waive his opportunity to do so.

The fact that any provisions of a mediated agreement were such that they could not or would not be granted by a court of law or equity is not, in and of itself, grounds for vacating an agreement. A motion to vacate under this section shall be made within two years after the mediated agreement is entered into, except that, if predicated upon fraud, it shall be made within two years after these grounds are discovered or reasonably should have been discovered.

Appendix E - Guidelines for the Training and Certification of Court-Referred Mediators

Appendix F - Standards of Ethics and Professional Responsibility for Certified Mediators

Appendix G - Virginia Rules of Professional Conduct

The Virginia Rules of Professional Conduct were adopted by the Supreme Court of Virginia on January 25, 1999, to become effective January 1, 2000.

RULE 2.10. - Third Party Neutral

a. A third party neutral assists parties in reaching a voluntary settlement of a dispute through a structured process known as a dispute resolution proceeding. The third party neutral does not represent any party.
b. A lawyer who serves as a third party neutral
    1. shall inform the parties of the difference between the lawyer's role as third party neutral and the lawyer's role as one who represents a client;
    2. shall encourage unrepresented parties to seek legal counsel before an agreement is executed; and
    3. may encourage and assist the parties in reaching a resolution of their dispute; but
    4. may not compel or coerce the parties to make an agreement.
c. A lawyer may serve as a third party neutral only if the lawyer has not previously represented and is not currently representing one of the parties in connection with the subject matter of the dispute resolution proceeding.
d. A lawyer may serve as a third party neutral in a dispute resolution proceeding involving a client whom the lawyer has represented or is representing in a matter unrelated to the mediation, provided
    1. there is full disclosure of the prior or present representation;
    2. in light of the disclosure, the third party neutral obtains the parties' informed consent; and
    3. the third party neutral reasonably believes that a prior or present representation will not compromise or adversely affect the ability to act as a third party neutral; and
    4. there is no unauthorized disclosure of information in violation of Rule 1.6.
e. A lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.
f. A lawyer shall withdraw as third party neutral if any of the requirements stated in this Rule is no longer satisfied or if any of the parties in the dispute resolution proceeding so requests. If the parties are participating pursuant to a court referral, the third party neutral shall report the withdrawal to the authority issuing the referral.
g. A lawyer who serves as a third party neutral shall not charge a fee contingent on the outcome of the resolution proceeding.
h. This Rule does not apply to intermediation, which is covered by Rule 2.2.

Comment

1. This Rule sets forth conflicts of interest and other ethical guidelines for a lawyer who serves as a third party neutral. Dispute resolution proceedings that are conducted by a third party

neutral include mediation, conciliation, early neutral evaluation, non-binding arbitration and non-judicial settlement conferences.

2. A lawyer who serves as a third party neutral under this Rule or as a mediator under Rule 2.11 is engaged in the provision of a law-related service that may involve the application of a lawyer's particular legal expertise and skills. The standards set forth in this Rule, however, do not amount to a determination that a lawyer who serves as a third party neutral pursuant to this Rule or as a mediator pursuant to Rule 2.11 is engaged in the practice of law. The determination of whether a particular activity constitutes the practice of law is beyond the scope and purpose of these Rules.
3. A lawyer serving as third party neutral shall not offer any of the parties legal advice, which is a function of the lawyer who is representing a client (See Preamble: A Lawyer's Responsibilities). A third party neutral may, however, offer neutral evaluations, if requested by the parties. Special provisions under which a lawyer-mediator can offer certain neutral evaluations are contained in Rule 2.11.
4. Confidentiality of information revealed in the dispute resolution process is governed by Code of Virginia Sections 8.01-576.9 and 8.01-576.10.
5. A third party neutral as defined in these Rules does not include a lawyer providing binding arbitration services (See Code of Virginia Section 8.01-577 et. seq.).

Committee Commentary

The Committee adopted this Rule, not part of the ABA Model Rules, to provide guidelines for lawyers who serve as neutrals and who do not represent a party to a dispute or transaction.

RULE 2.11. - Mediator

a. a lawyer-mediator is a third party neutral (See Rule 2.10) who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.
b. Prior to agreeing to mediate and throughout the mediation process a lawyer-mediator should reasonably determine that:
    1. mediation is an appropriate process for the parties;
    2. each party is able to participate effectively within the context of the mediation process; and
    3. each party is willing to enter and participate in the process in good faith.
c. A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent. The lawyer-mediator shall inform unrepresented parties or those parties who are not accompanied by legal counsel about the importance of reviewing the lawyer- mediator's legal information with legal counsel.
d. A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.
e. Prior to the mediation session a lawyer-mediator shall:
    1. consult with prospective parties about
        i. the nature of the mediation process;
        ii. the limitations on the use of evaluation, as set forth in subparagraph (d) above;

iii. the lawyer-mediator's approach, style and subject matter expertise; and
iv. the parties' expectations regarding the mediation process; and

2. enter into agreement to mediate which references the choice and expectations of the parties, including whether the parties have chosen, permit or expect the use of neutral evaluation or evaluative techniques during the course of the mediation.

f. A lawyer-mediator shall conduct the mediation in a manner that is consistent with the parties' choice and expectations.

Comment

[1] Offering assessments, evaluations, and advice are traditional lawyering functions for the lawyer who represents a client. A lawyer-mediator, who does not represent any of the parties to the mediation, should not assume that these functions are appropriate. Although these functions are not specifically prohibited in the statutory definition of mediation which is set forth as subparagraph (a) of this Rule, an evaluative approach which interferes with the parties' self-determination and the mediator's impartiality would be inconsistent with this definition of mediation.

[2] Defining mediation to exclude an evaluative approach is difficult not only because practice varies widely but because no consensus exists as to what constitutes an evaluation. Also, the effects of an evaluation on the mediation process depend upon the attitude and style of the mediator and the context in which it is offered. Thus, a question by a lawyer-mediator to a party that might be considered by some as "reality testing" and facilitative, might be viewed by others as evaluation. On the other hand, an evaluation by a facilitative mediator could help free the parties from the narrowing effects of the law and help empower them to resolve their dispute.

Informed Consent to Mediator's Approach

[3] The Rule focuses on the informed consent of the prospective mediation clients to the particular approach, style and subject matter expertise of the lawyer-mediation. This begins with consultation about the nature of the mediation process, the limitations on evaluation, the lawyer-mediator's approach, style and subject matter expertise and the parties' expectations regarding the mediation process. If the parties request an evaluative approach, the lawyer-mediator shall explain the risk that evaluation might interfere with mediator impartiality and party self-determination. Following this consultation the lawyer-mediator and the parties shall sign a written agreement to mediate which reflects the choice and expectation of the parties. The lawyer-mediator shall then conduct the mediation in a manner that is consistent with the parties' choice and expectations. This is similar to the lawyer-client consultation about the means to be used in pursuing a client's objectives in Rule 1.2.

Continuing Responsibility to Examine Potential Impact of Evaluation

[4] If the parties choose a lawyer-mediator who is willing and able to offer evaluation during the mediation process and has met the requirements of subparagraph (e), a lawyer-mediator has a continuing responsibility under subparagraphs (b) and (d) to assess the situation and consult with the parties before offering or responding to a request for an evaluation. Consideration shall be given again to whether mediator impartiality and party self-determination are at risk. Consideration should also be given as to whether an evaluation could detract from the willingness of the parties to work at understanding their own and each other's situation and at considering a broader range of interests,

issues and options. Also, with an evaluation the parties may miss out on opportunities to maintain or improve relationships or to create a higher quality and more satisfying result.

[5] On the other hand, the parties may expect the lawyer-mediator to offer an evaluation in helping the parties reach agreement, especially when the most important issues are the strengths or weaknesses of legal positions, or the significance of commercial or financial risks. This is particularly useful after parties have worked at possible solutions and have built up confidence in the mediator's impartiality or where widely divergent party evaluations are major barriers to settlement.

[6] The presence of attorneys for the parties offers additional protection in minimizing the risk of a poor quality evaluation and of too strong an influence on the parties' self-determination. An evaluation, coupled with a reminder to the parties that the evaluation is but one of the factors to be considered as they deliberate on the outcome, may in certain cases be the most appropriate way to assure that the parties are making fully informed decisions.

Legal Advice, Legal Information and Neutral Evaluation

[7] A lawyer-mediator shall not offer any of the parties legal advice which is a function of the lawyer who is representing a client. However, a lawyer-mediator may offer legal information under the conditions outlined in subsection (c). Offering legal information is an educational function which aids the parties in making informed decisions. Neutral evaluations in the mediation process consist of, for example, opining as to the strengths and weaknesses of positions, assessing the value and costs of alternatives to settlement or assessing the barriers to settlement.

[8] The lawyer-mediator shall not, however, make decisions for any party to the mediation process nor shall the lawyer-mediator use a neutral evaluation to coerce or influence the parties to settle their dispute or to accept a particular solution to their dispute. Subparagraphs (d), (e), and (f) restrict the use of evaluative techniques by the lawyer-mediator to situations where the parties have given their informed consent to the use of such techniques and where a neutral evaluation will assist, rather than interfere with the ability of the parties to reach a mutually agreeable solution to their dispute.

Mediation and Intermediation

[9] While a lawyer is cautioned in the Comment to Rule 2.2 not to act as intermediary between clients where contentious litigation or negotiation is expected, this should not deter a lawyer-mediator from accepting clients for mediation. Unlike intermediation, where the lawyer represents all parties, a lawyer-mediator represents none of the parties and should be trained to deal with strong emotions. In fact mediation can be especially useful in a case where communication and relational breakdown have made negotiation or litigation of legal issues more difficult.

Confidentiality and Professional Responsibility Standards

[10] Confidentiality of information revealed in the mediation process is governed by Code of Virginia Sections 8.01-576.09 and 8.01-576.10 and section 8.01-581.22.

Committee Commentary

The committee adopted this Rule, not part of the ABA Model Rules, to give further guidance to lawyers who serve as mediators. Although Legal Ethics Opinions (such as LEO 590 (May 17, 1985))

have approved of lawyers serving as mediators, different approaches to and styles of mediation ranging from pure facilitation to evaluation of positions are being offered. This Rule requires lawyer-mediators to consult with prospective parties about the lawyer-mediators' approach and style and to honor the parties' choice and expectations.

Appendix H - Legal Ethics Opinion No. 1368

Mediation-Arbitration: Attorneys Forming Lay Corporation to Provide Mediation/Arbitration Services to Corporation's Customers

You have indicated that Attorneys A and B are the sole shareholders of Virginia Corporation X which was formed for the purpose of providing mediation and arbitration services, in all fields except domestic relations, to the general public. Mediation and arbitration services will be provided by A and B, as well as by other attorneys, on an independent contractual basis with Corporation X. Each mediator or arbitrator will disclose to the parties at the outset that although he/she is a licensed attorney, he/she will not be serving as an attorney and will not provide legal advice at any time to any person during or in connection with the mediation or arbitration process.

Further, you advise that Corporation X will charge an administrative fee, to be totally retained by the Corporation, and an hourly fee for the services of the mediator or arbitrator, a portion of which will be paid to the mediator or arbitrator and the remainder of which will be retained by the Corporation. With specific regard to mediation, you indicate that the lawyer/mediators would agree in advance that they (1) will clearly inform the parties of the lawyer's role and will obtain the parties' consent to this arrangement; (2) will draft settlement agreements but only after advising and encouraging the parties to seek independent legal advice before executing it; (3) will not act on behalf of any party in court nor representing one party against the other in any related legal proceeding; and (4) will withdraw as mediator if any party so requests or if any of the conditions (1) through (3) above are no longer satisfied, following which withdrawal the lawyer/mediator will not continue to act on behalf of any of the parties in the matter that was the subject of the mediation. Finally, you indicate that potential arbitrators and mediators who have prior relationships with parties will not be appointed to serve in a dispute involving such parties.

You have inquired if the scenario you present violates any disciplinary rules. In addition, you have asked the committee to consider specifically the propriety of (1) Attorneys A and B, who will serve as mediators or arbitrators, soliciting business for Corporation X from other attorneys, insurance carriers and the general public; and (2) attorneys entering into contractual arrangements with Corporation X in which the hourly fee charges for the mediator's or arbitrator's services is split between the corporation and the mediator.

Based on the descriptions you have provided as to the activities involved in the proposed mediation/arbitration endeavor, and upon Virginia Code § 8.01-581.21 which defined a mediator as "an impartial third party" without regard to that individual's status as an attorney, the committee is of the view that such activities do not constitute the per se practice of law. Therefore, the committee opines that the Code of Professional Responsibility has only limited application to the circumstances you describe. Although the facts, as you have presented them, indicate that the attorney/mediators will not be serving as attorneys and will not be providing legal advice to the parties, the committee is of the view that the activities involved in mediation and the subject matter to which the mediation is addressed closely resemble the practice of law. The committee believes that providing legal information, albeit not legal advice, and assisting individuals to reach agreement on such issues as division of property, contractual obligations, liability and damages, by definition, entails the application of legal knowledge and training to the facts of the situation, See

LEO #511, 513, 516, 519. Therefore, under the rationale of LEO #1325 and ABA Opinion 336, the committee believes that such activities subject the attorney/mediator to the provisions of the Code of Professional Responsibility while carrying out the tasks involved in mediation.

The committee has consistently recognized the permissibility of lawyers engaged simultaneously in the practice of law and related entrepreneurial endeavors. Thus, the committee is of the opinion that the solicitation of business for Corporation X, as you describe, would not be improper. The committee cautions, however, that the attorneys' ownership interest in the mediation/arbitration enterprise, Corporation X, may constitute the type of financial, business, property or personnel interest envisioned by DR 5-101(A). Thus, before referring a client to Corporation X, or before accepting representation of a client who was theretofore served by Corporation X, albeit by another mediator or arbitrator, Attorneys A and B must obtain the consent of the client after full and adequate disclosure of the attorney's personal interest. See LEOs #1345, 1254, 1198, 1131, 939, 512, 187. In addition, Ethical Consideration 5-20 provides specific direction regarding the provision of mediation services by attorneys and their subsequent professional relationships with the parties involved. See LEOs #849, 590, 544, 519, 516, 513, 511.

With regard to your question (2), related to the splitting of fees between the mediator and Corporation X, the committee is of the opinion that, since the business of Corporation X does not constitute the practice of law, the prohibitions of the Code of Professional Responsibility against sharing fees with non-lawyers are inapplicable in the usual course of the business of Corporation X. To the extent that the mediator is engaged by the parties as a scrivener of the agreement reached during the mediation process, such tasks do not constitute the practice of law and, therefore, fees paid for that service are not deemed to be legal fees. Should, however, the mediator/lawyer provide any services beyond those of a scrivener, the mediator/lawyer must meet the requirements of DR 3-102, which prohibit the sharing of legal fees with a nonlawyer, and DR 5-107, relative to settling similar claims of clients. See Kansas Opinion 84-8 (10/4/84), ABA/BNA Law. Man. on Prof. Conduct 801:3818; Association of the Bar of the City of New York Opinion 1987-1(2/23/87), ABA/BNA Law. Man. on Prof. Conduct 901:6404; Tennessee Ethics Opinion 83-F-39 (1/25/83), ABA/BNA Law. Man. on Prof. Conduct 801:8107.

Finally, the committee cautions that, as in any other activities engaged in by members of the Bar, any criminal or deliberately wrongful act, or any conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law would be improper and violative of DR 1-102(A)(3 and 4) and would subject the attorney to disciplinary action. See ABA Formal Opinion 336; LEO #1325 at 3.

Committee Opinion
December 12, 1990

Appendix I - Legal Ethics Opinion No. 107

Foreign Attorneys-Scope of Permissible Practice

It is not the unauthorized practice of law for a non-Virginia licensed attorney to do "client intakes" - providing that this involves nothing more than the gathering of factual data. [UPR Definition (A)]

It is the unauthorized practice of law for a non-Virginia licensed attorney to render legal advice in Virginia - either on Virginia law or the law of his home jurisdiction. However, it is permissible for this

non-Virginia attorney to advice a Virginia attorney who may then render advice to a client if he deems this advice acceptable. [UPR definition (A)(1), (B)]

A non-Virginia licensed attorney may render advice and execute cases in Virginia involving federal law.[UPL Op.No.55,;UPR 9-102(A)(2)]

An attorney licensed in a foreign country should be referred to and identified as a lawyer licensed to practice in that foreign country only.{DR 3-104(E); UPR Definition B]

Committee Opinion
August 14, 1987

Appendix J - Issues for Future Study

During the course of development of these Guidelines, a number of issues were raised that are beyond the scope of this project and are referred for future study by the appropriate entities.

1. Licensure or certification for all mediators
2. Supreme Court Rule revisions
3. Review of the mediation and dispute resolution proceedings statutes including the statutory immunity provision
4. Professional liability insurance for mediators