

MEDIATION ETHICS: GOVERNING LAWS, RULES AND STANDARDS; MEDIATOR LIABILITY/IMMUNITY; ETHICAL DILEMMAS AND PRACTICAL PROBLEMS

PRESENTED BY:
MERLYN W. CLARK, CPM*
HAWLEY TROXELL ENNIS & HAWLEY LLP
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* **Merlyn W. Clark** is a senior partner in the Boise office of Hawley Troxell Ennis & Hawley LLP. His legal practice focuses on complex civil litigation and alternative dispute resolution, including mediation and arbitration. He has mediated more than 900 civil disputes. He is included on the rosters of approved mediators of the United States District Court, District of Idaho, and all state courts of Idaho. He has been designated a Certified Professional Mediator by the Idaho Mediation Association since 1995. He has served as a member of the IMA Board of Directors and is currently serving on the Governance Committee, Standards & Practice Committee, and Ethics Committee of the IMA. He is a Fellow of the American College of Civil Trial Mediators and a member of the National Rosters of Commercial and Employment Arbitrators and Mediators of the American Arbitration Association. Mr. Clark has served as Adjunct Professor of Negotiation and Settlement Advocacy at The Straus Institute for Dispute Resolution, Pepperdine University School of Law, and as an Adjunct Professor of Negotiation and Alternative Dispute Resolution at the University of Idaho, College of Law, Boise Campus. He also has served as an Adjunct Instructor on Negotiation Skills and Mediation Advocacy Skills at the University of Idaho, College of Law in Moscow, Idaho.

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I. INTRODUCTION

This one and one-half hour presentation of mediation ethics will include a brief review of the governing laws, rules, and standards that inform and define the ethics of mediation practice. The program will inform mediators and parties where to look for guidance and how to apply the laws, rules, and standards when ethical dilemmas and practical problems arise during the mediation process. The program will also examine the relationship of mediation ethics and mediator liability/immunity.

II. WHAT OR WHO DETERMINES THE APPLICABLE LAWS, RULES, AND STANDARDS THAT GOVERN THE MEDIATION PROCESS AND THE MEDIATOR?

A. What is Mediation?

It is important for mediators to understand and keep in mind that mediation is generally considered to be a voluntary process for resolving disputes.¹ There is no universal definition of mediation. The process has many definitions, depending on how it is used and the nature of the dispute in which it is applied.

The Idaho Uniform Mediation Act, § 2(1) (2008; am. 2015) (IUMA) defines mediation as “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”² In addition to dispute resolution, mediation can function as a means of dispute prevention, such as facilitating the process of contract negotiation. Governments can use mediation to inform and to seek input from stakeholders in formulation of fact-seeking aspects of policy-making.

The Preamble to the Idaho Mediation Association Standards of Practice for Idaho Mediators provides, in relevant part, that “[m]ediation is a process by which a neutral third party facilitates the resolution of conflict between two or more parties. Mediators must be qualified and impartial.”³ To be qualified to practice

1. Mediation should not be confused with arbitration. Mediation generally involves voluntary negotiations between disputants to attempt to reach an agreed resolution using a neutral third party to assist with the negotiations whereas arbitration involves the selection of a neutral third party or panel of three third parties who receive evidence and/or hear arguments from the parties and decide the outcome.

2. IDAHO CODE § 9-802(1) (2008).

3. *Standards of Practice for Idaho Mediators: Preamble*, IDAHO MEDIATION ASS’N (last visited Nov. 17, 2023), <https://idahomediatorsassociation.org/standards-of-practice#:~:text=Mediators%20must%20be%20qualified%20and,interests%20and%20exploration%20of%20alternatives>.

mediation, a mediator must know the applicable laws, rules, and standards that govern the mediation process and the practice of mediation.

B. What are Ethics?

Ethics is a reflective discipline that seeks to evaluate human conduct from the viewpoint of a value system. Applied ethics is embodied in reality and defines the steps we can take to lead to a just action. Ethics has a subjective dimension, referring to aspirational values that hold currency in a place and time circumscribed in the present.

Professional codes of ethics are fixed on regulated human activities. They translate just action into rules and duties, notably those governing the exercise of professions. The foundations of professional codes of ethics are thus found in codes of conduct for engineers, architects, physicians, lawyers, judges, arbitrators and mediators.

Mediation frequently gives rise to dilemmas that involve ethics, professional codes of ethics, and the law. Ethical dilemmas arise in the course of judicial mediation as well as in extrajudicial mediation. The ethical rules of mediation, defined in general terms, spell out best practices and establish means of implementing them. The rules of professional conduct applicable to mediators set standards for regulating mediation; these rules are derived from the law in some cases, and from codes of professional conduct in other cases.

C. What Dictates the Laws, Rules, and Standards That Govern the Mediation Process?

It is important to recognize that the process of mediation may be used in many different contexts and that the context can dictate the laws, rules, or standards that govern the mediation process. Mediation is applicable to disputes in many areas,⁴

4. WIKIPEDIA, *Mediation*, <https://en.wikipedia.org/wiki/Mediation> (last visited: Nov. 18, 2023).

such as family,⁵ workplace,⁶ commercial,⁷ public disputes,⁸ and many others.⁹ The list is not exclusive. The use of the mediation process to conduct plea-bargaining¹⁰ in criminal cases is also growing in some states, including Idaho.¹¹

The subject-matter or type of mediation may dictate—but not necessarily—the laws, rules, and standards that govern the process. For example, a mediation of a family law dispute that is pending before an Idaho state court is governed by the IUMA, Idaho Rule of Evidence (I.R.E.) 507, and Idaho Rules of Family Law Procedure (IRFLP) 601-602,¹² which govern mediation of child custody and visitation disputes in cases that are pending before an Idaho state court. Another example is the mediation of an Idaho state court civil case, which is governed by the IUMA, I.R.E. 507 and Idaho Rule of Civil Procedure (I.R.C.P.) 37.1¹³ or IRFLP 603.¹⁴ Still another example is the mediation of an Idaho state court criminal case is governed by the IUMA, I.R.E. 507 and Idaho Criminal Rule (ICR) 18.1.

The mediation of a case that is pending in the U.S. District Court, District of Idaho (U.S. Dist. Ct.) is governed by federal law, even when the dispute involves state law claims. The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658, contain no specific guidelines, but the Act of Congress authorizes the U.S. District Courts to adopt local rules to provide guidelines for ADR programs to resolve federal disputes. U.S. District Court, Idaho, Local Rule 16.4 provides procedures and rules for mediation of Idaho federal court cases.

Whether the mediator or a party or the attorney for a party belongs to an organization that controls the conduct of such persons during the mediation

5. Prenuptial/premarital agreements, financial or budget disagreements, separation, divorce, alimony, parenting plans (child custody and visitation), eldercare, family businesses, sibling conflicts, parent/adult children, estates, and medical ethics and end-of-life.

6. Wrongful termination, workers' compensation, discrimination, harassment, grievances, labor/management, and collective bargaining agreements/disputes.

7. Landlord/tenant, homeowners' associations, builders/contractors/realtors/homeowners, contracts, medical malpractice, personal injury, business entities, business/business, business/employee, and business/consumer.

8. Environmental, land-use, and zoning.

9. School conflicts, violence-prevention, victim-offender mediation, non-profit organizations, and faith communities.

10. Plea-bargaining is a process in which the accused and the prosecuting attorney negotiate the terms of a plea of guilty or *nolo-contendere* (no contest) by the accused in return for a reduced sentence or lesser charge, or some other terms that may be agreeable to each. It may also involve the victim or victim's family in the process.

11. Idaho Criminal Rule 18.1 provides authority and guidance for mediating state criminal cases. Idaho R. Crim. P. 18.1 (2018).

12. Idaho R. Crim. Pr. 16(k) (2015).

13. I.R.C.P. 16(j) (2015).

14. I.R.F.L.P. 603 (2021), (“[A]ll civil cases other than child custody and visitation disputes are eligible for referral to mediation under this subsection.”).

process may also dictate the laws, rules or standards that govern the mediation. For example, a mediator who is a member of the Idaho Mediation Association (IMA) is bound to follow the IMA Standards of Practice for Idaho Mediators (IMA Standards). Also, an attorney who represents a party in mediation or serves as the mediator is bound to comply with the Idaho Rules of Professional Conduct (IRPC), which govern the conduct of Idaho attorneys.

States have differed in the scope and breadth of their use of mediation as a mechanism to resolve disputes. Some states require mandatory mediation of civil disputes, while other states leave the decision to the judge and/or the parties who are involved in the civil dispute.¹⁵ In addition, some states provide specific statutory enforcement of mediation agreements, but other states leave enforcement to the general law of contracts.¹⁶ Idaho generally leaves the decision to the parties, but allows judges to mandate the use of mediation in certain cases.¹⁷ Idaho also leaves enforcement or rescission of mediated settlement agreements to the law of contracts.¹⁸

As is noted above, it is important that the mediator has a general understanding of the laws, rules, standards and court decisions that govern the mediation process and the enforcement and rescission of mediated settlement agreements to be able to conduct mediations in compliance with ethical and legal standards that result in enduring mediated settlement agreements.

III. THE LAWS, RULES, AND STANDARDS THAT GOVERN THE MEDIATION PROCESS AND THE MEDIATOR.

The following is an overview of the Idaho laws and rules that have the force and effect of law and govern the mediation process in certain cases. Also listed are the standards of practice or guidelines that may impose duties and/or provide aspirational guidelines for the practice of mediation in Idaho. They are listed as follows:

Governing Laws and Rules:

- The Idaho Uniform Mediation Act (2008; am. 2015 Sess. Laws, ch. 141, p. 382)
- Idaho Rule of Evidence 507 (2008; am. & reformatted 2018)
- Idaho Rule of Civil Procedure 37.1 (2016; am. 2021)
- Idaho Supreme Court Administrative Rule 73. Qualifications of Civil Mediators. (2016)

15. Compare Rule 5.518, California Rules of Court with Idaho Rule of Civil Procedure 37.1.

16. *Id.*

17. I.R.C.P 37.1; Idaho Rules of Family Law Procedure Rule 602.

18. See e.g., Caballero v. Wikse, 140 Idaho 329, 332, 92 P.3d 1076, 1079 (2004).

- Idaho Rules of Family Law Procedure 601-603 (2014; am. 2021)
- Idaho Criminal Rule 18.1 (2017; am. 2018)
- Idaho Rules of Professional Conduct 1.6, 1.12, 2.2, 4.1 and 8.4. (2014)
- Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658
- U.S. District Court, Idaho Local Federal Rule 16.4 (2020)

Standards of Practice and Guidelines:

- Idaho Mediation Association Standards of Practice
- Model Standards of Conduct for Mediators adopted by Idaho State Bar (2005)
- Model Standards of Conduct adopted by ABA/AAA/ACR¹⁹ (2005)
- Model Standards of Practice for Family and Divorce Mediation (2009)
- Association of Family and Conciliation Courts, Guidelines for Child Protection Mediation (2012)

No attempt is made to examine all the laws, rules, and guidelines in detail. Moreover, this list does not include other laws that are not enacted to provide guidance for mediators, but may apply to the conduct of a mediator during the mediation process. An example is the Idaho Child Protective Act, section 16-1605, which compels “[any] person having reason to believe that a child under the age of eighteen (18) years has been abused, abandoned or neglected or who observes the child being subjected to conditions or circumstances which would reasonably result in abuse, abandonment or neglect to report or cause to be reported within twenty-four (24) hours such conditions or circumstances to the proper law enforcement agency” or the Idaho Department of Health and Welfare, Child Protective Services.²⁰ This law would impose on a mediator who discovers child abuse during mediation, a legal obligation to report such abuse to authorities.

Standards of practice may impose duties and/or guidelines that are purportedly “aspirational” in nature. However, it is important to keep in mind that although the standards of practice and guidelines do not have the force and effect of law as do the statutes and rules, they may be used by the courts to establish standards of care for measuring the conduct of mediators when determining whether particular conduct constitutes negligence or malpractice for the purpose of imposing liability on a mediator.

19. American Arbitration Association et al., *Model Standards of Conduct for Mediators*, (2005), https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/MODEL_STANDARDS_OF_CONDUCT.pdf.

20. IDAHO CODE § 16-1605. Other examples are Local Land Use Planning, IDAHO CODE § 67-6510; Development Impact Fees Appeals IDAHO CODE § 67-8212; Teachers: Appointment of Mediators IDAHO CODE § 33-1274; Labor disputes IDAHO CODE § 22-4110; Coordinated Family Services IDAHO CODE § 32-1402; and Department of Revenue and Taxation IDAHO CODE § 63-118.

IV. GOVERNING LAWS AND RULES

A. The Idaho Uniform Mediation Act (2008; am. 2015²¹)

i. Enactment

In 2008, the state of Idaho enacted the Idaho Uniform Mediation Act (IUMA). It is patterned after the Uniform Mediation Act of 2001²² (UMA), which was promulgated by the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission (ULC). The ULC was established in 1892 to provide states with legislation that brings clarity and stability to critical areas of state statutory law.²³ The ULC researches, drafts, and promotes enactment of uniform acts in areas of state law where uniformity is desirable and practical. The ULC consists of approximately 350 commissioners—each must be an attorney—who is appointed by each state.²⁴ It has its headquarters in Chicago, Illinois.²⁵

The IUMA is codified at Title 9, Chapter 8 of the Idaho Code, Sections 9–801–814. The various sections provide, among other things, the essential definitions of terms used in the Act, the scope of the Act, testimonial privilege protection for communications in mediation that are subject to various waivers and exceptions, prohibited mediator reports, confidentiality, the right to an attorney, and a requirement that mediators disclose conflicts of interest before accepting an engagement.

ii. Purposes

The most important purposes of the IUMA are to provide for confidentiality in mediation proceedings and an evidentiary rule of privilege in mediation. The statute establishes an evidentiary privilege for the mediator and participants in mediation. It imposes a confidentiality obligation on mediators and, if agreed upon, on the participants in mediation. It is intended to provide a safe environment for parties to negotiate with confidence that their statements made during the

21. The amendment merely changed the specific statutes that contain the Idaho Public Records Act and the Open Meetings Law to the relevant chapters and titles in the Idaho Code.

22. UNIFORM MEDIATION ACT (2003), https://higherlogicdownload.s3-external-1.amazonaws.com/UNIFORMLAWS/571ba947-af50-45c2-ffb9-2322fd87fe6e_file.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1700326520&Signature=4v2b1x8SzounK0XCWD55jZiGrQU%3D. The UMA with commentary that explains each section.

23. <https://www.uniformlaws.org/aboutulc/overview> The Uniform Conference of Commissioners on Uniform State Laws.

24. *Id.*

25. *Id.*

mediation cannot be used against them in subsequent judicial proceedings in Idaho if the mediation does not result in a resolution of the dispute.

iii. Scope of IUMA

The Idaho Uniform Mediation Act governs all mediation proceedings in Idaho, with few exceptions and regardless of the type of dispute or the venue of the dispute that is being mediated. With the exception of the right in a state judicial proceeding to assert a testimonial privilege to prevent disclosure of confidential mediation communications, it does not matter whether the dispute arises in a judicial proceeding, administrative proceeding, arbitral or other adjudicative process, or in an informal proceeding so long as: "(a) the parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator; or (b) the ... parties and mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or (c) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself, himself, or herself out as providing mediation."²⁶

The exception for the mediation testimonial privilege in a state judicial proceeding arises from the language in Idaho Rule of Evidence (IRE) 501 that testimonial privileges are not recognized in the Idaho state courts unless granted by the state or federal constitution, statutes implementing a constitutional right [e.g., Fifth Amendment], or the I.R.E. or other rules promulgated by the Supreme Court of Idaho.²⁷ The effect of Rule 501 is that all claims for a mediation testimonial privilege in Idaho state courts must be based on Rules 501 and 507, and all claims for a mediation testimonial privilege in other venues (other than federal courts) must be based on the IUMA. In federal court cases, one must base a claim of testimonial privilege on local federal court rules or federal common law authorities (federal court decisions which have applied a rule of testimonial privilege).

The exclusions in which the IUMA does not apply are: a mediation relating to a collective bargaining relationship; or a dispute that is part of the processes established by a collective bargaining agreement (except when the dispute has been filed with an administrative agency or court); conducted by a judge who might rule on the case; or "conducted under the auspices of a primary or secondary school

26. IDAHO CODE § 9-803.

27. The Idaho Supreme Court has inherent authority to provide rules that govern all proceedings in Idaho state courts. IDAHO CODE §§ 1-105, 1-212. IDAHO R. EVID. 501 provides: "Privileges Recognized only as Provided. Except as otherwise provided by constitution, or by statute implementing a constitutional right, or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to: (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any matter or producing any object or writing."

if all parties are students, or a correctional institution for youth if all parties are residents.”²⁸ Parties can also agree “in advance in a signed record” that all or part of a mediation is not privileged.²⁹

iv. Right of Privilege

The right of privilege includes the right to refuse to disclose mediation communications and the right to prevent others from disclosing mediation communications.³⁰ The right is subject to various exceptions³¹ and it may be waived or precluded by certain conduct.³²

The scope of the privilege is not uniform for all participants in the mediation process. A mediation party may refuse to disclose and prevent another participant from disclosing any protected mediation communication.³³ A mediator may refuse to disclose and prevent another from disclosing a protected mediation communication of the mediator.³⁴ A nonparty participant may refuse to disclose and prevent another from disclosing a protected mediation communication of the nonparty participant.³⁵

v. Exceptions

The exceptions include mediation communications that are: (a) in a waiver agreement evidenced by a record signed by all parties;³⁶ (b) available to the public under the Idaho Public Records Act³⁷ or made during a mediation session that is open to the public under the Idaho Open Meetings Law;³⁸ (c) constitute a threat or statement of a plan to inflict bodily injury or commit a crime of violence; (d) made in a mediation that is used to plan a crime or commit a crime or conceal an ongoing crime; (e) sought or offered to prove or disprove professional misconduct of a mediator; (f) sought or offered to prove or disprove professional misconduct of a mediation party, nonparty participant or representative based on conduct during

28. IDAHO CODE § 9-803(2).

29. IDAHO CODE § 9-803(3).

30. IDAHO CODE § 9-804.

31. IDAHO CODE § 9-806.

32. IDAHO CODE § 9-805.

33. IDAHO CODE § 9-804(2)(a).

34. IDAHO CODE § 9-804(2)(b).

35. IDAHO CODE § 9-804(2)(c).

36. IDAHO CODE § 9-806(a).

37. IDAHO CODE § 74-101-126.

38. IDAHO CODE § 74-201-208.

the mediation; or (g) sought or offered to prove or disprove abuse, neglect or abandonment or exploitation in a proceeding involving a child or an adult who is a ward of a protective services agency.³⁹ The privilege may be waived if expressly waived by all mediation parties and, in case of the mediator, the mediator expressly waives or, in case of a nonparty participant, the nonparty participant expressly waives.⁴⁰ The parties cannot waive the mediator's right of privilege.⁴¹

An additional exception requires special attention. No privilege applies if a court, administrative agency or arbitrator finds that a party seeking discovery or a proponent of evidence has shown: (a) the evidence is not otherwise available; (b) the need substantially outweighs any interest in protecting confidentiality; and (c) it is needed in a criminal case or in a proceeding to rescind, reform or avoid the mediation agreement.⁴²

vi. Preclusions

A party may be precluded from asserting the privilege if he/she discloses a mediation communication which prejudices another, in which case the disclosing person is precluded from asserting the privilege when the other person responds.⁴³ Also, if a person uses mediation to plan, attempt to commit, or commit a crime or conceal an ongoing crime, he/she is precluded from asserting a privilege.⁴⁴

vii. Confidentiality

Section 9-808 provides: "[u]nless subject to the [Public Records Act or Open Meetings Law], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state" (emphasis added).⁴⁵

Parties and mediators need to be aware that the right of privilege or the duty of confidentiality may not be protected if the dispute is not settled and results in litigation in a state other than Idaho that does not protect mediation communications. For example, if the mediation takes place in Idaho, whose laws protect mediation communications from disclosure, and if the mediation communications are relevant in a different state that does not protect mediation communications, the court in a different state may apply its own evidence law and order a party or mediator to reveal the Idaho mediation communications.

39. IDAHO CODE §§ 9-806(1)(c)-(g).

40. IDAHO CODE § 9-805(1).

41. IDAHO CODE § 9-805(a).

42. IDAHO CODE § 9-806(2).

43. Idaho Code § 9-805(2)

44. IDAHO CODE § 9-805.

45. IDAHO CODE § 9-808.

For example, *Larson v. Larson*, 687 Fed. Appx. 695, 706 (10th Cir. 2017), involved a dispute between family members who were fighting over family assets.⁴⁶ The lawsuit was in Wyoming.⁴⁷ They mediated in Colorado, face to face.⁴⁸ Their mediation agreement provided that all mediation communications were confidential by the agreement and the Colorado Dispute Resolution Act.⁴⁹ At the end of the mediation they signed “basic terms of settlement” but could not agree on final documentation.⁵⁰ In Wyoming, Arny Larson moved to enforce the term sheet and demanded production of a PowerPoint that Charles Larson used at the mediation in Denver.⁵¹ The Wyoming judge applied Wyoming law that does not protect mediation communications and ordered production of the PowerPoint presentation and admitted it into evidence.⁵² The 10th Circuit Court of Appeals affirmed the trial court decision.⁵³ A similar situation and result occurred in the New York case of *Matter of People of the State of New York v. Price Waterhouse Coopers LLP*, 2017 NY Slip Op. 04071, 150 A.D. 3d 578 (N.Y. App. Div. 2017).⁵⁴ *See also, Hauzinger v. Hauzinger*, 43 A.D. 3d 1289, 842 N.Y.S. 2d 646 (N.Y. App. Div. 2007), *aff'd*, 10 N.Y.3d 923, 862 N.Y.S.2d 456, 892 N.E. 849 (2008) (court ordered mediator to testify in a divorce action about mediation communications notwithstanding a confidentiality agreement between the parties).

The issue whether mediation communications are confidential or privileged from disclosure becomes even more complicated when the mediation is conducted via a virtual means between or among parties who are located in different states, particularly if one of the states does not protect mediation communications.

The lesson to be learned is that mediators should not promise the parties that their communications, and particularly online mediation communications where one of the parties is located outside of Idaho, will be privileged from disclosure or be treated as confidential in any proceeding that takes place outside of Idaho unless

46. *Larson v. Larson*, 687 Fed. Appx. 695, 706 (10th Cir. 2017).

47. *Id.* at 699.

48. *Id.* at 700.

49. *Id.* at 706.

50. *Id.* at 697.

51. *Id.* at 701.

52. 687 Fed. Appx. at 705.

53. *Id.* at 706.

54. *Matter of People of the State of New York v. Price Waterhouse Coopers LLP*, 2017 NY Slip Op. 04071, 150 A.D. 3d 578 (N.Y. App. Div. 2017). *See also, Hauzinger v. Hauzinger*, 43 A.D. 3d 1289, 842 N.Y.S. 2d 646 (N.Y. App. Div. 2007), *aff'd*, 10 N.Y.3d 923, 862 N.Y.S.2d 456, 892 N.E. 849 (2008) (court ordered mediator to testify in a divorce action about mediation communications notwithstanding a confidentiality agreement between the parties).

the mediator is certain that all relevant jurisdictions and venues protect mediation communications.

viii. Mediator's Disclosure of Conflicts of Interest

Section 9-809 imposes an obligation on the mediator, before the mediator accepts the engagement, to make a reasonable inquiry whether any circumstances exist that a reasonable person would consider likely to affect or appear to affect the impartiality of the mediator and disclose such information to the mediation parties. It is a continuing obligation.⁵⁵ This section also imposes an obligation on the mediator to disclose the mediator's qualifications to mediate a dispute, if asked to do so by a mediation party.⁵⁶

ix. Understanding the Words: Some Definitions in the IUMA

(1) "Mediation" "means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."⁵⁷

(2) "Mediation communication" "means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing or reconvening a mediation or retaining a mediator."

(3) "Mediation party" "means a person that participates in a mediation and whose agreement is necessary to resolve the dispute."

(4) "Mediator" "means an individual who conducts a mediation."

(5) "Nonparty participant" "means a person, other than a party or mediator, that participates in a mediation."

(6) "Person" "means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity."⁵⁸

55. IDAHO CODE § 9-809

56. *Id.*

57. IDAHO CODE § 9-802(1)-(6).

58. IDAHO CODE § 9-802(1)-(6).

B. Idaho Rule of Evidence 507: Conduct of Mediations (2008; am. 2018).⁵⁹

i. Purpose of the Rule

I.R.E. 507 was adopted by the Idaho Supreme Court in 2008.⁶⁰ The purpose of the rule is to provide parties who participate in mediation an evidentiary privilege that may be asserted in Idaho state courts by mediation parties, other participants, and the mediator to protect mediation communications from unauthorized disclosure in Idaho state courts. Rule 507 is substantively identical to sections 9–801-807 of the UIMA.

ii. Need for Rule and Statute

There is a need for both the rule and the statute. Whereas the rule governs the right of privilege only in judicial proceedings in the Idaho state courts, the statute governs the right of privilege in other non-judicial venues such as administrative proceedings that are not governed by the Idaho Rules of Evidence, arbitration proceedings, and legislative proceedings.⁶¹ As noted above, the statute is not effective to provide a rule of privilege in state court proceedings because I.R.E. 501 provides there can be no privilege unless created by a constitutional provision, statute implementing a constitutional provision, or a rule created by the Idaho Supreme Court.⁶² In other words, statutory privileges that are not included in Rule 501 have no effect in Idaho state court proceedings. Rule 507 provides the privilege that protects most mediation communications.⁶³

59. In 2018 Rule 507 was amended and reformatted. See *Evidence Rules Advisory Comm. Minutes of Meeting December 1, 2017* for a description of the amendments.

60. Order of the Supreme Court adopted Rule 507 on January 3, 2008, effective July 1, 2008; amended April 27, 2012; effective July 1, 2012; amended March 26, 2018, effective July 1, 2018.

61. See Idaho Evidence Rule 101(b) Title and Scope: "These rules govern all cases and proceedings in the courts of the State of Idaho and all cases and proceedings to which rules of evidence are applicable, except as otherwise provided in this rule." Compare, IDAHO CODE 9-803, Uniform Mediation Act, Scope: "This chapter applies to a mediation in which: (a) The mediation parties are required to mediate by statute or court order, administrative agency rule or referred to mediation by a court, administrative agency or arbitrator."

62. Idaho R. Evid. 501.

63. Idaho R. Evid.506.

iii. Scope of Rule is Limited to Creating a Privilege

The evidence rule is limited to the creation of the right of privilege to protect mediation communications from disclosure in judicial proceedings.⁶⁴ The rule does not contain provisions for confidentiality, the right to be represented by an attorney in mediation, or the requirement that mediators disclose conflicts of interest before accepting an engagement. These provisions are found only in the IUMA.

C. Idaho Rule of Civil Procedure 37.1: Mediation of Civil Lawsuits (2016; am. 2021).

i. Re-designation and Amendment of the Rule

Rule 37.1 was formerly Rule 16(k) of the Idaho Rules of Civil Procedure. The new designation was effective in 2016. Rule 37.1 is substantively identical to former Rule 16(k).

Effective July 1, 2021, Rule 37.1 is amended to include Online Dispute Resolution of Civil Lawsuits in Ada County.⁶⁵ Online Dispute Resolution is the online process through which certain civil case types may be negotiated informally by the parties using the Court's online dispute resolution tool. At the present time, the online dispute resolution process is limited to disputes between landlords and tenants in Ada County, Idaho.⁶⁶

ii. Scope of the Rule

Rule 37.1 governs the mediation of civil lawsuits that are pending in the Idaho state courts and Online Dispute Resolution using the Court's online dispute resolution tool. The Rule provides that "[i]n its discretion a court may order a case to mediation (1) upon motion by a party; (2) at any Rule 16 conference; (3) ... if all parties agree that mediation would be beneficial; or (4) at any other time upon 7 days' notice to the parties if the court determines mediation is appropriate."

"Where available by county or judicial district, a case eligible for Online Dispute Resolution may be automatically assigned to Online Dispute Resolution after which the parties may opt-out affirmatively through the Court's system or by non-participation of either party."⁶⁷

64. Idaho R. Evid. 101(b).

65. I.R.C.P. 37.1, adopted March 1, 2016, effective July 1, 2016; amended September 9, 2016, effective September 9, 2016; amended June 24, 2021, effective July 1, 2021.

66. See Press Release, State of Idaho Judicial Branch, New Tool Allows Landlords, Tenants [in Ada County] to Resolve Eviction Cases Online (July 7, 2021), <https://isc.idaho.gov/sites/default/files/press-release-documents/20210707%20New%20Tool%20Allows%20Landlords%2C%20Tenants%20to%20Resolve%20Eviction%20Cases%20Online.pdf>.

67. I.R.C.P. 37.1(d).

iii. Definition of Mediation

Subpart (a) of Rule 37.1 defines “mediation” as “the process by which a neutral mediator assists the parties in reaching a mutually acceptable agreement. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and finding points of agreement. An agreement reached by the parties is to be based on the decisions of the parties, and not the decisions of the mediator.”⁶⁸

iv. Selection of the Mediator and Scheduling the First Session

The parties have 28 days to select a mediator if ordered to mediation by a court, and if not done, the court must appoint a mediator from the judicial district’s list of mediators.⁶⁹ Unless otherwise ordered by the court, the first session must occur within 42 days of the selection or appointment of the mediator.⁷⁰

v. Reports

The mediator or the parties must report to the court within seven days following the last mediation session “whether the case has, in whole or in part, settled.”⁷¹

vi. Compensation of Mediators

Mediators must be compensated at their regular fees and expenses; the parties, unless otherwise agreed, are responsible for their prorated share; and if not paid, the court, upon motion of the mediator, may order payment.⁷²

vii. Impartiality

Rule 37.1 expressly imposes on the mediator “a duty to be impartial, and ... a continuing duty to advise all parties of any circumstance bearing on possible bias, prejudice or partiality.”⁷³

68. I.R.C.P. 37.1(a).

69. I.R.C.P. 37.1(e).

70. I.R.C.P. 37.1(f).

71. I.R.C.P. 37.1(g).

72. I.R.C.P. 37.1(h).

73. I.R.C.P. 37.1(i).

viii. Confidentiality

The mediator must abide by the confidentiality rules agreed to by the parties. Confidentiality protections of Idaho Evidence of Rules 408⁷⁴ and 507⁷⁵ extend to mediations under this Rule 37.1.⁷⁶

ix. Attendance

Attendance with authority to settle is mandatory by the attorneys for the parties, the parties and insurers, if applicable, unless excused by the court, the mediator or the parties.⁷⁷

x. Sanctions

“The mediator is subject to sanctions, including ... removal from the roster of mediators, if the mediator fails to assume the responsibilities provided” in Rule 37.1.⁷⁸ There is no provision for sanctioning the parties if they fail to participate in good faith.

D. Idaho Supreme Court Administrative Rule 73. Qualifications of Civil Mediators (2016)

“Each trial court administrator shall maintain a list of mediators who meet the qualifications of [this Rule], and rosters from dispute resolution organizations that meet the criteria set forth in [this Rule].”⁷⁹ Mediators shall “(i) be a member of the Idaho State Bar; (ii) have been admitted to practice law for not less than five (5) years; and (iii) has attended a minimum of forth (40) hours of mediation training.”⁸⁰

In order for a person to remain on the list of mediators maintained by the Administrative Director of the Courts, the mediator must submit proof that the mediator has completed a minimum of five (5) hours of additional training or education during the preceding three (3) calendar years on one of the following topics: mediation, conflict management, negotiation, interpersonal communication, conciliation, dispute resolution or facilitation. This training shall be acquired by completing

74. I.R.E. 408 provides that offers of settlement and statements made during settlement negotiations may not be used to prove liability or damages. They can be used for other purposes. *Id.*

75. I.R.E. 507 provides a right of privilege to protect confidential mediation communications from disclosure.

76. I.R.C.P. 37.1(k).

77. I.R.C.P. 37.1(j).

78. I.R.C.P. 37.1(l).

79. I.C.A.R. 73.

80. I.C.A.R. 73(a)(1).

a program approved by an accredited college or university or by one of the following organizations: Idaho State Bar, or its equivalent from another state; Idaho Mediation Association, or its equivalent from another state; or Society of Professionals in Dispute Resolution: American College of Civil Trial Mediators; Northwest Institute for Dispute Resolution; Institute for Conflict Management; the National Academy of Distinguished Neutrals or any mediation training provided by the federal courts. Any program that does not meet this criteria may be submitted for approval either prior to or after completion. The requirement for continuing education for mediators include at least five (5) hours of training in mediation takes effect for renewals due on or after July 1, 2013.⁸¹

A public or private dispute resolution organization may make its roster of mediators available to the Administrative Director of the Courts for distribution to the trial court administrators if it documents that it has: (i) an established selection and evaluation process for neutrals; (ii) a mechanism for addressing complaints brought against neutrals; and (iii) a published code of ethics that the neutrals must follow. A compilation of the organizations selection, evaluation, published code of ethics, and complaint processes that can be distributed to the parties shall be provided.⁸²

A list and roster of mediators distributed by the Administrative Director the Courts must contain the following information about each mediator: (i) name, address, telephone and FAX number(s); (ii) professional affiliation(s); (iii) education; (iv) legal and/or mediation training and experience; and (v) fees and expenses.⁸³

E. Idaho Family Law Rules 601-603: Mediation of Child Custody and Visitation Disputes (2014; am. 2021)⁸⁴

i. Rule 601: Alternative Dispute Resolution Screening

81. I.C.A.R. 73(a)(2).

82. I.C.A.R. 73(b)(1).

83. I.C.A.R. 73(c).

84. I.F.L.R. 601-603. Rule 602 was amended in 2018 to clarify qualifications and documentation required of family law mediators. It was further amended effective July 1, 2021, to limit the qualifications of child custody mediators to ensure that new mediators meet the ethical standards required by their professional licenses or by their memberships in professional mediation and conflict resolution organizations.

The family law rules governing mediation of child custody and visitation disputes were formerly codified under I.R.C.P. 16(j).⁸⁵ They have been significantly revised and redesignated as Rules 601-603 of the Idaho Family Law Rules.

Rule 601 provides a mechanism for screening all domestic relations cases involving children and authorizes the judge to order the parties to participate in alternative dispute resolution (ADR) screening for the purpose of assessing whether parents are appropriate or prepared to engage in mediation.⁸⁶ The Rule provides for qualifications of ADR screeners and standards for ADR screening referral reports.⁸⁷ The ADR screening report is exempt from disclosure under Idaho Court Administrative Rule 32(d)(14)(B).⁸⁸

ii. Rule 602. Mediation of Child Custody and Visitation Disputes

Rule 602 defines “mediation” in the same language as I.R.C.P. 37.1.⁸⁹ It also contains similar provisions for selection of the mediator. However, the Rule then gets specific as to child custody and visitation disputes.

Matters subject to mediation. All domestic relations actions involving a controversy over custody or visitation of minor children are subject to mediation.⁹⁰

Requirement to attend orientation. All parties to any domestic relations case involving children can “be required to attend parent mediation orientation, unless excused by the court.”⁹¹

Authority of the court. A court shall order mediation if it finds that mediation is in the best interest of the children and it is not otherwise inappropriate to do so.⁹²

Qualifications of mediator – application and documentation. Unlike Rule 37.1 which does not impose qualifications for a civil case mediator, a family law mediation must meet certain qualifications to be admitted to the list of registered family law mediators that is maintained by the Administrative Director of the Courts.

Effective July 1, 2021, Rule 602 is revised so that only those [new] applicants who hold at least one of the following professional credentials will qualify for

85. See I.F.L.R. 601.

86. I.F.L.R. 601

87. I.F.L.R. 601(b) and (c).

88. I.F.L.R. 601(d).

89. I.F.L.R. 602(a); I.R.C.P. 37.1(a).

90. I.F.L.R. 602(b).

91. I.F.L.R. 602(d).

92. I.F.L.R. 602(e).

placement on the approved mediator roster: (a) recognition by the Idaho Mediation Association as a Certified Professional Mediator; or holds a membership in the Association for Conflict Resolution or other national organization with equivalent membership standards at an advanced practitioner level; or (b) the applicant is a member of the Idaho judiciary, a licensed member of the Idaho State Bar, or a licensed psychologist, counselor, social worker, or therapist.⁹³

Duties of family law mediator. Rule 602 imposes specific duties on the family law mediator, including the duty to define and describe for the parties the process of mediation and its cost during the initial conference before the mediation conference begins. The description should include (a) the difference between mediation and other forms of conflict resolution, including therapy and counseling; (b) the circumstances under which the mediator will meet alone with either of the parties or any other person; (c) any confidentiality of the mediation proceedings and any privilege against disclosure; (d) the fact that any agreement reached will be by mutual consent; (e) the mediator shall advise the participants to seek independent legal counsel prior to resolving the issues and in conjunction with formalizing an agreement; and (f) the information necessary for defining the disputed issues.⁹⁴

Impartiality. Rule 602 also imposes a duty on the mediator to be impartial and to advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality.

Agreement conditions. The parties have a “right to have counsel review any resulting agreement before” it is submitted to the court, and then it is subject to the review and approval of the court.⁹⁵ If the court finds it is not in the best interest of the children, it must be rejected.⁹⁶

Contact between mediator and the court. The mediator is to have no contact with the court except to report, without comment, that the parties are at an impasse; have reached an agreement, in which case it must be reduced to writing, signed and submitted to the court for its approval; that one of the parties failed to

93. I.F.L.R. 602(f).

94. I.F.L.R. 602(g)(1).

95. I.F.L.R. 602(g)(2).

96. *Id.*

attend; that meaningful mediation is ongoing; that the mediator withdraws; or the allegation or suspicion of domestic violence.⁹⁷

Contact between mediator and counsel or others. The mediator and counsel for the parties may communicate, provided (1) the communications are in writing or by conference call; and (2) attorneys and others are excluded from mediation conference unless their presence is requested by the mediator or ordered by the court.⁹⁸

Termination of mediation – status report. If progress toward a reasonable settlement is unlikely, the court or mediator may terminate mediation proceedings.⁹⁹ The mediator must notify the court when the mediation is concluded.¹⁰⁰ Also, notice of the mediation process must be submitted to the court within 28 days from the date of the order requiring mediation.¹⁰¹

iii. Rule 603. Mediation of Other Matters

This rule appears to be a duplication of I.R.P.C. 37.1, except it adds a provision for qualifications of mediators that is not contained in Rule 37.1. The Rule provides that each trial court administrator shall maintain a list of mediators who meet the qualifications that are specified in the Rule.¹⁰²

F. Idaho Criminal Rule 18.1: Mediation of Criminal Cases (2017; am. 2018)

Rule 18.1 provides that in any criminal proceeding, any party or the court may initiate a request for the parties to participate in mediation to resolve some or all of the issues presented in the case.¹⁰³ Participation is voluntary and will take place only upon agreement of the parties.¹⁰⁴ Not all defendants in a multi-defendant case need join in the mediation.¹⁰⁵ Decision making authority remains with the parties not the mediator.¹⁰⁶

97. I.F.L.R. 602(h).

98. I.F.L.R. 602(i).

99. I.F.L.R. 602(j).

100. *Id.*

101. I.F.L.R. 602(k).

102. I. F.L.R. 603(2).

103. Idaho Crim. R. 18.1.

104. *Id.*

105. *Id.*

106. *Id.*

i. Definition of "Mediation"

Mediation under the criminal rule is "the process by which a neutral mediator assists the parties (defined as the prosecuting attorney on behalf of the State and the Defendant) in reaching a mutually acceptable agreement as to issues in the case, which may include sentencing opinions, restitution awards, admissibility of evidence and any other issues which will facilitate the resolution of the case.¹⁰⁷ Unless otherwise ordered, mediation shall not stay any other proceeding."¹⁰⁸

ii. Matters Subject to Mediation

All misdemeanor and felony cases are subject to mediation if the court deems it may be beneficial in resolving the case.¹⁰⁹ Issues related, but not limited to, the possibility of reduced charges, agreements about sentencing recommendations or possible Rule 11 (pleas, alternative or conditional pleas) agreements, the handling of restitution and continuing relationship with any victim are all matters which may be referred to mediation.¹¹⁰

iii. Selection and Role of Mediator

The court shall select a mediator from a roster provided by the Administrative Office of the Courts after considering the recommendations of the parties.¹¹¹ The roster consists only of senior or sitting judges and justices who have indicated a willingness to serve as a mediator and have satisfied criminal mediation training.¹¹² The mediator is paid by the state.¹¹³

"The role of the mediator is limited to facilitating a voluntary settlement," to aiding "the parties in identifying the issues, reducing misunderstandings, exploring options and discussing areas of agreement" which "can expedite the trial or resolution of the case."¹¹⁴ The mediator cannot "preside over any future aspect of

107. Idaho Crim. R. 18.1(a).

108. Idaho Crim R. 18.1.

109. Idaho Crim. R. 18.1(b).

110. *Id.* at (b)(1-4).

111. IDAHO CRIM. R. 18.1(c).

112. *Id.*

113. *Id.*

114. Idaho Crim R. 18.1(d).

the case.”¹¹⁵ The mediator cannot “take a guilty plea from nor sentence any defendant.”¹¹⁶

iv. Persons To Be Present at Mediation

Participants are “determined by the attorneys and the mediator. Government attorney[s] participating in the settlement discussions must have authority to agree on a disposition of the case.”¹¹⁷

v. Confidentiality

Except as provided in Idaho Code section 16-1605, which compels reporting of child or adult abuse, mediation proceedings under the criminal rule are “in all respects confidential and not reported or recorded.”¹¹⁸

vi. Mediator Privilege

“The mediator privilege is governed by Idaho Rule of Evidence 507”¹¹⁹

vii. Communications Between Mediator and the Court and Mediator and Attorneys

Communications between the mediator and the court are restricted to a report that: (a) “the parties are at impasse”; (b) an agreement has been reached, in which case it may be reduced to writing, signed by the prosecutor, defendant and counsel, then submitted to the court for approval; (c) the mediation is ongoing; or (d) the mediator withdraws.¹²⁰

Communications between the mediator and attorneys may occur in advance of the mediation to become acquainted with the case and they “may be conducted separately with each of the attorneys and without the presence of the defendant.”¹²¹

xiii. Termination of Mediation

The mediation can be terminated at any time by any party or the mediator.¹²²

115. *Id.*

116. *Id.*

117. Idaho Crim. R. 18.1(e).

118. Idaho Crim. R. 18.1(f).

119. Idaho Crim. R. 18.1(g).

120. Idaho Crim. R. 18.1(h).

121. Idaho Crim. R. 18.1(i).

122. Idaho Crim. R. 18.1(j).

G. Idaho Rules of Professional Conduct 1.6, 1.12, 2.2, 4.1 and 8.4 (2014).

The Idaho Rules of Professional Conduct (I.R.P.C.) govern the conduct of attorneys who practice law in Idaho. The Rules that are currently in effect were adopted by the Idaho Supreme Court in 2014.¹²³ They are based largely on the American Bar Association (ABA) Model Rules of Professional Conduct, with some Idaho variations.

Although all of the Rules govern lawyers at all times, certain of the Rules are particularly relevant to times when lawyers are representing clients in the mediation process or are providing services as a mediator.

i. I.R.P.C. 1.6: Confidentiality of Information

Rule 1.6 imposes an obligation on a lawyer to “not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted” because the lawyer reasonably believes it is necessary

(a) to prevent the client from committing a crime; (b) to prevent reasonably certain death or substantial bodily harm; (c) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime; (d) to secure legal advice about the lawyer’s compliance with these Rules; (e) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of a client; or (f) to comply with other law or a court order.¹²⁴

Rule 1.6

123. See Introduction to the Idaho Rules of Professional Conduct. They became effective on November 1, 1986, with subsequent amendments by order of the Idaho Supreme Court. The IRPC are based largely on the ABA Model Rules of Professional Conduct with some Idaho variations. The current version of the IRPC were subsequently revised and adopted by the Idaho Supreme Court effective July 1, 2004.

124. IDAHO R. PRO. CONDUCT 1.6 (2014).

governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.¹²⁵

Rule 1.6 may restrict the authority or ability of a lawyer to represent a client during negotiations if the lawyer is not authorized to reveal information that is essential to the negotiation or mediation process.¹²⁶

ii. Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

A lawyer cannot represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge, arbitrator,¹²⁷ mediator or other third-party neutral unless all parties to the proceeding give informed consent, confirmed in writing.¹²⁸ Moreover, a lawyer cannot negotiate for employment with any person who is involved as a party or a lawyer for a party in a matter in which the lawyer is participating personally as an arbitrator, mediator or other third-party neutral.¹²⁹

Lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. Rule 1.12 forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing.¹³⁰

Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, Rule 1.12 provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of the Rule are satisfied.¹³¹

125. IDAHO R. PRO. CONDUCT 1.6 cmt 1, 2 and 5 (2014).

126. IDAHO R. PRO. CONDUCT 1.6 (2014).

127. An exception exists if the arbitrator was selected as a partisan of a party in a multimember arbitration panel. See Code of Ethics for Arbitrators in Commercial Disputes, Effective March 1, 2004, Canons IX and X.

128. IDAHO R. PRO. CONDUCT 1.6(a) (2014). This proscription also applies to all lawyers in the lawyer's firm.

129. IDAHO R. PRO. CONDUCT 1.12(b) (2014).

130. IDAHO R. PRO. CONDUCT 1.12 cmt 2 (2014).

131. IDAHO R. PRO. CONDUCT 1.12 cmt 3 (2014).

iii. Rule 2.2: Lawyer Serving as Third-Party Neutral

A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.¹³² Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.¹³³ A lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them, and when the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.¹³⁴

Lawyer-neutrals may be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes or the Model Standards of Conduct for Mediators. Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the third party neutral and a lawyer's service as a client representative. Lawyers who represent clients in ADR processes are governed by the Rules of Professional Conduct.¹³⁵ When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer's duty of candor is governed by Rule 3.3.¹³⁶ Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.¹³⁷

iv. I.R.P.C. 4.1: Transactions with Persons Other Than Clients

Rule 4.1 provides that a lawyer in the course of representing a client shall not knowingly: "(a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited by Rule 1.6."¹³⁸

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer

132. IDAHO R. PRO. CONDUCT 2.2 (2014).

133. *Id.*

134. IDAHO R. PRO. CONDUCT 2.1 (2014).

135. IDAHO R. PRO. CONDUCT 2.2. (2014)

136. IDAHO R. PRO. CONDUCT 3.3. (2014)

137. IDAHO R. PRO. CONDUCT 2.2 cmt 5 (2014).

138. IDAHO R. PRO. CONDUCT 4.1 (2014).

incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statement or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, [Rule 8.4 is applicable].¹³⁹

This Rule [4.1] refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.¹⁴⁰

v. I.R.P.C. 8.4: Misconduct

Rule 8.4 provides that

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct;
- (b) commit a criminal act;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of rules of judicial conduct or other law.¹⁴¹

H. Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (1998)

Congress authorized the district courts to adopt, by local rule, the use of ADR processes that include mediation.¹⁴² Under section 4, Confidentiality Provisions, Congress authorized each federal district court to provide, by local rule, for the

139. IDAHO R. PRO. CONDUCT 4.1 cmt 1 (2014).

140. IDAHO R. PRO. CONDUCT 4.1 cmt. 2 (2014).

141. IDAHO R. PRO. CONDUCT 8.4 (2014).

142. 28 U.S.C. § 651.

confidentiality of the ADR processes and to prohibit disclosure of confidential dispute resolution communications.¹⁴³

I. U.S. District Court, District of Idaho Local Federal Rule 16.4 (2015)¹⁴⁴

i. Purpose and Scope

The purpose of Rule 16.4 is “to provide parties to civil cases and proceedings in [the federal district court] with an opportunity to use ADR procedures. The Rule is intended to improve parties’ access to the dispute resolution process that best serves their needs and fits their circumstances.” The scope of the Rule covers all civil cases pending before any district judge or magistrate judge in the district and proceedings pending before a bankruptcy judge in the district.

ii. ADR Procedures and Rules

Rule 16.4 provides guidance for judicial settlement conferences,¹⁴⁵ mediation and arbitration.

(1) **Mediation.** “Mediation” is defined as “a process in which a private, impartial third party (the “Mediator”) is hired or retained by the parties to facilitate communication between them to assist in their negotiations, e.g., by clarifying underlying interests, as they attempt to reach an agreed settlement of their dispute. Whether a settlement results from a mediation and the nature and extent of the settlement are within the sole control of the parties.”

(2) **Initiation of a Mediation.** At any time after the action is at issue, any party may request, or the assigned judge on his/her own initiative may order, a mediation.

(3) **Selection of a Mediator.** Selection of a mediator is left to the parties. It may be someone from the court’s list of approved mediators or someone else.

(4) **Confidentiality.** The mediator must abide by the confidentiality rules agreed to by the parties. Confidentiality protections of Federal Rule of Evidence 408 (offers of settlement) extend to mediations under this Rule 16.4.

143. 28 U.S.C. § 652(d).

144. Rule 16.4 was initially adopted by the Idaho Federal District Court in 2015 and was included in the revision of other local rules in 2021. <https://pacer.login.uscourts.gov/csologin/login>.

145. A judicial settlement conference is a process in which a magistrate judge is made available to facilitate communication between the parties and assist them in their negotiations.

(5) **Report of Mediator.** A mediator is required to report within five days of the conclusion of a mediation whether it occurred and merely whether settlement was or was not achieved.

Rule 16.4 imposes a duty on the parties to consider ADR, confer and report which type of ADR process is best suited to the circumstances of their case, and when it will be appropriate for the ADR session to be held.

V. STANDARDS OF PRACTICE AND GUIDELINES

A. Idaho Mediation Association Standards of Practice of Idaho Mediators

The Preamble to the Idaho Mediation Association Standards of Practice for Idaho Mediators provides that “The Idaho Mediation Association views these standards as minimum standards that can reasonably be expected of mediators holding certificates issued by the Association. Mediators who are not Idaho Mediation Association certified are encouraged to abide by these standards when acting in a meditative (sp) capacity.”¹⁴⁶ Each section includes guidelines providing that a mediator has duties, which are summarized as follows:

Section I. Facilitating the Process.

- (1) To educate the parties about mediation;
- (2) To assess the parties’ willingness and ability to mediate;
- (3) To make a reasonable effort to assist the parties to consider the interests of absentee parties;
- (4) To gather information from the parties and assist them to mutually define and agree on issues;
- (5) To disclose any biases or strong views relating to the issues to be mediated;
- (6) To insist upon disclosure of relevant information in the mediation;
- (7) To reach an understanding with the parties regarding the procedures to be followed in the mediation;
- (8) To explain fees for services; and
- (9) Encourage parties to seek independent legal counsel if appropriate.

Section II. Confidentiality.

- (1) To foster confidentiality of the process unless all parties agree to share information;
- (2) To inform parties, in relevant cases, of the duty to report child abuse, neglect, or abandonment and to do so when appropriate;

¹⁴⁶. *Standards of Practice for Idaho Mediators*, IDAHO MEDIATION ASS’N (last visited August 21, 2023), <https://idahomediationassociation.org/Standards-of-Practice>.

- (3) To refrain from testifying at court proceedings without the consent of all parties;
- (4) To store and dispose of records in a confidential and professional way; and
- (5) To obtain mutual written consent of parties prior to release of information to others.

Section III. Impartiality.

- (1) To disclose affiliations to participants;
- (2) To be aware that post-mediation professional or social relationships may compromise the availability of the mediator;
- (3) A mediator who is an attorney, mental health, or other professional shall not represent or counsel either party during or after the mediation in matters pertaining to the instant mediation;
- (4) A mediator shall have no financial or other interest in the outcome;
- (5) To assist the participants in reaching an informed and voluntary settlement;
- (6) A mediator may provide professional advice where qualified by training and experience.

Section IV. Concluding Mediation.

- (1) To discuss the process for formalizing and implementing the memorandum of understanding if there is an agreement;
- (2) To terminate the process if at impasse.

Section V. Publicity and Advertising.

- (1) To not make false or misleading statements regarding abilities and qualifications.

Section VI. Professional Relationships.

- (1) Where more than one mediator is involved, to keep the other informed;
- (2) To respect the complementary relationship between mediator and legal, mental health, and other professionals.

Section VII. Training and Continuing Education.

- (1) To acquire substantive knowledge and procedural skills;
- (2) To participate in continuing education.

Section VIII. Advancement of Mediation.

(1) To provide some mediation service in the community pro bono and to act as a mentor to others.¹⁴⁷

B. The Model Standards of Conduct for Mediators adopted by Idaho State Bar (2005)

The Model Standards of Conduct for Mediators were adopted by the Idaho State Bar in 2005.¹⁴⁸ They are applicable to lawyers who practice law in Idaho.¹⁴⁹ The headnote states:

The Model Standards of Conduct for Mediators were adopted by the Idaho State Bar as aspirational guidelines for mediators in all fields in the State of Idaho. It is understood that by making these standards aspirational, violation of the standards in and of itself are not grounds for disciplinary action by the Idaho State Bar. However, if an act that is an alleged violation of these standards is also a violation of one of the Idaho Rules of Professional Conduct or of the Judicial Code, that act may be the basis for discipline under those latter standards.¹⁵⁰

The current Model Standards are the *Model Standards of Conduct for Mediators* originally prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution.¹⁵¹ They were revised by the same successor organizations in 2005.¹⁵² The Preamble to *The Model Standards* states:

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

147. *Standards of Practice for Idaho Mediators*, IDAHO MEDIATION ASS'N (last visited August 21, 2023.) <https://idahomediationassociation.org/Standards-of-Practice>.

148. *The Model Standards of Conduct for Mediators*, IDAHO STATE BAR 443, (2005), https://isb.idaho.gov/wp-content/uploads/the_model_standards_of_conduct_for_mediators_2005.pdf.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interest, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.¹⁵³

The Note of Construction instructs that the Standards are to be read and construed in their entirety and that: "There is no priority significance attached to the sequence in which the Standards appear."¹⁵⁴

It further points out that:

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.¹⁵⁵

A very brief and incomplete description of each standard follows:

STANDARD I. SELF-DETERMINATION. This Standard requires a mediator to "conduct a mediation based on the principle of party self-determination" and provides that "self-determination is the act of coming to a voluntary, uncoerced

153. *The Model Standards of Conduct for Mediators*, supra note 148, at 443.

154. *Id.*

155. *Id.*

decision in which each party makes free and informed choices as to the process and outcome.”¹⁵⁶

STANDARD II. IMPARTIALITY. This Standard provides that “a mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias, or prejudice.”¹⁵⁷

STANDARD III. CONFLICTS OF INTEREST. “A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict [] can arise from involvement with the subject matter of the dispute or from any relationship between a mediator and any participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality.” A mediator has a duty to make a reasonable inquiry for potential conflicts.¹⁵⁸

STANDARD IV. COMPETENCE. “A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.”¹⁵⁹

STANDARD V. CONFIDENTIALITY. “A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.”¹⁶⁰

STANDARD VI. QUALITY OF PROCESS. “A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.”¹⁶¹

STANDARD VII. ADVERTISING AND SOLICITATION. “A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experience, services and fees.”¹⁶²

STANDARD VIII. FEES AND OTHER CHARGES. “A mediator shall provide each party or each party’s representative true and complete information about

156. *Id.*

157. *Id.*

158. *Id.* at 444.

159. *The Model Standards of Conduct for Mediators*, *supra* note 148, at 444.

160. *Id.*

161. *Id.*

162. *Id.* at 445

mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.”¹⁶³

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE. “A mediator should act in a manner that advances the practice of mediation.” A list of good practices is provided.¹⁶⁴

C. Model Standards of Conduct Adopted by ABA/AAA/ACR (2005)

The Model Standards of Conduct for Mediators were initially approved in 1994, by the American Bar Association Section of Dispute Resolution, the American Arbitration Association, and the Association of Conflict Resolution.¹⁶⁵ They are considered by many to be a foundational set of ethical guidelines for mediator practice and apply to all mediators; not just lawyers.

As noted above, the Idaho State Bar adopted these Model Standards in 2005. Although the Model Standards adopted by the Idaho State Bar are limited in application to lawyers practicing in the State of Idaho, the Model Standards that have been adopted by the ABA, AAA, and ACR may be applied to nonlawyers to establish standards of care in mediation.¹⁶⁶ They are summarized above and the summary will not be repeated here.

D. Model Standards of Practice for Family and Divorce Mediation (2009)

Like the Model Standards that were adopted by the ABA, AAA, and ACR, these family mediation standards are not binding on Idaho mediators, but they may be applied to family mediators to establish standards of care in mediation of family and divorce cases.¹⁶⁷

163. *Id.*

164. *Id.*

165. The Association for Conflict Resolution was formerly known as the Society of Professionals in Dispute Resolution (SPIDR). Association for Conflict Resolution; History and Bylaws.

166. Model Standards of Conduct for Mediators 2005. The Model Standards of Conduct for Mediators were adopted by the Idaho State Bar as aspirational guidelines for mediators in all fields in the State of Idaho.

167. See Association of Family and Conciliation Courts, *Model Standards of Practice for Family and Divorce Mediation*. “These *Model Standards of Practice for Family and Divorce Mediation* aim to perform three major functions: 1) to serve as a guide for the conduct of family mediators; 2) to inform the mediating participants of what they can expect; and 3) to promote public confidence in mediation as a process for resolving family disputes.” They are not intended to create legal rules or standards of liability.

The introduction to the Standards states: “[t]hese Standards address the issue of the best interests of the children and how mediation can help parents to address them in divorce.”¹⁶⁸

The Symposium that developed these Standards included representatives from Academy of Family Mediators (AFM), Association of Family Courts and Community Professionals (AFCC), American Bar Association (ABA) Family Section, and other national, state, and regional organizations.¹⁶⁹ The Standards represent a consensus of the best suggestions made over a period of two years in which the Symposium met to develop them.

The Standards had previously been adopted by the ABA Family Section and by AFCC, as well as several state mediation organizations.¹⁷⁰ The adoption of these Standards by ACR rounds out the trio of major national organizations whose members are family and divorce mediators.

The General Standards are described as follows:

Standard I. “A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.”¹⁷¹

Standard II. “A family mediator shall be qualified by education and training to undertake the mediation.”¹⁷²

Standard III. “A family mediator shall facilitate the participants’ understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.”¹⁷³

Standard IV. “A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator’s impartiality, the mediator shall withdraw regardless of the express agreement of the participants.”¹⁷⁴

168. See Introduction to “Model Standards of Practice for Family and Divorce Mediation (2009).”

169. See Association for Conflict Resolution, History and Bylaws, Bylaws for the Association for Conflict Resolution, Inc. (adopted 2002; amended June 2016).

170. *Id.*

171. Model Standards of Practice for Family and Divorce Mediation, Standard I.

172. *Id.*, Standard II.

173. *Id.*, Standard III.

174. *Id.*, Standard IV.

Standard V. "A family mediator shall fully disclose and explain the basis of any compensation, fees, and charges to the participants."¹⁷⁵

Standard VI. "A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge."¹⁷⁶

Standard VII. "A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the parties."¹⁷⁷

Standard VIII. "A family mediator shall assist participants in determining how to promote the best interests of children."¹⁷⁸

Standard IX. "A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly."¹⁷⁹

Standard X. "A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly."¹⁸⁰

Standard XI. "A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reason."¹⁸¹

Standard XII. "A family mediator shall be truthful in the advertisement and solicitation for mediation."¹⁸²

Standard XIII. "A family mediator shall acquire and maintain professional competence in mediation."¹⁸³

175. *Id.*, Standard V.

176. *Id.*, Standard VI.

177. Model Standards of Practice for Family and Divorce Mediation, Standard VII.

178. *Id.*, Standard VIII.

179. *Id.*, Standard IX.

180. *Id.*, Standard X.

181. *Id.*, Standard XI.

182. *Id.*, Standard XII.

183. Model Standards of Practice for Family and Divorce Mediation, Standard XIII.

E. Association of Family and Conciliation Courts, Guidelines for Child Protection Mediation, Guidelines for Child Custody Evaluation, and Guidelines for Intimate Partner Violence

The Guidelines promulgated by the AFCC were developed by the Child Welfare Collaborative Decision Making Network. The Network operates with the support and guidance of a number of organizations, including the Association of Family and Conciliation Courts (AFCC), the American Humane Association (AHA), and the Werner Institute of Creighton University.¹⁸⁴ The guidelines will be found at the AFCC website.¹⁸⁵

VI. RELATIONSHIP BETWEEN MEDIATION ETHICS AND MEDIATOR LIABILITY/IMMUNITY

A. Introduction

The mediator's conduct should conform to the requirements of the law, both in professional service to mediation parties and in the mediator's mediation business affairs. Many of the mediator's professional responsibilities are prescribed in the laws, rules, and standards of practice that provide guidelines and define the obligations that are imposed on the conduct of mediators. A violation of a standard of practice that results in harm to a mediation party or to a third party may form the basis for holding a mediator liable to the injured person for such injury or damage.¹⁸⁶ Although a violation of a standard of practice may not per se¹⁸⁷ give rise to a cause of action against a mediator for breach of a legal duty, the standard of practice may be used to establish a standard of care as a legal duty, the violation of which may result in liability being imposed upon the mediator, unless the mediator's situation warrants application of the defense of quasi-judicial immunity.¹⁸⁸ The scope of the defense of quasi-judicial immunity is limited.

184. Association for Conflict Resolution, History and Bylaws.

185. *Id.*

186. Liabilities and Immunities of Mediators – A Hostile Environment for Model Legislation, 1 OHIO STATE J. ON DISP. RESOL. 47, 47–83 (1986).

187. See Model Standards of Conduct for Mediators, 2005 Note on Construction: “The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion. The violation of a standard does not automatically result in a finding of strict liability.”

188. Idaho Supreme Court grants absolute immunity to judges and prosecuting attorneys at common law. *Shubert v Ada County*, 166 Idaho 458, 466, 461 P.3d 740, 748 (Idaho 2020), (citing *Nation v. State, Dept of Corr.*, 144 Idaho 177, 187-88, 158 P.3d, 963-64 (2007) (granting immunity for persons performing quasi-judicial functions).

The Preamble to the Idaho Mediation Association Standards of Practice for Idaho Mediators provides: "The Idaho Mediation Association views these standards as minimum standards that can reasonably be expected of mediators holding certificates issued by the Association. Mediators who are not Idaho Mediation Association certified are encouraged to abide by these standards when acting in a meditative (sp) capacity."¹⁸⁹ The Preamble to The Model Standards of Conduct for Mediators that were adopted by the Idaho State Bar in 2005 states: "Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes."¹⁹⁰

The relationship between ethical guidelines for mediators is clearly established when an ethical guideline is used to establish a standard of conduct for mediators and the violation of that standard of conduct is used to establish liability of a mediator for injuries or damages that result from the violation of the standard of conduct.

Lawsuits against mediators are infrequent,¹⁹¹ but there have been cases where mediators have been sued for negligence or malpractice. Most of the cases have been dismissed on the pleadings or by summary judgment in the mediator's favor.¹⁹² For example, in *Lehrer v. Zwernemann* the plaintiff sued the mediator, among others, for "negligence and malpractice, breach of contract, breach of fiduciary duty, fraud and conspiracy to commit fraud."¹⁹³ The plaintiff essentially claimed that the mediator did not act as a neutral, had conflicts of interest, and did not disclose certain facts to the plaintiff.¹⁹⁴ Rather than focus on particular duties or standards required of a mediator, the court took a functional approach. The court concluded that the "primary obligation" of a mediator is "to facilitate a settlement," which the defendant accomplished. Summary judgment in favor of the mediator was affirmed because the plaintiff could cite to no injury caused by the mediator.¹⁹⁵

189. *Standards of Practice for Idaho Mediators*, IDAHO MEDIATION ASSOCIATION, <https://www.idahomediationalassociation.org/Standards-of-Practice#:~:text=>

190. *Id.*

191. *Liabilities and Immunities of Mediators – A Hostile Environment for Model Legislation*, U.S. DEP'T OF JUST., <https://www.ojp.gov/ncjrs/virtual-library/abstracts/liabilities-and-immunities-mediators-hostile-environment>.

192. *Lehrer v. Zwernemann*, 14 S.W.3d 775, 776 (Tex. App. Hous. 1st Dist. 2000).

193. *Id.* at 777.

194. *Id.*

195. *Id.* at 777–78.

When actions against mediators sound in negligence, defining the duty of care of a mediator can be difficult, absent specific statutes or court rules. In *Chang's Imports, Inc. v. Srader*,¹⁹⁶ a 2002 case in which the plaintiff claimed the attorney/mediator was negligent and had conflicts of interest in mediating a dispute between a former client and a former acquaintance, the court ruled that a mediator should not be held to the same standard of care expected in the legal profession, even if the mediator is a lawyer.¹⁹⁷ The court dismissed the case, noting that at that time "[t]here is almost no law on what the appropriate standard of care is, if any, for a mediator who helps negotiate a settlement between parties."¹⁹⁸

Today, there is a whole body of law consisting of statutes, rules, and standards that govern the mediation process and the mediator, which make it much easier to define the duty of care of a mediator. While statutes and rules will apply to all mediators,¹⁹⁹ standards of an organization will apply only to its members. A plaintiff can argue that if a mediator is a member of a mediation organization, then that organization's guidelines for conduct may serve as a basis for establishing the mediator-defendant's standard of care and conduct.

One of the earlier reported cases involving a claim against a mediator is the 1981 case of *Lange v. Marshall*,²⁰⁰ which was in the Missouri Court of Appeals. On the facts of this case, a lawyer undertook the mediation of a divorce between two friends who had been married for 25 years. There was no written agreement to mediate. They signed a separation agreement, but the wife had second thoughts. She retained counsel, who obtained a more favorable settlement after lengthy discovery.²⁰¹ The wife then sued the mediator for negligence, which she alleged consisted of: (1) not inquiring deeply enough into the financial worth of the husband; (2) failing to help her negotiate a "better" settlement; (3) not advising her that she would get more if she litigated; and (4) not fully disclosing her rights to property and maintenance.²⁰² At trial, the wife was awarded \$74,000.00 against the mediator for damages, fees, and costs.²⁰³ On appeal, the Missouri Court of Appeal set the trial judgment aside, concluding that the mediator did owe a positive duty to: (1) make inquiries respecting the extent of assets; (2) advise the parties of the

196. *Chang's Imps., Inc. v. Srader*, 216 F. Supp. 2d 325 (S.D.N.Y. 2002).

197. *Id.* at 332–33.

198. *Id.* at 332.

199. Com. Arb. § 174:3 Uniform Mediation Act (NAT'L CONF. COMM'RS UNIF. L 2003). For example, Section 9 of the Uniform Mediation Act (UMA) may provide a basis for a mediator misconduct claim. Section 9 requires a mediator to make a reasonable inquiry to determine if there are any facts that might impact the impartiality of the mediator and disclose these facts to the parties as soon as possible. The UMA states that a mediator must disclose those facts a "reasonable individual" would consider likely to affect impartiality, the standard by which a mediator is held to perform.

200. *Lange v. Marshall*, 622 S.W. 2d 237 (Mo. Ct. App. 1981).

201. *Id.*

202. *Id.* at 238.

203. *Id.* at 237.

alternatives to mediation, and (3) facilitate negotiation of a “better” arrangement for the wife, which duties were breached.²⁰⁴ However, the court held that the plaintiff did not meet the burden of establishing that the negligence of the mediator actually caused the loss.²⁰⁵ There was no evidence that the husband would have agreed to a different settlement in mediation had the mediator done the things he failed to do. The Court said that the wife had to prove that the husband would have agreed to a better settlement if the mediator had made better financial inquiries and had advised the wife of her rights, but that it was “the rankest conjecture” to conclude the husband would have so acted without litigation.²⁰⁶

The *Lange* decision raised some interesting and troubling questions for mediators:

- 1) How far must the mediator inquire into the financial worth of the parties and what obligation does he or she bear to ensure that full disclosure has actually been made?
- 2) To what extent can or should the lawyer mediator be obliged to make the parties aware of their separate legal rights and obligations and of the probable outcome of a contested hearing?
- 3) Is the mediator responsible to ensure that the settlement is fair—if so, fair by what standard?
- 4) If parties select a lawyer mediator and expressly rely on his or her legal skills during the mediation, say for advice on the law, is the applicable standard of care in any way different from that of a lawyer in an adversarial role?
- 5) If the parties have independent legal advice during the mediation, are any of these responsibilities shifted to the independent counsel?²⁰⁷

B. Claims and Causes of Action Against Mediators

What follows is a brief description of the types of claims and causes of action that have been asserted against mediators.

204. *Id.* at 239.

205. *Id.* at 238–39.

206. *Lange*, 622 S.W. at 237–238.

207. *Id.*

i. The Unauthorized Practice of Law

The unauthorized practice of law is a potential liability for the non-lawyer mediator or for an out-of-state lawyer who is not licensed in Idaho, but is mediating a case in Idaho.²⁰⁸ Although the practice of mediation is generally viewed as not constituting the practice of law, there is a fine line between mediating and practicing law. In many states, including Idaho, the unauthorized practice of law is a misdemeanor crime.²⁰⁹ The unauthorized practice of law includes providing legal advice, even if it occurs during mediation.²¹⁰

When mediators opine on the likely court outcome or analyze the merits of claims or defenses, such activities raise questions about the expertise necessary to give an opinion, the duty to research prior to evaluating, and the liability of a neutral for erroneous conclusions. The evaluation of likely court outcomes is the practice of law and should be done only by those neutrals with the appropriate knowledge, ability, and credentials both in mediation and in the legal substance of the dispute.²¹¹

ii. Breach of Fiduciary Duty

Breach of fiduciary duty is another basis for a malpractice claim against a mediator. Some critics have asserted that mediators serve as fiduciaries to the disputants since “mediators must rely for their authority almost exclusively on the trust of the parties.”²¹² In a 2006 BYU Law Review article,²¹³ the author points out that “The expression ‘fiduciary relation’ is one of broad meaning, including both technical fiduciary relations and those informal relations which exist when one man trusts and relies upon another,”²¹⁴ and that over the past few decades, courts have increasingly extended the designation of “informal fiduciary” under certain factual

208. Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J. L. ETHICS & PUB. POL’Y 479 (2014); *See also* Pales v. Carrillo, No. 1-12-3107, 2013 IL App (1st) 123107-U (Ill. App. Ct. Unpublished) (a claim for unauthorized practice of law will not lie in the absence of the giving of legal advice).

209. IDAHO CODE § 3-420 (2023) (practicing law without a license or carrying on the calling of a lawyer without a valid license is punishable by a \$500 fine and/or six months in jail); IDAHO CODE § 3-104 (2023) (a person who is practicing law without a license may also be held in contempt of court).

210. *Id.*

211. Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 297 n.7, 304 n.28 (2000).

212. Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731, 732 (1984).

213. Rebekah Ryan Clark, *The Writing on the Wall: The Potential Liability of Mediators as Fiduciaries*, 2006 BYU L. REV. 1033 (2006).

214. *Id.* at 1033 (quoting *Reeves v. Crum*, 225 P. 177, 179 (Okla. 1924)).

circumstances to individuals, including some clergy, educators, and travel agents who have not traditionally been considered inherent fiduciaries.²¹⁵

Courts have identified two basic types of fiduciary relationships: formal and informal.²¹⁶ Formal fiduciary relationships arise as a matter of law based on the status of the parties.²¹⁷ The list of commonly accepted formal fiduciaries includes corporate officers, agents, partners, lawyers, guardians, employers, and trustees.²¹⁸ Informal fiduciary relationships may arise when a special relationship of trust is established.²¹⁹ This type of fiduciary relationship is not based on the trust and reliance inherent to the type of relationship itself but is instead “implied in law due to the factual situation surrounding the involved transaction, and the relationship of the parties to each other and to the transaction.”²²⁰ For example, the Ninth Circuit Court of Appeals has held that “the existence of a fiduciary relation is a question of fact which properly should be resolved by looking to the particular facts and circumstances of the relationship at issue.”²²¹

“Courts have found that such informal relationships may establish... fiduciary duties when the facts indicate a ‘confidential relationship’²²² in which ‘one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one.’”²²³ Courts have imposed fiduciary liability upon clergy members,²²⁴ university educators,²²⁵ and even “travel agents for failing to disclose known dangers of travel.”²²⁶

No Idaho case has been found that involves the mediator as a fiduciary. In the 2013 case of *City of Meridian v. Petra Inc.*, the Idaho Supreme Court held that the

215. *Id.* at 1034.

216. *Id.* at 1037 (citing *Lee v. LPP Mort. Ltd.*, 74 P.3d 152, 160 (Wyo. 2003)).

217. *Id.*

218. *Id.*

219. *Clark, supra* note 213, at 1037.

220. *Id.* at 1038 (citing *Lee*, 74 P.3d at 160).

221. *Id.* (quoting *In re Daisy Sys. Corp.*, 97 F.3d 1171, 1178 (9th Cir. 1996)).

222. *Id.* at 1038 (quoting *Lee*, 74 P.3d at 160).

223. *Id.* (quoting *Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992)).

224. *Id.* (citing *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. 1989); *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988); *Ira C. Lupu & Robert W. Tuttle, Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. Rev. 1789 (2004)).

225. *Clark, supra* note 213, at 1038–39 (citing *Chou v. Univ. of Chi.*, 254 F.3d 1347, 1362 (Fed. Cir. 2001); *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 98 (D. Conn. 2000)).

226. *Clark, supra* note 213, at 1037.1039 (citing *Maurer v. Cerkenick-Anderson Travel, Inc.*, 890 P.2d 69, 71 (Ariz. Ct. App. 1994)).

City's construction manager did not have a fiduciary relationship with the City.²²⁷ The City claimed that a fiduciary relationship with the construction manager existed because the City trusted the construction manager.²²⁸ The court disagreed.²²⁹ The court noted that, "[g]enerally speaking, where one party is 'under a duty to act or to give advice for the benefit of the other upon a matter within the scope of the relation,' a fiduciary relationship exists."²³⁰ The court further stated:

The term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a relationship. *The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.*²³¹ (Italics in original.)

It is important that mediators know the risks of establishing relationships of trust within the mediation process and the duties expected of the mediator when entering into the mediation engagement. A mediator will be well advised to provide in the mediation engagement agreement with the parties that no fiduciary relationship exists between the mediator and the parties. Whether such a disclaimer will protect a mediator from liability for breach of a fiduciary duty is unknown, but it at least provides some basis for denying the existence of a fiduciary relationship with mediation parties.

iii. Contractual Breach

Contractual breach is a ground for holding a mediator liable for damages that flow from the breach. For example, the mediator could be held liable for breach of contract if he/she makes an implied or express promise concerning the outcome of a mediation and the end result is contrary to the promise.

Under Idaho law, a breach of contract action will not lie against an attorney who commits an act of malpractice. The Idaho Supreme Court has ruled that the appropriate cause of action is an action in tort for malpractice when an attorney violates a standard of care that results in loss to a client.²³² It is reasonable to assume that a similar rule would be applied in an action against a mediator for

227. *City of Meridian v. Petra Inc.*, 154 Idaho 425, 299 P.3d 232 (2013).

228. *Id.* at 441, 299 P.3d at 248.

229. *Id.* at 442, 299 P.3d at 249.

230. *Id.* at 441, 59 P.3d at 248.

231. *Id.* at 442, 59 P.3d at 249.

232. *DBSI/TRI V v. Bender*, 130 Idaho 796, 948 P.2d 151 (1997).

breach of contract when the gravamen of the action is malpractice for breaching a standard of care.

iv. Tortious Breach of Duty

Tortious breach of duty is a common ground for suing a mediator. Because a mediator holds a position of confidence, a mediator is in a position to harm a party through a tortious breach of duty. A mediator, for example, may breach the confidentiality provision of a contract by revealing to the opposing party highly restricted information, thereby damaging the position of the first party. Such conduct may constitute professional malpractice.

Tortious interference with contract or prospective business relations may form the legal basis for a claim against a mediator if the conduct of the mediator before, during or after the mediation session constitutes wrongful conduct that results in the loss of a contractual right or the reasonable prospect of acquiring a contractual right or business prospect.

In April 2011, a mediator was sued in federal district court in Tennessee for allegedly giving legal advice to the divorcing husband a few days after a mediation session. In an email, the husband made comments to the mediator about the wife's allegedly threatening conduct, and the mediator allegedly responded by email that the husband should ask his attorney about pursuing a restraining order or order of protection. The mediator is also alleged to have advised the husband to take measures that could shame the wife into ceasing her conduct and to save the emails to preserve an evidentiary record. Subsequently, the husband secured an order of protection against the wife. The wife sued the mediator for \$15 million, under theories of malpractice, breach of contract, and intentional infliction of emotional distress, claiming she lost her job as a result of the actions set in motion by the mediator and suffered other losses. In September 2011, the court granted the mediator's motion for summary judgment and dismissed the lawsuit. The court reasoned that, if the mediator's statements to the husband had been made in her role as mediator, then immunity applied to bar the claim. If, on the other hand, the statements were made outside the scope of her role as mediator, then she owed no legal duty to the plaintiff. Either way, the court concluded, the case should be dismissed. plaintiff appealed, and in June 2012, the appeal was dismissed.²³³

233. *Savoie v. Martin*, 673 F.3d 488 (6th Cir. 2012). Cited in Robert A. Badgley, *Mediator Liability Claims: A Survey of Recent Developments*, LOCKE LORD LLP 2 (May 2013).

v. Fraud, Including False Advertising

Fraud, including false advertising, is also grounds for imposing liability on a mediator. In a case that arose in California, the plaintiff participated in a mediation with a retired judge who was employed as a mediator by JAMS, Inc. (“JAMS”). The plaintiff, who was unhappy with the settlement that was made in the mediation, sued JAMS and the retired judge alleging four causes of action based on “deceptive representations” made about JAMS and the judge’s biography that was posted on JAMS’ website. The causes of action were : (1) violation of California Consumer Legal Remedies Act; (2) fraud based on alleged false representations posted on the website about the arbitrator’s creation of a fund that was never funded and failure to disclose the neutral’s involvement with an attorney for a party, and about JAMS that its neutrals act with “highest ethical standards” and that JAMS acts with “integrity, honesty, accountability, and mutual respect in all our interactions;” (3) negligent misrepresentation; and (4) violation of California Business and Professions Code. JAMS’ motion for summary judgment seeking dismissal was denied.²³⁴ The court refused to extend judicial immunity because in making the statements on the website, defendants were not exercising their judicial function or performing dispute resolution services. The matter went to a jury trial and the jury found that plaintiff failed to prove any reliance on the representation was a substantial fact in causing him harm. The appellate court of California affirmed the judgment of the trial court.

vi. Invasion of Privacy

Invasion of privacy may be a valid ground to sue a mediator if the mediator wrongfully reveals confidential information about a participant that was acquired during the mediation.

vii. Intentional Tort

Intentional tort is another ground. If a mediator engages in an intentional tort, such as intentionally inflicting emotional distress on a mediation participant, the mediator could be held liable for the intentional tort.

For example, a mediator may make highly unfavorable commentary about the parties or their counsel to a third party, giving rise to a cause of action for defamation. A mediator was sued for alleged defamation arising from a construction defect dispute he mediated in 2010. The plaintiff in the defamation suit was one of the lawyers participating in the underlying construction defect mediation. It is alleged that the mediator berated this lawyer, calling him a “horrible lawyer” and commenting, unflatteringly, on the size of the lawyer’s manhood. It is alleged that these comments were repeated by the mediator outside the confines

234. *Kinsella v. JAMS Inc.*, No. D073159, 2019 WL 21410, at *1,1 (Cal. Ct.App. June 18, 2019).

of the mediation proceeding. At a social event shortly after the mediation, the wife of one of the other lawyers at the mediation said to the plaintiff: "You're the guy with the little ****!" The plaintiff filed suit against the mediator, alleging defamation, false light, intentional infliction of emotional distress and other claims. In April 2013, the mediator filed a motion for summary judgment, seeking dismissal of all claims by reason of quasi-judicial immunity, privilege, and the fact that the mediator's statements were opinions, not assertions of fact. The action was dismissed.²³⁵

viii. Malpractice

Mediators can be sued for negligence, also known as professional malpractice in the performance of their duties. To show negligence, a plaintiff must show that the defendant had a duty that he/she breached and that proximately caused the plaintiff's damages. Prior to the adoption of the UMA, the 2005 Model Standards of Conduct, and other national and local guidelines for mediators, there was little agreement on what a reasonably competent mediator should do, and it was almost impossible to ascertain when a mediator had fallen below the professional standards expected of a reasonably competent mediator. Now, however, a court can impose a duty on a mediator to follow the guidelines established by the UMA, applicable mediation rules, and the guidelines of the mediation program to which the mediator belongs. Additionally, a court could impose a similar duty on mediators whose names are maintained on a roster by a program as a "qualified" mediator under the rules of that organization.²³⁶ Thus, if a mediator breached the standards established by his/her certifying organization or by an organization to which he/she is a member, the mediator could be held liable, assuming that damages and causation for the damages can be established.

If a mediator drafts a settlement agreement between the parties, the mediator must be careful to accurately reflect the arrangement and should suggest to the parties that they have their counsel review the document before signing it. The mediator who drafts a settlement agreement may have a duty to ensure that the terms of the agreement are fair to the parties and should include a disclaimer in the agreement that the mediator assumes no such duty or liability.

An alternative to an action for malpractice, is an action for disgorgement of the fees that were paid to the professional. In the case of *Parkinson v. Bevis*, 165

235. Reported in Robert A. Badgley, *Mediator Liability Claims: A Survey of Recent Developments*, May 2013, LOCKE LORD LLP 3 (May 2013).

236. For example, The Idaho Supreme Court maintains a roster of mediators and the Court, acting through the Idaho State Bar, has adopted standards of conduct for mediators participating in the mediation program.

Idaho 599, 448 P.3d 1027 (2019), the Court held a former client could pursue an equitable-fee disgorgement claim against her attorney, independent of a tort claim for malpractice, even if the breach was accomplished by potentially negligent acts, based on the fact the attorney shared a confidential communication from client to attorney with the opposing party's attorney during mediation. The court found that disclosing the communication was a breach of fiduciary duty owed to the client to maintain confidentiality of communications with the client.²³⁷

The criteria discussed by the court are: (1) the extent of the misconduct, (2) whether the breach involved knowing violation or conscious disloyalty to a client, (3) whether forfeiture is proportionate to the seriousness of the offense, and (4) the adequacy of other remedies, which were to be used to determine whether the trial court may order forfeiture of all or a portion of an attorney's fee as an appropriate equitable remedy for such a violation.²³⁸

The criteria for legal malpractice are: (a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate cause of the damage to the client.²³⁹

The criteria for breach of fiduciary duty are: (a) plaintiff must establish that defendant owed plaintiff a fiduciary duty and (b) that the fiduciary duty was breached, e.g., disclosure of secrets or confidential information.²⁴⁰ When the client seeks only equitable remedies, it is an equitable claim rather than a malpractice claim where the client seeks damages.²⁴¹

The Idaho Supreme Court has held that breach of fiduciary duties by an agent (real estate agent) to the principal can result in disgorgement or damages.²⁴²

ix. Breach of a Duty to Disclose Conflicts of Interest

Breach of duty to disclose conflicts of interest may result in the imposition of liability upon a mediator. The UMA, applicable mediation rules, the 2005 Model Standards of Conduct, and other national and local guidelines for mediators, impose on mediators the obligation to disclose prior or current relationships—whether professional or personal—with the mediation participants or their attorneys, which may create an actual or apparent conflict of interest.²⁴³ These standards also require disclosure by a mediator of his/her personal or pecuniary interest in the mediation result.²⁴⁴ Because of the significance of the mediator's role

237. *Parkinson v. Bevis*, 165 Idaho 599, 608, 448 P.3d 1027, 1036 (2019).

238. *Id.* at Idaho 608, P.3d 1036.

239. *Id.* at Idaho 608, P.3d 1036.

240. *Id.* at Idaho 605, P.3d 1033.

241. *Id.* at Idaho 606, P.3d 1034.

242. *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2001).

243. *See, e.g.*, Idaho Uniform Mediation Act, IDAHO CODE 9-809.

244. *Id.*

as a neutral and impartial entity, a mediator is under a duty to screen for and reveal any potential conflicts of interest to the parties.²⁴⁵ If a mediator fails to disclose a conflict about which he/she knew or should have known, then the mediator can be held liable for negligence where it can be shown that the conflict actually impaired the ability of the mediator to properly perform the mediation and which affected the outcome or where a participant claims he/she would not have participated in the mediation if the conflict had been known to the participant.²⁴⁶

C. Quasi-Judicial Immunity

At common law, absolute immunity was granted to judges and other participants in the judicial process to protect that process from the harassment and intimidation associated with litigation.²⁴⁷ The defense of judicial immunity is available based on a functional analysis of the conduct challenged.²⁴⁸ Judicial officers are granted absolute immunity for acts within their judicial capacity and subject matter jurisdiction, even if erroneous.²⁴⁹ In contrast, violations of ministerial or administrative duties are not protected.²⁵⁰ In 1872, the U.S. Supreme Court extended the common law absolute immunity of state judges to federal judges.²⁵¹ Such immunity is not limited to judges because “immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches.”²⁵² The Idaho Supreme Court has extended the immunity to persons appointed by judges to provide services to the court.²⁵³

McKay v. Owens, 130 Idaho 148, 937 P.2d 1222 (1997), involved a case where an attorney was appointed by the court to act as a guardian ad litem for a minor child.²⁵⁴ Plaintiffs filed a suit against the attorney alleging legal malpractice in the performance of his duties as guardian ad litem.²⁵⁵ The court concluded the attorney was protected by quasi-judicial immunity.²⁵⁶ In doing so, the court applied a

245. *Id.*

246. *Id.*

247. *See e.g.*, *Shubert v. Ada County*, 166 Idaho 458, 466, 461 P.3d 740, 748 (2020).

248. *Id.* (Citing *Poff v. Scales*, 36 Idaho 762, 766, 213 P. 1019, 1019-20 (1923))

249. *Id.*

250. *Id.* (Citing *Imbler v. Pachtman*, 424 U.S. 409, 423-24 (1976).

251. *Bradley v. Fisher*, 80 U.S. 335 (1871).

252. *Forrester v. White*, 484 U.S. 219, 227 (1988).

253. *See, e.g.*, *McKay v. Owens*, 130 Idaho 148, 156, 937 P.2d 1222, 1230 (1997); *Colafranceschi v. Briley*, 159 Idaho 31, 35, 355 P.3d 1261, 1265 (2015).

254. *McKay*, 130 Idaho at 156, 937 P.2d at 1230.

255. *Id.* at 150, 937 P.2d at 1224.

256. *Id.* at 154, 937 P.2d at 1233.

“functional approach” articulated by the United States Supreme Court that looks to the nature of the function performed, not the identity of the actor who performed it.²⁵⁷ The court concluded the attorney was protected by quasi-judicial immunity because as a guardian ad litem, he was “acting as an arm of the court.”²⁵⁸

In *Colafranceschi v. Briley*, 159 Idaho 31, 355 P.3d 1261 (2015), the Idaho Supreme Court applied the same reasoning to conclude that a social worker who had been appointed to perform child custody evaluations, and her supervisor, were entitled to the immunity provided by the doctrine of quasi-judicial immunity in the father’s suit for defamation and professional malpractice arising out of social worker’s reports that did not cast father in a positive light.²⁵⁹

No Idaho case has been found that provides quasi-judicial immunity to mediators who are appointed by the court to conduct mediations of Idaho cases. One may interpret the standards that have been applied by the Idaho Supreme Court to argue that a court-appointed mediator should enjoy the same quasi-judicial immunity. On the other hand, one should also be aware that a mediator who has been engaged by the parties but not appointed by the court may not be protected by the immunity.

VII. ETHICAL DILEMMAS AND PRACTICAL PROBLEMS

A. Problem No. 1: Keeping Within the Limits of Competency

Sub-topic: Lack of training. In this situation, the parties have not agreed upon a solution or have reached an apparent point of impasse. When this occurs the parties may ask the mediator to provide a resolution.

#1 Example: In a divorce mediation, all issues have been settled except one—the value of a business that is a major asset of the marriage and must be valued in order for the property settlement to be finalized. The parties cannot agree on a figure. They ask the mediator to make a decision, which they will accept as binding on what the value of the business is in dollar terms. The mediator has no training as an appraiser of real property. Should the mediator agree to decide the issue for the parties, especially since they requested it?

Is this a situation when the mediator can or should suggest the parties convert the mediation to a mediation/arbitration type arbitration proceeding?

B. Problem No. 2: Specific Substantive or Skill Competencies

Sub-topic: Lack of subject matter knowledge. Sometimes, grasping or handling an important aspect of a dispute may require specific background knowledge, information, or skills that a mediator does not have. If he/she realizes

257. *Id.* at 156, 937 P.2d at 1230, (Citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S. Ct. 22606, 2613, 125 L.Ed.2d 209 (1993)).

258. *See id.* at 156.

259. *Colafranceschi*, 159 Idaho at 31, 355 P.3d at 1261.

this in advance, he/she may decline to serve. But what if the parties know this and still want the mediator to serve.

#2 Example: A nonlawyer family mediator is asked to mediate a business dispute regarding a failed business deal, in which both parties are represented by attorneys. Both parties know that she is a nonlawyer, but they want her because of her expertise in mediation. She knows that legal issues may be involved, but does not know how central they will be, or how complicated.

Should she automatically refuse the case because she has no background or training in law, or go ahead on the belief that her mediation skills are sufficient? If she refuses, she spares the parties possible wasted cost and effort, but she deprives them of the chance that her skills could facilitate a desired settlement.

C. Problem No. 3: Preserving Impartiality

Mediation is held out to be a neutral and unbiased process in which the mediator is not partial to either side. But questions arise regarding what is necessary to maintain both the appearance and fact of impartiality.

Sub-topic: Relationships with parties. It is commonly accepted that relationships with parties can compromise impartiality. This includes not only prior but subsequent relationships. It also concerns relationships that arise not because of personal contact but because of class or group affiliations/identities. Normally, where the mediator has had some sort of prior relationship with one party (or lawyer) the accepted response is to disclose this fact to the parties and let them decide whether to continue. However, what if a prior relationship is disclosed and the parties waive objections and agree to proceed but the mediator is still uncomfortable?

N#3 Example: One of the parties is the manager of the mediator's condominium complex. The dispute has nothing to do with the complex. This fact is disclosed and the other party has no objection and is willing to proceed. But the mediator is concerned; what, if he/she has to engage in persuasion with that party later in the mediation? The party may wind up being suspicious because of the relationship, despite the party's present unconcern.

The question is: should the mediator ever refuse to serve because of a prior relationship, even though the parties know and want him/her anyway? If he/she does, he/she protects the parties from possible future regrets, but he/she deprives them of their choice for mediator, an important element of control over the process.

D. Problem No. 4: Preserving Impartiality**Sub-topic: Prior relationships with lawyers.**

#4 Example: What if the mediator has provided prior several mediations for one of the attorneys?

Should the mediator disclose this to the opposing side? Should the mediator stop accepting cases that involve a prior service of mediation for one of the attorneys? What dangers, if any exist for the mediator?

E. Problem No. 5: Preserving Impartiality**Sub-topic: Relationship with an insurer.**

#5 Example: What if the mediator is asked to mediate a series of cases for an insurance company that is trying to resolve several cases/claims that arose from a natural disaster that is insured by the insurance company.

Should the mediator accept the engagement? Should the mediator disclose this to each claimant? If accepted, has the mediator agreed to effectively be an insurance adjuster for the insurance company? What dangers, if any exist for the mediator?

F. Problem No. 6: Preserving Impartiality

Sub-topic: Personal reactions to parties – Antipathy. Even where there are no personal relationships or group connections with either party, the mediator may experience a strong personal reaction—whether of antipathy or sympathy—to one of the parties during the mediation itself because of that party’s situation, actions, or positions. Mediators are concerned that, if this occurs, it may affect their ability to conduct the mediation with impartiality.

#6 Example: In a custody mediation, Husband (the noncustodial parent) wants to arrange for a visit with the child for a few days around the Christmas holiday and Wife refuses to agree to any visits of more than one afternoon at a time, even for the holiday. The mediator sees no reason for Wife’s refusal other than plain meanness, and the outrageousness of Wife’s attitude makes the mediator feel highly negative to Wife.

What can/should the mediator do? Should the mediator withdraw?

G. Problem No. 7: Preserving Impartiality**Sub-topic: Personal reactions to parties – Sympathy.**

#7 Example: In a divorce mediation, Wife is a displaced homemaker, a middle-aged woman who has never worked outside the home or dealt with complicated financial matters; and there is a great disparity of knowledge between her and Husband, a business executive, in dealing with the property issues in the dissolution. Mediator sees Wife struggling with these issues and experiences a strong reaction of sympathy toward Wife because of her difficult position.

What can/should the mediator do?

H. Problem No. 8: Maintaining Confidentiality

Mediation is intended to be a confidential/private process. The privacy makes it possible to explore the possibilities of settlement without risk of disclosure or adverse consequences if settlement is not obtained. Mediators promise confidentiality but have concerns about the limits to the principle of confidentiality, because other values sometimes point in the direction of disclosure. There are two main areas where mediators experience this tension—confidentiality vis-à-vis outsiders and confidentiality between the mediator and each party.

Sub-topic: Confidentiality vis-à-vis outsiders. Mediators are sometimes legally required, sometimes requested, and sometimes tempted to disclose or report information from or about a mediation to outside parties, courts, or agencies. Sometimes the obligations of the mediator are not so clear.

Allegations of past or threatened violence or crime are sometimes made in mediation sessions. Sometimes there are statutes (I.C. § 16-1605 re: abuse, abandonment or neglect of child under 18) requiring the mediator to report such allegations. Where there is no statute, mediators must decide for themselves whether to report or not.

#8 Example: In child custody mediation, Wife discloses she cannot agree to allow Husband to have visitations that are unsupervised because Husband beats the kids. Mediator suggests Wife get a protective order, but she refuses. Mediation ends with no agreement.

What should the mediator do? When is an allegation substantial enough to require reporting? Given the importance of confidentiality, should the mediator make a presumption against reporting, despite Idaho Code section 16-1605 that compels any person having reason to believe that a child under 18 years has been abused, abandoned or neglected, to report to authorities? Or, given the risks of harm from criminal action, should the mediator report every allegation? If there is a middle ground, where is it?

I. Problem No. 9: Maintaining Confidentiality

Sub-topic: Reporting to court. When a mediation is court-ordered, situations may arise where mediators are tempted to communicate to a court, either upon request or on their own.

#9 Example: In a court-ordered mediation of a personal injury case, the guardian for a permanently disabled minor victim, with a strong claim of \$500,000 damages, has accepted a \$250,000 settlement. All but \$45,000 of this will be consumed by fees and costs, including a \$100,000 attorney fee. The victim's attorney advised him and his guardian to accept the deal, but the mediator sees it as leaving the victim with a grossly inadequate sum for his life-long support. The mediator suspects the court will just rubber stamp the settlement when it reviews

the minor's compromise, unless the mediator attaches a note to the file suggesting the judge look closely at the settlement before approving it.

Would this be a breach of confidentiality, since nothing substantive is disclosed? Should a mediator ever initiate communications with the court on his/her own, without any request, for reasons of fairness or other values, or should confidentiality always take precedence?

J. Problem No. 10: Maintaining Confidentiality

Sub-topic: Giving testimony.

#10 Example: The parties to a mediation over a condominium dispute reach oral agreement in the session, and the lawyers agree to write up the agreement later for signature. A week later, one of the parties calls the mediator and tells him/her that the other party now denies ever having agreed to anything. He asks the mediator to testify in court to the fact that a settlement was reached, without saying more.

Would doing so be a breach of confidentiality? Should the mediator in such cases ask the parties for a waiver of confidentiality to testify to the fact of a settlement? What impact does the right of privilege play in the scenario? There may be an exception if the court finds that the party seeking testimony from the mediator shows (a) the evidence is not otherwise available; (b) the need substantially outweighs any interest in protecting confidentiality; and (c) is needed to rescind, reform, or avoid the mediation agreement. See I.C. § 9-806(2).

K. Problem No. 11: Maintaining Confidentiality

Sub-topic: Contacting a party's lawyer.

#11 Example: In a divorce mediation, the mediator sees that Wife badly needs both emotional and financial counseling in order to come through the divorce in decent shape, and it is clear that she is not getting any. Wife's lawyer is not present at the session, and has apparently never seen Wife try to deal with Husband, which she will have to do in the future. The mediator suggests to Wife that she discuss counseling with her lawyer, but is very doubtful that she will. Wife declines the mediator's offer to call the lawyer directly, but she still seems reluctant to bring the matter up with him herself, perhaps thinking he will not respond.

Should the mediator call Wife's lawyer anyway to recommend counseling, since Wife has not flatly refused her permission to do so? If she does, she will be helping Wife to get needed services, but will she also be compromising confidentiality?

L. Problem No. 12: Maintaining Confidentiality

Sub-topic: Confidentiality between parties. Often one party reveals information to the mediator, in caucus, for example, on condition that it be held in

confidence from the other party.²⁶⁰ Despite the importance of honoring such confidences, mediators sometimes feel strongly compelled to reveal confidential information. An agreement is about to be reached that the other party would probably not accept if the confidential information were disclosed.

#12 Example: In a business mediation over repayment of a loan, the parties agree to a settlement in which one of the major items is assignment to Lender of an interest in a lawsuit Borrower has filed against a third party. Borrower tells the mediator confidentially that the lawsuit is somewhat tenuous and that he may not even have enough funds to carry through with it, though he hopes to.

Assuming Borrower says flatly that he does not want the other party to know this, and resists any suggestion to disclose the information himself, should the mediator disclose it, or else discontinue the mediation? If the latter, would this not be a form of disclosure in itself? How does the mediator explain discontinuing the mediation? Should the mediator, therefore, simply maintain the confidence and proceed, no matter what? If so, confidentiality is preserved but at the expense of the values of consent and fairness.

M. Problem No. 13: Ensuring Informed Consent

Mediation is a consensual process in which both parties must consent to any proposed settlement.²⁶¹ In order for meaningful consent to exist, there must be an opportunity for free and informed choice by both parties regarding any options for settlement.²⁶² Sometimes, however, situations arise in which one party may be experiencing coercion or may be deprived of crucial information. Where either of these is true, mediators express concerns about what to do.²⁶³

Sub-topic: Fear of the other party. In some cases, though expressly wanting to continue the mediation session, one party appears afraid of and intimidated by the other party but insists on going on with the mediation.

#13 Example: An example of this problem is the family mediation in which Husband speaks threateningly and Wife seems frightened but denies the seriousness of Husband's threats and wants to continue the session. Assume the mediator feels qualified to determine that the intimidation is real, i.e., that past violence has occurred and is now influencing Wife's actions so that no competency dilemma is presented.

260. See, e.g., Idaho Uniform Mediation Act, IDAHO CODE 9-804.

261. See, e.g., Model Standards of Conduct for Mediators, September 2005, Standard I, Self-Determination.

262. See American Arbitration Association, THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2005, Standard I, Self-Determination.

263. *Id.*

There is still a dilemma regarding consent; namely, should the mediator discontinue the mediation because of the presence of coercion by one party, or not? If she does, she avoids making the mediation process an instrument of coercion, but she denies Wife the right to make the decision of whether or not to continue the mediation. In effect, either way the mediator responds, Wife is denied her freedom of choice, either by Husband or by the mediator. Is there any way to avoid this? In short, wherever the mediator intervenes to “protect” one party from coercion by another, even though that party insists they do not need protection, there is an element of paternalism inconsistent with the principle of free choice underlying the value of consent itself.

N. Problem No. 14: Ensuring Informed Consent

Sub-topic: Mediator coercion.

#14 Example: In a mediation of a personal injury claim, Victim has made what the mediator knows, based on his/her own experience, is a very fair demand. Injurer, represented by an attorney, has flatly rejected it. Mediator sees that Victim can be pushed to lower her demand even more, though it is quite fair as is. He/she also knows that both parties see the mediator as quite experienced in this field. Several questions arise:

Should the mediator pressure Victim to go lower just to get a settlement, even though her demand is already very modest? Should the mediator always “push” on whichever side where there is give, regardless of any question of fairness? On the other hand with Injurer, should the mediator, if he/she thinks that the attorney is the source of the resistance, talk directly to the client and tell him/her something like, “Based on my experience—and I have a lot of it—he/she is making a very reasonable demand and you would be lucky to get away with so little—give it to her.” Should a mediator, in pursuing a possible settlement, go around an attorney directly to the party and make direct personal recommendations to a party to accept an offer in order to overcome the party’s resistance? Would that be unduly coercive?

O. Problem No. 15: Ensuring Informed Consent

Sub-topic: Party ignorance. A type of consent dilemma involves the situation in which a party is deciding whether to accept or reject a proposed settlement, but is doing so without realizing that he/she lacks relevant information, and that information is known to the mediator.²⁶⁴ Some will argue that a party’s decision that is not made with full available information lacks meaningful consent. Sometimes the information is legal, and sometimes it is factual.

²⁶⁴ *Id.*; See also, Model Standards of Conduct for Mediators, September 2005, Standard II, Impartiality.

#15 Example: When a lack of factual information exists: In a mediation of a business dispute over a breach of contract, after most of the terms of a settlement have been worked out, including the amount of damages to be paid by Party A to Party B, A tells the mediator in caucus that there is a good chance he will be filing for bankruptcy before the agreed time for payment to B arrives. Without some sort of collateral or security, B may only be able to collect pennies on the dollar for his settlement in mediation.

If Party A intends to file bankruptcy before the obligation comes due, is Party A committing a fraud on Party B? What, if anything should the mediator, do?

P. Problem No. 16: Preserving Self-Determination

Sub-topic: When parties request a solution.

#16 Example: In the mediation of a business contract dispute, Plaintiff originally claims \$200,000 damages and Defendant offers to pay \$75,000. After three hours of discussion, the parties are stalled at \$150,000 versus \$110,000; \$40,000 apart. No further progress is produced by caucuses and further negotiations. The parties ask the mediator to tell them his opinion as to what would be a reasonable settlement, based on what he has heard. They ask for a mediator's recommendation.

Should the mediator give one or not? The recommendation would not be binding; does this make any difference in whether the mediator should or should not do this?

Q. Problem No. 17: Preserving Self Determination

Sub-topic: Temptation to oppose a solution of the parties.

In this type of situation presenting the nondirectiveness dilemma, the parties have reached a resolution of their own design, but the mediator believes that it is a "poor quality" solution to the dispute and feels compelled to direct the parties away from it or, if necessary, to block it entirely. This can arise when the solution is not in the best interest of a third party.

#17 Example: Husband and Wife agree in a divorce mediation that, for various reasons, Wife will have sole custody of their child; Husband agrees to waive even visitation rights. The parties have fully discussed the issue and decided this is what they want. The mediator believes it is not in the best interest of the child. What can the mediator do?

R. Problem No. 18: Preserving Self-Determination

Sub-topic: When the solution may be illegal.

#18 Example: In a mediation in a personal injury wrongful death case of Husband, with several survivors, including a minor child, the surviving spouse and

Injurer agree to a settlement providing for \$20,000 for each survivor. They are preparing to formalize the agreement. The law of the state is that the settlement on behalf of a minor requires the appointment of a guardian ad litem, which has not been done.

What should the mediator do? Should the mediator ask generally whether the parties have considered whether the agreement complies with the law in order to "put them on notice?" Should he/she point out the specific legal rule involved, if known, and suggest they look for another solution? What if the parties want to proceed anyway? Should the mediator discontinue the mediation? What is the obligation of a mediator to prevent parties from violating the law?