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A PROPOSED CONFLICT OF INTEREST RULE FOR ATTORNEY-MEDIATORS

Michelle D. Gaines

Abstract: Maintaining the success and fairness of mediation requires mediators to be impartial toward all parties and to protect the confidentiality of mediation sessions. Attorney-mediators encounter conflicts of interest, based on prior or subsequent representation of clients, that can disrupt impartiality or confidentiality. When attorneys practice mediation, it is unclear where they should look for guidance: attorney rules of professional conduct, mediator ethical standards, or both. Additionally, attorney-mediators encounter unique issues that ethical guidelines designed for attorneys or mediators do not address adequately. This Comment proposes a comprehensive conflict of interest rule for inclusion in the Rules of Professional Conduct that is tailored specifically to attorney-mediators.

The integrity of mediation as an alternative form of dispute resolution depends largely on the ethics of mediators. To promote the success of the process and protect the rights of the parties, mediators must remain impartial and must preserve the confidentiality of mediation sessions. Conflicts of interest involving past or future professional relationships can undermine confidentiality and call into question mediators' impartiality. Attorneys who practice both mediation and law are particularly likely to find themselves in situations where the role of "impartial mediator" conflicts with the role of "loyal advocate."¹

The lack of clear ethical guidance for attorney-mediators has become more apparent as more attorneys have entered the practice of mediation. Ethical standards for mediators vary from non-existent to highly comprehensive depending on the jurisdiction. Even in jurisdictions with comprehensive mediator ethical guidelines, the relative authority of attorney rules of professional conduct and mediator ethical standards may not be clear to attorney-mediators.

The Washington State Rules of Professional Conduct (Washington Rules) were amended in 1993 to bring attorney-mediators under the

1. Attorney-mediators face many other difficult ethical dilemmas. Indeed, it has been suggested that all mediators should be specifically governed by comprehensive ethics rules covering areas such as "self-determination," "impartiality," "competence," "fees," "advertising and solicitation," and "confidentiality." AAA/ABA/SPIDR Model Standards of Conduct for Mediators, reprinted in John D. Feerick, *The Lawyer's Duties and Responsibilities in Dispute Resolution: Toward Uniform Standards of Conduct for Mediators*, 38 S. Tex. L. Rev. 455 app. A, at 478-84 (1997) [hereinafter Model Standards]; see also Ala. Code of Ethics for Mediators (Michie 1996); Iowa Code Ann. app. § 598 (West 1996).

conflict of interest rule for judges, arbitrators, and law clerks.² Although this amendment acknowledges the need for conflict of interest rules governing attorney-mediators, its provisions are ultimately inadequate. Recent case law, rules adopted in other jurisdictions, and ethical guidelines promulgated by professional organizations demonstrate that the unique advocacy relationship between attorneys and clients calls for a more comprehensive conflict of interest rule for attorney-mediators than Washington Rule 1.12, and its counterparts in other states, provide.

Part I of this Comment provides background on mediation and the need for conflict of interest rules for attorney-mediators. Part II describes the current approaches to resolving conflicts. Part III argues that the current approaches are inadequate. It proposes a comprehensive conflict of interest rule for attorney-mediators that should be adopted as part of the Rules of Professional Conduct in all states.

I. MEDIATION AND POTENTIAL CONFLICTS FOR ATTORNEY-MEDIATORS

A. *The Function and Nature of Mediation*

Mediation differs from other forms of dispute resolution because it is informal and facilitated by impartial mediators who lack authority to command decisions.³ In essence, mediators help conflicting parties voluntarily reach a settlement.⁴ Unlike arbitration and mediation-arbitration ("med-arb"), mediation parties are not bound to abide by the decisions of the mediator.⁵ Mediation also differs from negotiation, which is less formal than mediation and generally takes place between the parties or their attorneys without the aid of an outside facilitator.

2. Washington Rule of Professional Conduct Rule 1.12 (1995).

3. Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Disp. Resol. 1, 5-6 (1995).

4. Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflicts* 14 (1st ed. 1986); see also Model Standards, preface, *supra* note 1, at 478; Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. Fla. L. Rev. 19, 24 (1985).

5. George Friedman, *A Guide to Mediation and Arbitration for Business People*, in *Insurance Coverage Litigation 1998*, at 361, 367 (PLI Litig. & Admin. Practice Course Handbook Series No. 577, 1998).

Despite these identifiable characteristics, mediation is not easily defined. The increasing use⁶ and lack of regulation of mediation⁷ have created opportunities for many different types of professionals to practice mediation in a variety of settings, for a variety of purposes.⁸ Mediators come from many walks of life; they may be attorneys, therapists, counselors, or employees of administrative agencies.⁹ The diversity among mediators and the freedom to experiment produce a wide range of styles and procedures¹⁰ that fall along a continuum, ranging from primarily evaluative to primarily facilitative.¹¹

The context of the mediation and preferences of the parties often affect the role and responsibilities of the mediator.¹² For example, in a complex, "high stakes" case, such as a labor mediation, where the parties would likely be represented by legal counsel, the process may remain somewhat adversarial.¹³ In such settings, mediation is used to resolve material differences while preserving business relationships and avoiding

6. Because there are many types of mediation, it is difficult to quantify the increase in use of mediation. *See infra* note 8. Many jurisdictions encourage mediation through state-approved dispute resolution centers and mandatory mediation programs. *See, e.g.*, 710 Ill. Comp. Stat. Ann. 20/1 (West 1997) (dispute resolution centers); Wash. Rev. Code § 7.75.010 (1996); Island and San Juan Counties, Wash., L.R. 23 (West 1998) (mandatory mediation); *see also* John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 Fla. St. U. L. Rev. 839, 839–40 (1997); Sharon Press, *Building and Maintaining a State-Wide Mediation Program: A View from the Field*, 81 Ky. L.J. 1029, 1029 (1993).

7. Washington, like many jurisdictions, has no certification or licensing requirements covering all mediators, so anyone can offer mediation services. In many court-adjunct mediation programs, only court-approved mediators who meet certain criteria are allowed to mediate. *See, e.g.*, Island and San Juan Counties, Wash., L.R. 23(3). *See generally* Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct of Mediators*, 2 Harv. Negotiation L. Rev. 87, 96–97 (1997).

8. *See Note, The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 Harv. L. Rev. 1876, 1878–82 (1986) (discussing three general types of mediation: grass roots communitarian, professional problem-solving, and court-adjunct systems).

9. Telephone interview with Laura Pierson, Director of Dispute Resolution Center and Snohomish and Island Counties, Wash. (July 24, 1998).

10. *See* Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 Wash. U. L.Q. 47, 53–54 (1996) (noting wide variety of practices to which label "mediation" is attached); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negotiation L. Rev. 7, 8 (1996).

11. *See* Lande, *supra* note 6, at 850 n.40; Riskin, *supra* note 10, at 23–24.

12. *See* Lande, *supra* note 6, at 845, 853 (discussing different approaches to mediation, noting that "reconcilers" are likely to be community and family mediators, and observing that while "empowerers" are unlikely to be selected by parties represented by lawyers, they might be selected by disputants acting alone); Note, *supra* note 8, at 1877–78.

13. *Cf.* Lande, *supra* note 6, at 846 & n.23.

the costs and publicity of litigation.¹⁴ The mediator is often considered an expert who takes on a more evaluative and problem-solving role.¹⁵ Alternatively, in a more informal, “low-stakes” setting such as a neighborhood property line dispute, the parties may not be represented because litigation might not be a viable option. Here, the focus is often on enhancing the parties’ autonomy and empowering them to develop their own solutions.¹⁶ The mediator generally takes on a less active role, facilitating the process by emphasizing self-determination and improved communication, rather than stressing the most efficient settlement of material issues.¹⁷

B. The Importance of Mediator Impartiality and Confidentiality in Successful and Fair Mediation

Regardless of mediator style and context, the mediator’s impartiality is critical to the success of the mediation and the protection of the parties’ rights.¹⁸ Mediator impartiality¹⁹ instills trust, enables the parties to collaborate and share information with the mediator and other parties,²⁰ protects mediation agreements from subsequent challenges,²¹

14. *Id.*

15. See Note, *supra* note 8, at 1880 (describing community-based volunteer mediators as handling essentially private conflicts or interpersonal matters, in contrast to “highly-trained” problem-solving mediators).

16. Nolan-Haley, *supra* note 10, at 54–55 (discussing mediation’s effect of enhancing parties self-determinative capabilities).

17. *Id.*

18. See Henikoff & Moffitt, *supra* note 7, at 101 (noting importance of neutrality to virtually all proposed mediator ethics codes).

19. Practitioners and scholars debate the meaning of “neutral” and “impartial” and to what extent mediators can and should be neutral or impartial. See Leda M. Cooks & Claudia L. Hale, *The Construction of Ethics in Mediation*, 12 *Mediation Q.* 55, 62–63 (1994); see also Moore, *supra* note 4, at 15. In this Comment, the term “impartial” or “impartiality” will be used to signify an absence of relationships that might significantly impair the mediator’s ability to function in an unbiased manner toward the parties.

20. See *Poly Software Int’l, Inc. v. Su*, 880 F. Supp. 1487, 1494 (D. Utah 1995) (explaining success of mediation depends greatly upon mediator maintaining neutral stance while preserving confidences).

21. See *McEnany v. West Delaware County Community Sch. Dist.*, 844 F. Supp. 523, 532 (N.D. Iowa 1994) (involving challenge to validity of mediation settlement on grounds that mediator was biased through past representation of party by his law firm); John D. Feerick, *The Lawyer’s Duties and Responsibilities in Dispute Resolution: Toward Uniform Standards of Conduct for Mediators*, 38 *S. Tex. L. Rev.* 455, 466 (1997).

and helps prevent abuse of the process.²² In addition, an appearance of impartiality promotes public confidence in the fairness of the process.²³

Maintaining the confidentiality of mediation proceedings is equally important.²⁴ Mediators may learn confidential information through mediation sessions.²⁵ Many states, including Washington, protect mediation confidences through a statutory privilege that prevents mediation communications from being later used in court.²⁶ These statutes recognize that without a promise of confidentiality, parties might be unwilling to disclose information necessary for settlement, thus seriously hampering mediation's effectiveness.²⁷ The mediator's duty of confidentiality has also been recognized under contract theory, evidence

22. Because mediation occurs without the procedural protections of litigation and parties are sometimes not represented, mediators must monitor the process to ensure that it is not abused to the advantage of one side, and that any agreement is voluntary and meets minimal standards of societal fairness. See Feerick, *supra* note 21, at 462–63; Kirtley, *supra* note 3, at 8 n.38; see also Nolan-Haley, *supra* note 10, at 66–71; Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 Ariz. L. Rev. 329, 354–59 (1984). See generally Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. Tex. L. Rev. 541 (1997). Some jurisdictions address this issue in their mediator guidelines. See, e.g., Iowa Code Ann. app. § 598; Ala. Code of Ethics for Mediators § III, standard 1(b) (Michie 1996); Ga. Ct. R., Alternative Dispute Resolution Rules, app. C(A), standard I(B) (Michie 1998); R. 5 (West 1996); Kan. Ct. R. 903(a) (West 1998).

23. See Fla. Mediation R. 10.070(a) (West Supp. 1998). The need for an appearance of impartiality can be analogized to Washington's requirement that arbitrators disclose conflicts "when the relationship or circumstance creates a reasonable inference of the presence of bias or the absence of impartiality." *Hanson v. Shim*, 87 Wash. App. 538, 547, 943 P.2d 322, 327 (1997).

24. Kirtley, *supra* note 3, at 8–10. Scholars debate the proper role of confidentiality within mediation. See Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy & Practice* 14, 119 (2d ed. 1994); Feerick, *supra* note 21, at 469 & n.55; Sherman, *supra* note 22, at 542–44. However, most professional organization guidelines for mediators require some level of confidentiality. See, e.g., Va. Code Ann. § 8.01-576.9 (Michie Supp. 1997); Model Standards, *supra* note 1, at 481, standard V; see also Joel M. Douglas & Lynn J. Maier, *Divorce Mediation's Debt to Labor Mediation: Bringing the Parties Apart*, 49 Disp. Resol. J. 29, 34 (1994); Kirtley, *supra* note 3, at 1 n.4 (listing numerous sources addressing mediation confidentiality); Alison Smiley, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 Geo. J. Legal Ethics 213, 217, 245 (1993) (discussing reasons for confidentiality).

25. *McKenzie Constr. v. St. Croix Storage Corp.*, 961 F. Supp. 857, 862 (D.V.I. 1997); *Poly Software*, 880 F. Supp. at 1493–94.

26. Wash. Rev. Code §§ 5.60.070, 7.75.050 (1996). For a detailed list of mediation privilege statutes and rules in various states, see Kirtley, *supra* note 3, at 2–3 nn.6–7.

27. See, e.g., Wis. Stat. § 904.085(1) (West Supp. 1997) ("The purpose of this section is to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled."); *Poly Software*, 880 F. Supp. at 1494; see also Bruce A. Biltman, *Mediation in Florida: The Newly Emerging Case Law*, 70 Fla. B.J. 44, 50 (1996); Kirtley, *supra* note 3, at 8.

theory, and common law.²⁸ Although this duty to protect confidential information varies by jurisdiction and by the parameters set by each mediator,²⁹ it should at least extend to the expectations of the parties.³⁰

C. *Protecting Impartiality and Confidentiality: the Need for Conflict of Interest Rules for Attorney-Mediators*

When attorney-mediators alternate between the roles of impartial mediator and loyal advocate, unique conflict of interest problems arise that may interfere with the duties of impartiality and confidentiality.³¹ These conflicts of interest can be divided into two categories, according to the chronology of the relationships involved.³²

First, during mediation an attorney-mediator may have a conflict of interest based on prior or concurrent client representation.³³ The attorney's role as loyal advocate for clients raises doubts about his or her impartiality in a mediation between a former client and a third party. For example, one court has held that attorneys cannot represent clients in divorce proceedings and then impartially mediate in a subsequent divorce mediation.³⁴ Moreover, concurrent representation of a mediation party indicates an undeniable lack of impartiality and invites potential abuse of confidential information learned during mediation.

28. Kirtley, *supra* note 3, at 10–14.

29. Moore, *supra* note 4, at 160.

30. See Model Standards, *supra* note 1, at 481–82, standard VI. Cf. *Poly Software*, 880 F. Supp. at 1494.

31. See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer's Responsibilities*, 38 S. Tex. L. Rev. 407, 437–38; see also *McKenzie Constr. v. St. Croix Storage Corp.*, 961 F. Supp. 857, 859–60 (D.V.I. 1997); *Poly Software*, 880 F. Supp. at 1494–95; *McEnany v. West Delaware County Community Sch. Dist.*, 844 F. Supp. 523, 533 (N.D. Iowa 1994); *State v. Tolias*, 135 Wash. 2d 133, 954 P.2d 907 (1998).

32. Menkel-Meadow, *supra* note 31, at 434. Conflicts of interest of other types also arise, including material or personal conflicts of interest. See Model Rules of Professional Conduct Rule 1.8 (governing material conflicts of interest). Additionally, prior mediation could create conflicts of interest for later mediation. See Ala. Code of Ethics for Mediators § III, standard 5(b)(3). Both of these areas are beyond the scope of this Comment because they are not specific to attorney-mediators and do not directly relate to the attorney-mediator's cross-profession practice.

33. *McEnany*, 844 F. Supp. at 533 (involving challenge to validity of mediation settlement agreement on grounds that mediator's law firm previously represented one party); see also *Ebersole v. Ebersole*, No. 0115765, 1994 WL 146238, at *1 (Conn. Super. Ct. Apr. 19, 1994).

34. *Ebersole*, 1994 WL 146238, at *1.

Second, an attorney-mediator may encounter conflicts with clients based on prior mediation.³⁵ Subsequent representation of a party to a mediation or a client who is adverse to a former mediation party, in a matter that substantially relates to the mediation, can raise a conflict of interest between the attorney-mediator's duty to protect confidential information learned in mediation and his or her duty to advocate zealously for the new client. Furthermore, subsequent representation of such individuals on any matter might imply that the mediator was not unbiased during the mediation, or that he or she unethically used mediation to solicit clients.

In addition to these direct conflicts, conflicts may be imputed to attorney-mediators through conduct of other members of their firms. Attorney-mediator rules, like attorney-client imputed client rules, should provide guidance for attorney-mediators sharing professional and financial interests with associates who have prior, concurrent, or subsequent professional relationships with mediation parties.³⁶

II. CURRENT SOURCES OF CONFLICT OF INTEREST RULES FOR ATTORNEY-MEDIATORS

Several efforts have been made to address comprehensively the unique ethical issues facing attorney-mediators through specific tailoring of rules.³⁷ Professional associations have proposed guidelines to govern mediator ethics³⁸ and many jurisdictions have adopted court rules or statutes governing mediator ethics in general.³⁹ Other jurisdictions have merely applied the Model Rules of Professional Conduct (Model

35. In several cases, attempts have been made to disqualify attorneys for conflicts of interest based on past mediation. See *McKenzie Constr.*, 961 F. Supp. at 859; *Poly Software*, 880 F. Supp. at 1491-92; *Tolias*, 135 Wash. 2d at 135, 954 P.2d at 911; see also Feerick, *supra* note 21, at 464-66.

36. See *Poly Software*, 880 F. Supp. at 1490; Model Rules of Professional Conduct Rules 1.9(c), 1.10.

37. For a description of the most comprehensive of these guidelines, see *infra* note 88. For another set of standards that specifically addresses attorney-mediators, but does so less comprehensively, see ABA Standards of Practice for Lawyer Mediators in Family Disputes (1984), reprinted in Regulation of Lawyers: Statutes and Standards 633 (Stephen Gillers & Roy D. Simon, Jr. eds., 1993) [hereinafter ABA Standards for Family Mediators]; see also Proposed Standards of Practice for Lawyers Who Conduct Divorce and Family Mediation, ABA Family Law Section Task Force (July 1997) <www.mediate.com/ethics/abafamstds.cfm> (on file with author) [hereinafter Proposed Standards for Mediators].

38. See *infra* note 41.

39. See *infra* notes 50-56.

Rules).⁴⁰ However, none of the existing approaches adequately address all conflict of interest situations attorneys-mediators may face, and the multitude of different standards creates confusion rather than clarity.

A. *General Conflict of Interest Rules for Mediators*

No universal conflict of interest rules for mediators exist. Rather, a wide array of rules promulgated by professional organizations, courts, or legislatures govern mediator conduct.⁴¹ In 1994, the American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution proposed a set of comprehensive ethical guidelines for mediators: the Model Standards of Conduct for Mediators (Model Standards).⁴²

The Model Standards address conflicts of interest arising before, during, and after mediation.⁴³ A mediator must disclose to the parties "all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality for the mediation."⁴⁴ This requires mediators to disclose all current or past professional relationships with any party or lawyer involved in the mediation.⁴⁵ The parties can waive a conflict of interest after disclosure and consultation unless the conflict casts serious doubt on the integrity of the process.⁴⁶ Following mediation, a mediator may not, without the consent of the parties, "establish a professional relationship with one of the parties in a related matter, or in an unrelated

40. See *infra* Part II.B.2.

41. See Model Standards, *supra* note 1; AFM-AFCC Standards of Practice for Divorce and Family Mediation <www.mediate.com/ethics/afmstd.cfm> (on file with author); Code of Ethics of the American Arbitration Association for Arbitrators in Commercial Disputes (adopted 1977) in *Regulation of Lawyers: Statutes and Standards* 510–21 (Stephen Gillers & Roy D. Simon, Jr. eds., 1993). Other professional organizations have created internal rules guiding mediators who operate under the auspices of their programs. See, e.g., World Intellectual Property Organization Mediation Rules (Oct. 1, 1994) <www.arbiter.wipo.int/a_and_m_center/mediation-rules/index.html> (on file with author).

42. For text, see Feerick, *supra* note 1, at 478. The Model Standards have been adopted in whole or in part in at least two jurisdictions. See *infra* note 50 and accompanying text.

43. Model Standards, *supra* note 1, at 479–80, standard III.

44. *Id.*

45. Feerick, *supra* note 21, at 464.

46. Model Standards, *supra* note 1, at 479–80, standard III.

matter under circumstances which would raise legitimate questions about the integrity of the mediation process.⁴⁷

When the Model Standards are applied to attorney-mediators, a number of gaps emerge.⁴⁸ The Model Standards address only representation of “parties,” failing to address the possibility that subsequent representation of other clients might also undermine the confidentiality or appearance of impartiality of the original mediation.⁴⁹ In addition, the Model Standards do not address imputation of a conflict of interest to or from other members in a firm.

State and local governments have also regulated conflicts of interest between mediators and mediation parties. Some have adopted the Model Standards⁵⁰ or other existing codes of ethics.⁵¹ Minnesota has adopted an enhanced version of the Model Standards that prohibits future professional relationships with *anyone* on a related matter without consent for a “reasonable” period of time.⁵² Several other jurisdictions have promulgated very basic rules that merely require mediators to check for conflicts of interest and either recuse themselves when participation would be inappropriate or disclose the situation to the mediation parties and continue only if consent is given.⁵³ Finally, several jurisdictions have

47. *Id.*

48. Henikoff & Moffitt, *supra* note 7, at 88; Michael Moffitt, *Loyalty, Confidentiality, and Attorney-Mediators: Professional Responsibility in Cross-Profession Practice*, 1 Harv. Negotiation L. Rev. 203, 207 (1996).

49. Model Standards, *supra* note 1, at 479–80, standard III. Subsequent representation of any adverse client on a related matter might reasonably cause fear of a breach of confidentiality. Moffitt, *supra* note 48, at 209. Likewise, subsequent representation of any client against a mediation party shortly after mediation would detract from the mediator’s appearance of neutrality.

50. *See, e.g.*, Kan. Ct. R. 903 (West 1998); S.C. Ct. R., Alternative Dispute Resolution, Family Court Mediation, app. B (West 1997).

51. West Virginia applies Canon 3 of the Code of Judicial Conduct to its mediators. *See* W. Va. Ct. Rules of Procedure for Court-Annexed Mediation, R. 27 (Michie 1998); *see also* W. Va. Code of Judicial Conduct, Canon 3(E) (Michie 1998). California Bankruptcy courts refer attorney-mediators to the California Rules of Professional Conduct. *See* C.D. Cal. Bankr. Order No. 95-01 (5.4) (West 1998). Several federal district courts have applied 28 U.S.C. § 455 (1994), a federal disqualification statute governing justices, judges, and magistrates, to mediators through local court rules. *See, e.g.*, N.D. Cal. Alternative Dispute Resolution L.R. 6-3, 2.5 (West 1998); D. Idaho Gen. Order No. 130 (West 1997); E.D.N.Y. Civil Rules app. F(4), R. 28 (West 1998); E.D. Tenn. L.R. 16.4(f), (g) (West 1997).

52. Minn. Dist. Ct. Prac. R. 114 app. II (West Supp. 1998).

53. *See, e.g.*, Va. Code Ann. § 8.01-576.9 (Michie Supp. 1997); C.D. Cal. Bankr. Order No. 95-01 (5.4) (West 1998); D.D.C. Ct. R. app. B (Michie 1998); Ill. 17th Cir. Med. R. 4(A)(3) (West 1997); Mo. S. Ct. R. 88.06(a)(4) (West Supp. 1998); N.H. Super. Ct. R. 170(d)(2) (Michie Supp. 1995); Uniform Rules for the New York State Trial Courts app. F & G (McKinney 1998).

developed comprehensive ethics rules for mediators that address cross-profession conflicts of interest specifically.⁵⁴ For example, Maine has added a separate comprehensive mediation section to its attorney conduct rules⁵⁵ and Iowa has adopted a special rule for attorney-mediators in family disputes.⁵⁶

B. *Application of Attorney Rules of Professional Conduct*

1. *As Written, the Model Rules Do Not Apply to Attorney-Mediators*

The Model Rules are written and designed for attorneys in an adversarial setting and are premised upon the existence of an attorney-client relationship.⁵⁷ The language of the Model Rules conflict of interest provisions is directed at "attorney-client" relationships,⁵⁸ not mediation parties because mediation parties are not "clients."⁵⁹ The comments to Model Rule 2.2, which governs intermediation by attorneys among two or more clients, specifically exempt attorney-mediators who conduct mediation involving non-clients, referring them instead to ethical guidelines developed by professional mediation associations.⁶⁰ Thus, on their face, the Model Rules do not govern attorney-mediators.⁶¹

54. See, e.g., Ind. Code Ann. § 4-21.5-3.5-16, 22, 23 (Michie Supp. 1997); Kan. Stat. Ann. § 23-603(d) (1995); Ala. Code of Ethics for Mediators, § III, standard 5(b) (Michie 1996); Santa Barbara County, Cal. Ct. R. 644.4 (West 1998); Fla. Med. R. 10.070 (West Supp. 1998); Ga. Ct. R., ADR Rules app. C(A), standard III (Michie 1998); Ill. 16th Cir. Ct. R. 15.22 (West 1997); D. Neb. L.R. 53.2(g)(4)-(9) (West 1998); E.D. Tenn. L.R. 16.4(f)-(g) (West 1997). The scope of these rules varies by jurisdiction; some apply to all court-appointed mediators or mediators registered with a dispute resolution center, while others apply only to domestic or family mediation.

55. Me. Bar R. 3.4(h) (West 1997).

56. Iowa Code Ann. app. § 598 (West 1996).

57. Sandra E. Purnell, Comment, *The Attorney as Mediator—Inherent Conflict of Interest?*, 32 UCLA L. Rev. 986, 991-92 (1985).

58. Model Rules of Professional Conduct Rules 1.7-1.10.

59. Purnell, *supra* note 57, at 1007-08. For an analysis of whether mediation is the practice of law, see *id.* at 991-1008.

60. Model Rules of Professional Conduct Rule 2.2, cmt.; Purnell, *supra* note 57, at 991-92; Smiley, *supra* note 24, at 222-23. However, at least two state ethics opinions have disregarded these comments and applied Rule 2.2 to attorney-mediators. See, e.g., Fla. Advisory Op. 86-88 (1986); Ky. Op. E-335, reprinted in 53 Ky. Bench & Bar, Summer 1989, at 47; see also Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 Geo. J. Legal Ethics 503, 511-12 (1991). Even if Rule 2.2 applies, it does not provide enough guidance to attorney-mediators to protect the integrity of the process. See *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1493 (D. Utah 1995); ABA/BNA Manual on Professional Conduct 51:15001 (1997).

61. A new addition to the Model Rules would add an additional wrinkle to this issue. It would require attorneys to act according to appropriate professional standards when not acting as attorneys,

2. *Application of Rules of Professional Conduct Conflict of Interest Rules to Attorney-Mediators*

Despite language that forestalls application of the Model Rules to attorney-mediators, two federal courts have looked to the Model Rules for guidance in cases involving subsequent representation of mediation parties by attorney-mediators.⁶² One court noted, “[w]here there is no specific rule that speaks to the issue, courts refer to the Model Rules as a guide to regulate the conduct of the attorney who serves as a mediator in Alternative Dispute Resolution [ADR] proceedings who is later involved in the matter in which he or she mediated.”⁶³ The Supreme Court of Washington took an alternative approach when it amended its Rules of Professional Conduct to include attorney-mediators in conflict of interest rules for judges and arbitrators.⁶⁴

a. *Case Law Applying the Model Rules to Attorney-Mediators*

At least two federal district courts have addressed the application of the Model Rules to attorney-mediators. In *Poly Software International, Inc. v. Su*, an attorney who had previously mediated a dispute involving two software companies later represented one of the parties against another on a substantially related matter.⁶⁵ The adverse party moved to disqualify the attorney-mediator, and the court granted the motion.⁶⁶ The court discussed Utah Rule 1.9 (conflicts based on previous attorney-client relationships) and Utah Rule 1.12 (conflicts based on previous role as judge or arbitrator).⁶⁷ While Utah Rule 1.12, like the Model Rule,

and mandate that “law-related activities” be conducted in accordance with the Model Rules conflict of interest provisions. See Model of Professional Conduct Rule 5.7. While the variety of services and processes provided by attorney-mediators makes it difficult to generalize, it is likely that some attorney-mediators provide “law-related services” and in so doing, would be covered by the Model Rules. See generally Rodgers & McEwen, *supra* note 24, at § 10.02. However, given the difficulty of determining when an attorney-mediator’s actions constitute “representation,” a provision directly guiding attorney-mediators is necessary to prevent confusion and mistake. *Id.*

62. *McKenzie Constr. v. St. Croix Storage Corp.*, 961 F. Supp. 857, 861 (D.V.I. 1997); *Poly Software*, 880 F. Supp. at 1493.

63. *McKenzie*, 961 F. Supp. at 860 n.3.

64. Washington Rules of Professional Conduct Rule 1.12.

65. 880 F. Supp. at 1488–89. At the time of mediation, the opposing parties in the subsequent lawsuit were on the same side because they were employees of the same software company.

66. *Id.* at 1491, 1495.

67. *Id.* at 1494. Model Rules of Professional Conduct Rule 1.9(a) prohibits representing a client whose interests are materially adverse to a former client on a same or substantially related matter

prohibits subsequent representation in the “same matter,” the broader Utah Rule 1.9 prohibits subsequent representation in the “same or a substantially factually related matter.”⁶⁸ The *Poly Software* court utilized the “substantially related” standard from Utah Rule 1.9 when it held that “[w]here a mediator has received confidential information in the course of a mediation, that mediator should not thereafter represent anyone in connection with a same or substantially related matter unless all parties to the mediation proceeding consent after disclosure.”⁶⁹ The court supported this choice by arguing that, in terms of confidentiality and trust, the relationship between mediator and party is more closely related to the attorney-client relationship than to the relationship between judge and litigant.⁷⁰ The court’s rule encompasses subsequent representation of *anyone* in a substantially related matter.⁷¹

Another recent case, *McKenzie Construction v. St. Croix Storage Corp.*, addressed whether an attorney-mediator’s conflict may be imputed to her law firm.⁷² The litigation in this case involved subject matter identical to an earlier mediation and neither side disputed that the attorney-mediator should be disqualified under Model Rule 1.9.⁷³ The *McKenzie* court applied Model Rule 1.10 and disqualified the mediator’s entire law firm.⁷⁴ The court noted that although the conflict arose through mediation rather than representation, the analysis was the same and the

unless the former client consents after full disclosure. Model Rules of Professional Conduct Rule 1.10(a) prohibits members of a firm from representing a client if another member of the firm would be disqualified under Model Rule 1.9 (or other rules). Model Rules of Professional Conduct Rule 1.12(a) prohibits representation of anyone in connection with a matter in which a lawyer participated substantially as a judge or other adjudicative officer, arbitrator, or law clerk unless all parties consent. Rule 1.12(c) provides that if a lawyer is disqualified by Rule 1.12(a), then no member of that lawyer’s firm may undertake or continue representation unless the disqualified lawyer is screened and gives notice to the appropriate tribunal.

68. Utah Rule 1.9 differs from Model Rules of Professional Conduct Rule 1.9 in that it contains a “substantially *factually* related” standard, whereas the Model Rules of Professional Conduct Rule 1.9 contains a “substantially related” standard. *Poly Software*, 880 F. Supp. at 1492 n.7. In Washington, the analysis would likely not differ because Washington has adopted a “factual context” analysis in interpreting “substantially related.” See *infra* note 121.

69. *Poly Software*, 880 F. Supp. at 1494.

70. *McKenzie Constr. v. St. Croix Storage Corp.*, 961 F. Supp. 857, 861, 863 (D.V.I. 1997); *Id.* at 1492–93.

71. See *Poly Software*, 880 F. Supp. at 1494.

72. 961 F. Supp. at 859.

73. *Id.* at 859.

74. *Id.* at 862.

Model Rules should apply absent a specific rule governing mediators.⁷⁵ Although the law firm asserted that it had screened the attorney-mediator by erecting a “cone of silence,” the court found the firm’s method of screening insufficient to protect the mediation parties, in part because evidence showed that the attorney-mediator had personally contacted the firm’s investigator for the case.⁷⁶

If the theory of these decisions is correct, then at least in these jurisdictions attorney-mediators should look to the Rules of Professional Conduct for guidance. However, aside from the analysis in these two decisions, attorney-mediators have little guidance in applying the Rules of Professional Conduct. Because the Model Rules are tailored to attorney-client relationships, it is difficult to translate them into language that fits the relationship between mediators and parties. Also, the Rules of Professional Conduct conflict of interest rules do not address issues involving the attorney-mediator’s impartiality; they only address subsequent representation in related matters. This leaves attorney-mediators without guidance on questions such as whether prior representation creates a conflict of interest during mediation, or whether subsequent representation in unrelated matters constitutes a conflict of interest.⁷⁷

b. Washington Includes Attorney-Mediators in Rule 1.12

In 1993, the Supreme Court of Washington recognized the importance of conflict of interest issues for attorney-mediators by amending Washington Rule 1.12, the conflict of interest rule for judges, adjudicative officers, arbitrators and law clerks, to include mediators.⁷⁸ This Rule prohibits a lawyer from representing “anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.”⁷⁹ The Rule also imputes this type of conflict to

75. *Id.* at 860.

76. It is not clear whether this court would ever allow screening, because it found here that the law firm’s attempt at screening was inadequate. *See id.* at 858, 862.

77. *See Menkel-Meadow, supra* note 31, at 432; *Moffit, supra* note 48, at 204.

78. Washington is the only jurisdiction that includes mediators in the text of its Rule 1.12. North Dakota has indicated in its comments to Rule 1.12 that the term “adjudicative officer” includes mediators, so apparently it is similar to Washington.

79. Washington Rules of Professional Conduct Rule 1.12.

members of the mediator's law firm.⁸⁰ Although this is a unique approach to regulating attorney-mediators, like the *Poly Software* rule, it addresses only subsequent representation in related matters and omits significant areas of concern for attorney-mediators.⁸¹ Furthermore, the guidelines expressed in Rule 1.12 are even more limited than those guidelines expressed in *Poly Software* because they address only subsequent representation in the "same matter" rather than the "same or substantially related matter."⁸²

In a decision later overturned by the Supreme Court of Washington, a court of appeals panel applied Washington Rule 1.12 and reversed a criminal conviction wherein a county prosecutor had attempted to resolve an ongoing dispute between neighbors and later successfully prosecuted one of the parties on a felony charge arising out of the same dispute.⁸³ The court of appeals reversed on the grounds that the prosecutor's actions while mediating had violated the appearance of fairness doctrine.⁸⁴ Although the supreme court later overturned the appellate court decision because the appearance of fairness issue was not properly raised at the trial court level,⁸⁵ the issues in the case highlight the need for clarity regarding the rules guiding attorneys who mediate.⁸⁶

80. Washington Rules of Professional Conduct Rule 1.12(c).

81. *Supra* note 77 and accompanying text.

82. *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1495 (D. Utah 1995).

83. *State v. Tolias*, 135 Wash. 2d 133, 135, 954 P.2d 907, 908 (1998).

84. *Id.* at 138, 954 P.2d at 909. The court of appeals decision that the appearance of fairness doctrine had been violated was based largely on a finding that the prosecutor had violated Washington Rules of Professional Conduct Rule 1.12. *State v. Tolias*, 84 Wash. App. 696, 702, 929 P.2d 1178, 1181 (1997).

85. *Id.* at 140-41.

86. In adopting a conflict of interest rule such as the one suggested in this Comment, a court should clarify when the rule would apply through a definition of mediation. *Tolias* highlights the current lack of clarity about what constitutes mediation. *See Tolias* 135 Wash. 2d at 135, 954 P.2d at 909 (discussing State's argument that the "mediation" was actually "plea bargaining"). Although Washington has legislation encouraging mediation and authorizing dispute resolution centers, it has no definition of "mediation" or "mediator," unlike other jurisdictions. *See, e.g.*, 710 Ill. Comp. Stat. Ann. 20/2(b)-(c) (West 1997); W. Va. Ct. Rules of Procedure for Court-Annexed Mediation, R. 2 (Michie).

C. *Proposed American Bar Association Conflict of Interest Rules for Attorney-Mediators*

In 1991, the American Bar Association (ABA) Standing Committee on Dispute Resolution (SCODR)⁸⁷ proposed a comprehensive set of attorney-mediator ethics rules.⁸⁸ The SCODR proposal, although not adopted by the ABA,⁸⁹ acknowledged the need for a rule specifically governing attorney-mediators by suggesting an amendment to the Rules of Professional Conduct.⁹⁰ The SCODR proposed this set of rules because attorney-mediators lacked sufficient guidance regarding which conflicts of interest rules applied to them in the context of mediation.⁹¹ The proposal addressed conflicts of interest with the following rules:

- (a) A lawyer may act as mediator only if the lawyer has not previously nor is currently representing one of the parties in conjunction with the subject matter of the mediation.
- (b) A lawyer may act as a mediator in a dispute involving a past or present client, who was or is represented in a matter unrelated to the mediation, [provided there is disclosure, informed consent, no breach of confidentiality or impartiality]. This does not prohibit intermediation between clients, which is interpreted by Rule 2.2 [or EC 5-20].

87. The SCODR is no longer in existence.

88. Smiley, *supra* note 24, at 235. Two jurisdictions have adopted rules that, like the ABA proposal, comprehensively address all three areas (prior, concurrent, and subsequent representation).

Maine's ethical code for attorneys contains a provision governing attorney-mediators. It states that prior to mediating, attorney-mediators must disclose any relationships likely to affect impartiality or appearance of impartiality; during mediation, attorney-mediators cannot represent either party in court on a same or related matter; and following mediation, attorney-mediators shall not represent any party on the same or any related matter. Me. Bar R. 3.4(h)(3), (5) (West 1997).

The court rules of one Illinois district provide that prior to mediating, any prior professional relationship with either party must be disclosed and each party must consent in writing; during mediation attorney-mediators may not represent either party on any matter; and following mediation attorney-mediators may not represent either party in a dispute between the parties. Additionally, attorney-mediators associated with law firms shall not mediate if any other associate would be prohibited from mediating. Ill. 16th Cir. Ct. R. 15.22 (West 1997).

89. ABA/BNA Manual on Professional Conduct 51:1515. (1997); Smiley, *supra* note 24, at 235-36.

90. See Smiley, *supra* note 24, at 234.

91. *Id.*

- (c) A lawyer may not act on behalf of any party to a mediation, nor represent one such party against the other, in any legal proceeding related to the subject of the mediation.⁹²

This rule comprehensively addresses prior, concurrent, and subsequent representation. However, it does not address conflict of interest imputation to an attorney-mediator's law firm. Additionally, like the Model Standards, the rule only addresses subsequent representation of mediation parties in related matters and does not address other adverse clients.

III. PROPOSED ATTORNEY-MEDIATOR CONFLICT OF INTEREST RULE

A. *Need For Comprehensive and Uniform Conflict of Interest Rules*

In all but the few jurisdictions that have adopted comprehensive rules, attorney-mediators practice without practical, authoritative conflict of interest guidelines.⁹³ The confusion over whether and in what manner attorney ethical rules or mediator ethical standards apply can be corrected by adopting a definitive and comprehensive conflict of interest rule for attorney-mediators.⁹⁴ The Supreme Court of Washington recognized the need for a rule by amending Rule 1.12. All states should amend their Rules of Professional Conduct to include a comprehensive conflict of interest rule covering all aspects of conduct both during and after mediation.

The following proposed rule has two parts. The first addresses conflicts that arise during mediation through prior or concurrent representation. The second addresses conflicts that arise following mediation during subsequent representation. Within each section, the proposed rule is further divided into subsections addressing the type of protection that should be extended: an absolute prohibition of mediation or representation or a conditional bar that can be waived by the parties or lapse over time. Each section also contains a subsection addressing whether and to what extent a conflict of interest should be imputed to or from the attorney-mediator's firm.

92. For full text of the 1991 proposed rule "Lawyers Acting as Mediators for Non-Clients" [hereinafter ABA Proposal], see Smiley, *supra* note 24, 235-36 (1993).

93. Two exceptions are Maine and Illinois 16th Dist., *supra* note 88.

94. See, e.g., Me. Bar R. 3.4(h) (West 1997).

The level of restriction will depend on how the timing of the representation, the relatedness of the matters in controversy, and the identity of the prospective client affect impartiality and confidentiality.⁹⁵ Overly broad restrictions could be used to disqualify an attorney or mediator or to upset a mediation settlement agreement on technical grounds when the impartiality or confidentiality of the mediation is not actually threatened.⁹⁶ Too strict a construction would unduly discourage attorneys from entering the practice of mediation.⁹⁷ The proposed rule should apply to all types and contexts of mediation.⁹⁸

B. Proposed Rule

Following is a proposed conflict of interest rule and commentary explaining the need for each subsection and how each rule balances the competing concerns. The commentary should be included as part of a complete ethics rule for attorney-mediators.

1. Conflicts Arising Before or During Mediation

- (a) A lawyer shall not act as a mediator if the lawyer has previously represented one of the parties in a same or substantially related matter, or is currently representing one of the parties on any matter.
- (b) A lawyer shall not act as a mediator in a dispute involving a past client who was represented in an unrelated matter unless the parties consent in writing after disclosure and consultation and the past representation would not cast serious doubt on the integrity of the process.
- (c) A lawyer shall not mediate a dispute involving a party concurrently represented by a member of the lawyer's firm on a same or substantially related matter. A lawyer shall not mediate a dispute involving a party concurrently represented by a member of the lawyer's firm on other matters or formerly represented by a member of the lawyer's firm on

95. For a list of issues that should be addressed in any rule and an alternative categorization of these issues, see Menkel-Meadow, *supra* note 31, at 433–34.

96. See Jonathan J. Lerner, *An Overview of the Law Governing Legal Conflicts of Interest*, 403 PLLit 9, 53–55 (1990); Moffit, *supra* note 48, at 210.

97. See *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1494 (D. Utah 1995); Menkel-Meadow, *supra* note 31, at 434 n.116, 436–37; Smiley, *supra* note 24, at 237.

98. See Note, *supra* note 8, at 1877.

any matter, unless the requirements of 1(b) are met and the lawyer is screened from all participation in the representation (if ongoing) and apportioned no part of the fee therefrom.⁹⁹

2. Conflicts Arising After Mediation

- (a) A lawyer who has formerly mediated may not represent anyone who is directly adverse to a mediation party in a same or substantially related matter.
- (b) A lawyer who has formerly mediated may not represent a mediation party, or any client who is directly adverse to a mediation party, in any matter for a period of two years unless the affected mediation parties consent in writing after disclosure and consultation.
- (c) If a lawyer has formerly mediated, no member of the lawyer's firm may undertake or continue to represent anyone who is directly adverse to a mediation party in a same or substantially related matter unless all affected mediation parties consent in writing after disclosure and consultation, or the lawyer is screened from any participation in the representation and apportioned no part of the fee therefrom. No member of the lawyer's firm may represent a party to the mediation in any matter for a period of one year, unless the mediation parties consent in writing after disclosure and consultation.

IV. COMMENTARY ON PROPOSED RULE

A. *Commentary on Section 1: Restrictions on the Ability to Mediate Following Certain Attorney-Client Relationships*

Many attorney-mediators practice mediation after long legal careers involving many clients, simultaneously practice both law and mediation, or practice mediation as members of law firms. In some situations, a previous or existing attorney-client relationship with a mediation party might undermine impartiality or confidentiality. In others, the attorney-client relationship might be such that the attorney-mediator can set it aside and mediate objectively and in full confidentiality. The specific guidelines suggested by this proposed rule should be construed only as a

⁹⁹ Screening procedures should meet the requirements outlined in Washington Rules of Professional Conduct Rule 1.10(c).

threshold. Because of the fact-dependent nature of ethical dilemmas, attorney-mediators should always use their judgment in deciding when to disclose information about past or existing attorney-client relationships and when to decline to mediate, with an eye toward protecting the integrity of the mediation process.¹⁰⁰

1. Section 1(a): Absolute Prohibition of Mediation

- (a) A lawyer shall not act as a mediator if the lawyer has previously represented one of the parties in a same or substantially related matter, or is currently representing one of the parties on any matter.

a. Concurrent Representation of a Party in Any Matter

An absolute rule barring mediation for current clients on all matters is necessary to protect the confidences of the mediation parties and preserve the impartiality of the mediator. When the concurrent representation relates to a same or substantially related matter, the need for an absolute restriction is most evident. If a prior mediation failed and the dispute was litigated, the attorney would be hard-pressed to maintain confidentiality to the former mediation parties while fulfilling the duty to advocate zealously for the client.¹⁰¹ Even if the concurrent representation were unrelated to the mediation, and confidentiality were not threatened, an absolute bar would be justified because of the impartiality requirement. If one of the parties were also a client, the element of loyalty present in any attorney-client relationship would give the client an actual or perceived advantage over the other party, thereby undermining the success and fairness of the mediation.¹⁰²

Absolute rules regarding concurrent representation, like the one suggested here, have been adopted in several jurisdictions.¹⁰³ The ABA

100. See Model Standards, *supra* note 1, at 479–80, standard III.

101. For example, following a business merger, an attorney-mediator could not act as a mediator between the shareholders of both companies while simultaneously litigating an employment issue relating to the merger against one of the companies without neglecting one of these duties.

102. Even if an attorney-mediator could remain impartial in mediating between a client and non-client, such mediation would likely violate the attorney's responsibility to represent clients diligently under Model Rules of Professional Conduct Rule 1.3.

103. See, e.g., Ala. Code of Ethics for Mediators, § III, standard 5(b)(4) (Michie 1996); Iowa Code Ann. app. § 598, R. 1(F) (West 1996); Kan. Stat. Ann. § 23-603(d) (1995); Ill. 16th Cir. Ct. R. 15.22(F)(1) (West 1997); see also Proposed Standards for Mediators, *supra* note 37, standard IV.D.1.

Proposal, however, absolutely prohibits concurrent representation in conjunction with the subject-matter of the mediation, but allows waiver by the parties if the attorney-mediator is concurrently representing one of the parties on an *unrelated* matter.¹⁰⁴ Even consent cannot overcome the clearly apparent bias that would result if one of the mediation parties had an ongoing professional relationship with the mediator. Consent would not remove the incentive for the attorney-mediator to favor his client during the mediation in order to preserve the ongoing relationship. An absolute prohibition of concurrent representation of mediation parties is needed to protect participants who might not understand the conflict of interest inherent in such a situation, as well as to protect the process against the appearance of unfairness.

b. Prior Representation of a Party on the Same or Substantially Related Matter

When an attorney-mediator has previously represented one of the parties on a same or substantially related matter, an absolute bar to mediation is justified based on the strong appearance of bias inherent in such a situation. For example, in *Ebersole v. Ebersole*, an attorney-mediator initiated a dissolution of marriage proceeding on behalf of a client, and later acted as a mediator between the former client and spouse in the same proceeding.¹⁰⁵ Because the attorney had advocated zealously for the client under Connecticut Rule 1.3, the court held that it could not "accept counsel's assertion that he may then retire as advocate and assume the role of impartial mediator."¹⁰⁶ The ABA proposal¹⁰⁷ suggested providing an absolute prohibition when the prior representation was on a same or substantially related matter, while

104. See Smiley, *supra* note 24, at 239. Some jurisdictions adopt a similar approach. See, e.g., Me. Bar R. 3.4(h) (West 1997) (prohibiting representation of party during mediation on related matters or unrelated matters so long as other representation won't be improperly affected and impartiality can be preserved); E.D. Tenn. L.R. 16.4(f) (West 1997) (prohibiting appearances as counsel in same or substantially related matter).

The Model Standards add an additional subjective requirement of limiting the use of waiver on unrelated matters to situations in which it would not "raise legitimate questions about the integrity of the mediation process." Model Standards, *supra* note 1, at 480, standard III.

105. No. 0115765, 1994 WL 146238 (Conn. Super. Ct. Apr. 19, 1994).

106. *Id.* at *1.

107. See *supra* note 92.

providing a less absolute restriction in other cases. This method provides a balance lacking in many other approaches.¹⁰⁸

2. *Section 1(b): Conditional Prohibition of Mediation*

- (b) A lawyer shall not act as a mediator in a dispute involving a past client who was represented in an unrelated matter unless the parties consent in writing after disclosure and consultation and the past representation would not cast serious doubt on the integrity of the process.

a. *Prior Representation of a Party in Unrelated Matters*

When an attorney-mediator has represented one of the parties on an unrelated matter, disclosure of the past relationship and consent from the parties is necessary to eliminate the impression of bias that might arise if the information surfaced after commencement of mediation. Even if the parties consent, the attorney-mediator should not mediate if he or she believes the past representation would cast serious doubt on the integrity of the mediation.¹⁰⁹ Prior representation of one of the parties on an unrelated matter is unlikely to affect an attorney-mediator's ability to remain impartial during a mediation. The attorney-client relationship has ended and presumably the attorney-mediator has not established an adversarial relationship with any of the parties. Due to the element of loyalty in an attorney-client relationship, however, potential bias or appearance of bias toward the former client remains.¹¹⁰ If a party learns of a prior relationship during or after mediation and loses trust in the impartiality of the mediator, the mediation could fail. If an agreement has

108. Some local rules and professional standards are more strict, absolutely prohibiting mediation based on *any* past representation of one of the parties. *See, e.g.*, AFM-AFCC Standards of Practice for Divorce and Family Mediation, *supra* note 41; Iowa Code Ann. app. § 598, R. 1(F) (West 1996); Proposed Standards for Family Mediators, *supra* note 37, standard IV(C).

Other rules are less strict, allowing mediation so long as the attorney-mediator discloses any past representation and waiver by consent of the parties. *See, e.g.*, E.D. Tenn. L.R. 16.4 (West 1997); Ala. Code of Ethics for Mediators, § III, standard 5(b)(6) (Michie 1996); Fla. Med. R. 10.070(b)(3) (West Supp. 1998). The Model Standards generally allow waiver of this type of conflict unless it would cast "serious doubt on the integrity of the process." Model Standards, *supra* note 1, standard III, at 480.

109. A similar restriction is found in the ABA proposal, *supra* note 92, at 235, § (e), Model Standards, *supra* note 1, at 480, standard III, and rules adopted in several jurisdictions. *See, e.g.*, E.D. Tenn. L.R. 16.4(e), (g) (West 1997); Ala. Code of Ethics for Mediators, § III, standard 5(b)(6) (Michie 1996); Fla. Med. R. 10.070(b)(3) (West Supp. 1998); Ill. 16th Cir. Ct. R. 15.22 (West 1997).

110. *Cf. Feerick, supra* note 21, at 466.

already been made, awareness of the relationship could be grounds for challenging the mediation agreement's validity.¹¹¹ By allowing the parties to waive this restriction, this rule also addresses the concern that overly broad rules might discourage attorneys from mediating.¹¹²

3. *Section 1(c): Imputation from the Firm*

- (c) A lawyer shall not mediate a dispute involving a party concurrently represented by a member of the lawyer's firm on a same or substantially related matter. A lawyer shall not mediate a dispute involving a party concurrently represented by a member of the lawyer's firm on other matters or formerly represented by a member of the lawyer's firm on any matter, unless the requirements of 1(b) are met and the lawyer is screened from all participation in the representation (if ongoing) and apportioned no part of the fee therefrom.

a. *Absolute Prohibition of Mediation: Concurrent Representation by Attorney-Mediator's Firm in a Same or Substantially Related Matter*

Attorney-mediators who practice as members of law firms should not mediate if an attorney at the firm is concurrently representing one of the mediation parties in a same or substantially related matter. This absolute rule is necessary to protect impartiality and prevent breaches of confidentiality. Because the interests of attorneys practicing in firms are commingled, concurrent mediation and representation in related matters by attorneys of the same firm would at least imply a bias in favor of the client, and, at the worst, result in breaches of confidentiality. This would be particularly true if the mediation failed and the matter proceeded to litigation. Although it might be possible for the attorney-mediator to protect the parties' confidences and maintain impartiality, the appearance of impropriety of such an arrangement mandates an absolute bar that does not allow waiver by the parties.

111. *Supra* note 21 and accompanying text.

112. To restrict the possibility of someone obstructively withholding consent after threats to the mediator's impartiality have passed, a time limit might be placed on this restriction. For example, to require consent only for mediation occurring within six months of prior representation. *See* Menkel-Meadow, *supra* note 31, at 435 n.117.

b. *Conditional Prohibition of Mediation: Concurrent Representation by Attorney-Mediator's Firm in an Unrelated Matter*

If another member of the firm is concurrently representing one of the parties on an unrelated matter, the potential conflict should be waivable as long as the integrity of the process would not be seriously threatened. There may still appear to be a lack of impartiality because the affiliation of one party with the attorney-mediator's law firm might imply a bias toward that party. However, on unrelated matters, the opportunity to use confidential information to the detriment of a party is minimal, and the issue of impartiality could be adequately addressed by requiring disclosure and informed consent by the parties. This rule balances the need to protect the integrity of the process against the goals of encouraging mediation and preventing attorneys from using disqualification for tactical purposes.¹¹³ A requirement of screening the attorney-mediator from all concurrent involvement in the representation would further ensure the attorney-mediator's independence, impartiality and confidentiality.

c. *Conditional Prohibition on Mediation: Prior Representation by Attorney-Mediator's Firm on Any Matter*

If an attorney-mediator's associates have *previously* represented one of the parties on any matter, the attorney-mediator should be allowed to mediate upon disclosure and consent of the parties, as long as the attorney-mediator reasonably believes impartiality and confidentiality can be maintained. Prior representation of a party by an attorney-mediator's law firm could create an attenuated implication of possible bias or raise a question about impartiality, but would not likely disturb the attorney-mediator's impartiality.¹¹⁴ Because the relationship with the client has ended, conflict regarding abuse of confidential information

113. See *supra* notes 96–97.

114. An imputed conflict of interest was one element of a challenge to the validity of a mediation agreement in a recent Iowa case, *McEnany v. West Delaware County Community Sch. Dist.*, 844 F. Supp. 23, 532 (N.D. Iowa 1994). The court held that there was no conflict of interest because the attorney-mediator was not personally involved in his law firm's prior representation of one of the parties, and the law firm had only minimal contact with the party. *Id.* at 533.

would not likely arise. Informed consent adequately safeguard and ensure the impartiality of the mediator.¹¹⁵

Imputed disqualification based on past or concurrent representation of a mediation party by the attorney-mediator's law firm has not been directly addressed in either the ABA Proposal or the Model Standards. However, some jurisdictions and professional organizations have addressed this problem through a variety of guidelines.¹¹⁶ By absolutely prohibiting mediation in certain cases, and requiring disclosure and consent in others, the rule promotes the dual goals of encouraging mediation and preventing conflicts of interest.

B. *Commentary on Section 2: Attorney-Client Relationship Following Mediation*

Attorney-client relationships following mediation can call into question the confidentiality of the mediation session and cast doubt on whether the mediator was in fact impartial.¹¹⁷ While attorney-mediators owe a duty of confidentiality to mediation parties similar to that attorneys owe their clients, attorney-mediators have an additional responsibility to protect the integrity of the mediation procedure. By choosing to mediate, an attorney places herself in a position of trust, impartiality, and confidentiality vis a vis all the parties. The success of the process, the durability of mediation settlement agreements, and the acceptance of mediation as a legitimate form of dispute resolution depend on the mediator's commitment to maintaining impartiality and an appearance of impartiality. Actions taken after mediation can destroy this

115. In *McEnany*, disclosure and informed consent by the mediation parties likely contributed to the court's decision not to disqualify the attorney-mediator based on an imputed disqualification. *Id.* at 526.

116. Some imputation rules promulgated in other jurisdictions are more strict. *See, e.g.*, Ill. 16th Cir. Ct. R. 15.22(f)(2), (prohibiting mediation if member of firm is concurrently representing one of parties on *any matter* and requiring consent if member of firm has previously represented party on *any matter*); Iowa Code Ann. app. § 598, R. 1(F) (West 1996) (prohibiting mediation if either party was previously client of attorney-mediator's firm).

Other rules are less strict, requiring only disclosure and consent for any representation of mediation parties; *see, e.g.*, Ala. Code of Ethics for Mediators, § III, standard 5(c) (Michie 1996) (requiring disclosure of representation of any mediation party by member of law attorney-mediator's law firm); C.D. Cal. Bankr. Order No. 95-01 (5.4) (West 1998) (requiring disclosure in writing if member of attorney-mediator's firm has represented party).

117. *See supra* note 35 and accompanying text; *See also* Ga. Ct. R., Alternative Dispute Resolution Rules, App. C(A), standard III (Michie 1998) (providing that mediators must scrupulously maintain neutrality).

appearance and put the legitimacy of a past mediation in jeopardy. Because the Model Rules aim to protect confidential information, application of the existing Model Rules to attorney-mediators, such as Washington Rule 1.12 and the *Poly Software* rule, does not sufficiently govern attorney-mediator conflicts of interest following mediation.¹¹⁸ At the same time, because the Model Standards were written generally and broadly to apply to all mediators, they do not adequately address the post-mediation conflicts attorney-mediators might encounter.

1. *Section 2(a): Absolute Prohibition of Representation in Certain Cases Following Mediation*

- (a) A lawyer who has formerly mediated may not represent anyone who is directly adverse to a mediation party in a same or substantially related matter.

Following mediation, an attorney-mediator must not subsequently represent a client who is directly adverse to a mediation party on a same or substantially related matter. Neither the Model Standards, Washington Rule 1.12, nor the *Poly Software* rule includes an absolute bar against subsequent representation; instead, they allow all post-mediation conflicts to be waived by disclosure and consent.¹¹⁹ Both Washington's Rule 1.12 and the *Poly Software* rule are good starting points because they are designed to provide mediation parties with the same level of protection of confidential information that clients of attorneys are given. At the same time, these approaches are too broad and too narrow.

First, the Rules are too broad because they restrict subsequent representation to "anyone" in the same or substantially related matter (*Poly Software*) or the same matter (Washington Rule 1.12). They could bar even subsequent representation that does not involve the mediation parties in any way. For example, suppose that following a natural disaster an attorney-mediator mediates a dispute between a homeowner and an insurance company. If a neighboring homeowner later seeks representation against a different insurance company regarding damages from the same natural disaster, the attorney-mediator would risk disqualification on the grounds that the matters are substantially related.

118. See Menkel-Meadow, *supra* note 31, at 432.

119. For examples of absolute prohibition of subsequent representation, see *infra* note 123 and accompanying text.

This result would be reached despite the fact that the subsequent representation would harm neither of the original mediation parties. Such a broad restriction cannot be justified.¹²⁰ Instead, application of the “substantially related” standard to attorney-mediators should only restrict representation of adverse parties, as in Model Rules 1.7 and 1.9.¹²¹

Second, the guidelines in Washington Rule 1.12 and *Poly Software* are too narrow because allowing waiver by disclosure and consent leaves too much room for abuse of the mediation process.¹²² If subsequent adverse representation in a same or substantially related matter were allowed, attorney-mediators would likely encounter conflicts between the duty to protect confidential information learned during mediation and the duty to advocate zealously for the client.¹²³ Application of the Rules of Professional Conduct would allow for waiver in such cases, not taking into account the need to maintain the integrity of the mediation process—a need that continues even after a mediation has ended.¹²⁴

120. A potential problem might occur when the mediator has confidential information that might be used to the advantage of the new client. A requirement that attorney-mediators be subject to Model Rules of Professional Conduct Rule 1.7 (which provides that attorneys shall not agree to represent clients if duties to third parties would materially limit representation) would prevent the attorney from undertaking such representation following mediation.

121. Washington has adopted a “factual context” analysis in determining whether a matter is “substantially related.” *State v. Hunsaker*, 74 Wash. App. 38, 45, 873 P.2d 540, 544 (1994). The factual context analysis requires the court to consider “whether the factual contexts of the two representations are similar or related.” *Id.* This is distinguished from a “patently clear” test where the court considers only whether the issues involved are identical or essentially the same. *Id.*

122. With regard to the Model Rules for attorneys, in situations so fraught with danger (for example, material or personal conflicts covered by Model Rules of Professional Conduct Rule 1.8), per se disqualification is adopted, so that even consent of the parties will not justify waiving the restriction. Geoffrey C. Hazard, 1 *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 123 (1985).

123. An absolute bar can be found in some jurisdictions that restrict only subsequent representation of a party to the mediation on a same or substantially related matter. *See, e.g.*, Ind. Code Ann. § 4-21.5-3.5-23 (Michie Supp. 1997); Kan. Stat. Ann. § 23-603(d) (1995); Me. Bar R. 3.4(h)(5) (West 1997). *See also* ABA Proposal § (f), *supra* note 92, at 235; Model Standards, *supra* note 1, at 479–80, standard III.

Other rules would go further, providing an absolute bar for all subsequent representation of a party regardless of whether it is on a related or unrelated matter. *See, e.g.*, Ill. 16th Cir. Ct. R. 15.22(f)(1) (West 1997); *see also* ABA Standards for Family Mediators, *supra* note 37, at 636, standard III(A). This standard is too harsh, however, because when the matter is unrelated, the possibility for abuse of confidentiality or impartiality is more attenuated, and an absolute bar would unnecessarily discourage lawyers from mediating or result in tactical abuse of the conflict of interest rules. *See supra* notes 96–97 and accompanying text. Further, this standard is not broad enough, in that it only addresses subsequent representation of parties, not other adverse clients, which would result in some potential conflicts going unchecked. *See supra* note 49 and accompanying text.

124. Model Standards, *supra* note 1, at 480, standard III.

Additionally, allowing this type of representation to occur upon consent of the parties could allow attorney-mediators to use the mediation process improperly to obtain clients. For example, if an attorney-mediator discovered through mediation that one of the parties had a potentially lucrative case against one of the other parties, and also knew that if mediation failed he or she might be able to obtain the party as a client, the attorney-mediator might lose the incentive to encourage settlement. Allowing such a direct conflict to be waived by consent would permit manipulation and abuse of less sophisticated or knowledgeable parties. An absolute bar is justified given the mediator's likely possession of confidential information and the fact that it would rarely be in a party's best interest to consent to subsequent adverse representation by the mediator in a same or substantially related matter.

Washington's application of Rule 1.12 to attorney-mediators has an additional shortcoming in that its narrower "same matter" standard would not adequately protect the confidential relationship, as discussed in *Poly Software*.¹²⁵ The "same or substantially related" standard takes into account the fact that confidential information learned during a mediation might be used in the same or related matters.¹²⁶

An absolute prohibition of subsequent representation of adverse clients on a same or substantially related matter would correct the shortcomings in Washington Rule 1.12 and in the *Poly Software* rule.¹²⁷ Although this rule might proscribe attorney-mediators from representing a significant pool of potential clients, it is justified by the need to protect against abuse and preserve the integrity of the process.

2. *Section 2(b): Conditional Prohibition of Representation Following Mediation*

- (b) A lawyer who has formerly mediated may not represent a mediation party, or any client who is directly adverse to a mediation party, on any

125. The term "matter," although not explained in Washington case law, has been interpreted to include "any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties." *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1492 (D. Utah 1995). Furthermore, the "same matter is not involved [when] there is lacking the discrete, identifiable transaction of conduct involving a particular situation and specific parties." *Id.* (quoting *Securities Investor Protection Corp. v. Vigman*, 587 F. Supp. 1358, 1365 (C.D. Cal. 1984)).

126. *Poly Software*, 880 F. Supp. at 1495.

127. The concept of absolutely barring related matters and conditionally barring unrelated matters is found in the ABA Proposal, *supra* note 92, at 235-36, §§ (d)-(e); *see also supra* Part IV.A.1.a.

matter for a period of two years, unless the affected mediation parties consent in writing after disclosure and consultation.

When considering subsequent representation of a mediation party or a client adverse to a mediation party, an attorney-mediator should disclose and obtain informed consent from affected mediation parties for a defined period of time following mediation.¹²⁸ First, subsequent representation of a mediation party on any matter, even if the representation is not related to the mediation, might imply favoritism or solicitation of clients.¹²⁹ Second, subsequent representation of a client who is adverse to a mediation party, even if the representation is not related to the mediation, would likely upset the trust the parties had in the mediator and cast doubt on the impartiality of the mediator.¹³⁰

Because this rule is not primarily directed at protecting confidentiality or the procedural or substantive rights of the parties, but rather at protecting the appearance of impartiality and preventing solicitation of clients during mediation, an absolute bar is not justified. A two-year limit on this restriction and allowance of waiver by consent of the parties provides the restraint necessary to maintain confidence in the mediator's impartiality and prevent the attorney-mediator from using mediation to solicit clients. It also balances the countervailing concerns about attracting attorneys to the practice of mediation and using disqualification rules for purely tactical reasons.

Although the *Poly Software* rule and Washington Rule 1.12 do not address subsequent representation in unrelated matters, some jurisdictions have placed a conditional bar on subsequent representation of mediation parties on unrelated matters,¹³¹ while others have absolutely prohibited future representation of mediation parties either on all matters, or on related matters.¹³² This Comment's proposed rule adopts a broad

128. See Feerick, *supra* note 21, at 466.

129. See Ga. Ct. R., Alternative Dispute Resolution Rules, app. C(A), standard III(B), Ex. 1, Recommendation (Michie 1998) (discussing problems inherent in subsequent contact with mediation parties); Feerick, *supra* note 21, at 465.

130. See Feerick, *supra* note 21, at 465.

131. See, e.g., Iowa Code Ann. app. § 598 R. (F). (West 1996) (three years); Minn. Dist. Ct. Prac. R. 114 app. II (West Supp. 1998) (reasonable time).

132. See *supra* note 123. The ABA Proposal absolutely prohibit representing mediation parties on related matters. See ABA Proposal, *supra* note 92, at 235-36, § (d). On the other hand, the Model Standards involve a subjective element, restricting representation of mediation parties on unrelated matters only "when it would cast doubt on the integrity of the process." Model Standards, *supra* note 1, at 480, standard III.

yet balanced approach, restricting representation of former mediation parties and clients adverse to mediation parties, while allowing the restriction to be waived either by the parties or after the passage of two years.

3. *Section 2(c): Imputation to the Attorney-Mediator's Firm*

- (c) If a lawyer has formerly mediated, no member of the lawyer's firm may undertake or continue to represent anyone who is directly adverse to a mediation party in a same or substantially related matter unless all affected mediation parties consent in writing after disclosure and consultation, or the lawyer is screened from any participation in the representation and apportioned no part of the fee therefrom. No member of the lawyer's firm may represent a party to the mediation in any matter for a period of one year, unless the mediation parties consent in writing after disclosure and consultation.

a. *Conditional Prohibition of Subsequent Representation of an Adverse Client in a Same or Substantially Related Matter*

Colleagues at an attorney-mediator's firm should be required to obtain consent before representing clients adverse to mediation parties in matters related to the mediation. This will prevent the threat of using confidential information to benefit another client or harm the mediation party. If allowed, the attorney-mediator's duty to uphold the parties' expectations of confidentiality could conflict with the firm's duty to advocate zealously for the adverse client, resulting in a reasonable fear that the confidentiality of a mediation session might be breached.

The threat to the mediator's duties of confidentiality and impartiality in imputed conflicts is not as great as in direct conflicts, so imputed conflicts should be waivable with the informed consent of the parties. A law firm should be allowed to screen associates who might be disqualified from a particular case based on past mediation work. Screening procedures for attorneys who migrate between law firms and between the public and private sectors are included in Washington Rules 1.10 and 1.12¹³³ and are accepted in many jurisdictions.¹³⁴ Mediators are

133. See Washington Rules of Professional Conduct Rule 1.10.

134. See Karen A. Haase, Note, *You Can Check Out Anytime You Like, But You Can Never Leave: Attorney Conflict of Interest and Imputed Disqualification Under Nebraska's New Bright Line Rule*, 74 Neb. L. Rev. 137, 144-46 (1995).

ideal candidates for such screening because their duty of confidentiality extends to the entire mediation, not just individual clients, and therefore attorney-mediators are not as likely to share information with the rest of the attorneys in their firms.¹³⁵ The courts in *Poly Software* and *McKenzie Construction*¹³⁶ each addressed imputation to other members of the attorney-mediator's firm in this manner.¹³⁷

b. Conditional Prohibition of Subsequent Representation of a Mediation Party in Any Matter by the Attorney-Mediator's Firm

Subsequent representation of a party to the mediation on even unrelated matters raises additional concerns about attorneys abusing the process to solicit clients for the firm.¹³⁸ Such solicitation could taint the integrity of the mediation process,¹³⁹ discouraging public approval of mediation and possibly casting doubt on the fairness of past mediation settlement agreements. As with direct conflicts, this restriction should be waived either upon consent of the parties or after the passage of one year. The time period for this restriction on imputed conflicts of interest should be shorter than the restriction on direct conflicts¹⁴⁰ because the appearance of impropriety is more attenuated when it is a member of the attorney-mediator's firm who subsequently represents a mediation party or adverse client, not the attorney-mediator herself. This approach would protect the integrity of the process without unduly burdening the attorney-mediator's law firm.

135. See Menkel-Meadow, *supra* note 31, at 437.

136. 961 F. Supp. 857 (D.V.I. 1997).

137. See *supra* notes 69, 72-76, and accompanying text; see also Ala. Code of Ethics for Mediators, § III, standard 5(b)(1)(c) (Michie 1996); *McKenzie*, 961 F. Supp. at 862; *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1493 (D. Utah 1995).

138. *Supra* note 129 and accompanying text. However, no restriction should be placed on subsequent representation of adverse clients on unrelated matters. Since confidentiality is not threatened when the subject matter of the past mediation was unrelated, and because the appearance of impropriety would be highly attenuated, a restriction on such representation would unduly discourage attorneys from mediating and could be used by adverse litigation parties for purely tactical purposes. This rule would be consistent with the result in *McEnany v. West Delaware County Community Sch. Dist.*, 844 F. Supp. 523, 533 (N.D. Iowa 1994) (finding no conflict of interest in part because mediation was unrelated to prior representation).

139. See *supra* note 129.

140. See *supra* Part II.B.2.b.

V. CONCLUSION

Mediators must be impartial and mediation must be confidential in order to create an atmosphere conducive to successful mediation, protect the rights of the parties based on their reasonable expectations, and enhance the substantive and procedural fairness of this out-of-court proceeding. Attorney-mediators' relationships with former and subsequent clients can call into question the attorney-mediators' own impartiality and the confidentiality of the mediation. Comprehensive, balanced conflict of interest rules for attorney-mediators will promote impartiality and confidentiality within mediation, while minimizing the potential for tactical use of the rules and ensuring that attorneys are not unduly discouraged from mediating.

Washington has already recognized the need for such guidance by amending Rule 1.12 to include mediators. However, recent case law demonstrates that the "same matter" standard of this rule is too narrow to protect the interests at stake in mediation and subsequent developments by professional organizations, and other jurisdictions suggest that a comprehensive rule should address issues beyond the scope of the Rules of Professional Conduct. The Washington Legislature should take the next step by amending the Rules of Professional Conduct to include a comprehensive rule for attorney-mediators that covers conflicts of interest that arise both during and after mediation. The proposed rule, which borrows the best parts of rules professional organizations and jurisdictions have enacted or proposed, provides a balanced, fair rule that protects the parties to mediation, preserves public acceptance of mediation, and encourages attorneys to practice mediation.

