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## THE UNAUTHORIZED PRACTICE OF COUNSELING: RENEWING A MUCH NEEDED DISCUSSION FOR MEDIATORS

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### INTRODUCTION

Mediation is a wide field.<sup>2</sup> On one end, it is used between nations. On the other, it is used between individuals. Within this breadth, there are a multitude of approaches to resolve conflicts and disputes. Are there any mediation practices, however, that should never be accepted?

Attorneys and therapists alike are often referred to as *counselor*. With a nationwide lax on certification, either can generally become a mediator—too often so may nonprofessionals.<sup>3</sup> There are severe ethical concerns when a mediator steps out of his or her role and acts as a legal or mental health counselor. Some individuals conducting mediation have been cited for the

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<sup>2</sup> In fact, *mediation* is not limited to Alternative Dispute Resolution (ADR). *Mediator* and *moderator*, terms often used in ADR, also have technical application within the study of mental health. “Whereas moderator variables specify when certain effects will hold, mediators speak to how or why such effects occur.” Reuben M. Baron and David A. Kenny, *The Moderator-Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and Statistical Considerations*, 51 *J. of Personality and Social Psychology* 1173, 1176 (1986). For purposes of this paper, *mediator* strictly refers to the ADR process.

<sup>3</sup> Mandy Zhang, *To Certify, Or Not To Certify: A Comparison of Australia and the U.S. In Achieving National Mediator Certification*, 8 *Pepp. Disp. Resol. L.J.* 307, 318-319 (2008).

Unauthorized Practice of Law (UPL).<sup>4</sup> In contrast, copious research has yet to reveal a single mediator who has been cited for the unauthorized practice of counseling.<sup>5</sup>

Perhaps state and local prosecutors are less concerned with the quality of mediation as they are with exterminating the rats among their own trade.<sup>6</sup> Whatever the reason, this unbalanced regulation will likely push some mediators away from legal counseling and towards the opposite extreme of mental health counseling. As self-evident as it ought to be, this paper proposes, no matter which style of practice a mediator chooses it is unacceptable when they lack the proper training.

Anybody who has taught or taken a course in mediation in the last decade was very likely exposed to Leonard Riskin's *Grid for Mediator Orientations*.<sup>7</sup> Riskin's Grid, as it has become known, was immediately debated.<sup>8</sup> Riskin has twice changed the vertical axis describing how to classify the amount of mediator intervention.<sup>9</sup> However, the lateral axis which describes how narrow or broad a mediator frames the issues remains in its original formation.<sup>10</sup> Suppose Riskin's Grid was viewed as a compass or a map where North represents more intervention by the mediator and South represents less. Now, suppose West is occupied by the field of law and

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<sup>4</sup> David A. Hoffman and Natasha A. Affolder, *Mediation and UPL: Do Mediators have a Well-Founded Fear of Prosecution?*, 6 Disp. Resol. Mag. 20 (Winter 2000).

<sup>5</sup> To my knowledge, experienced mediator Robert Benjamin was the first person to title this issue the *Unauthorized Practice of Counseling*. It is with Benjamin's express permission and encouragement that I do the same. See Robert Benjamin, *Practice Hints: Ethical And Professional Issues In Mediation*, <http://www.rbenjamin.com/14-1%20Practice%20Hints.pdf>. See also Michael Meltsner, *The Jagged Line Between Mediation and Couples Therapy*, 9 Negotiation J. 261 (1993) (suggesting, though not addressing in great detail, that "ethical dilemmas... are compounded when the same person actually practices both as therapist and mediator").

<sup>6</sup> Hoffman and Affolder, *supra* note 4, at 20.

<sup>7</sup> Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Neg. L. Rev. 7, 36 (1996).

<sup>8</sup> Kimberlee K. Kivach and Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 Harv. Neg. L. Rev. 71 (1998).

<sup>9</sup> Leonard L. Riskin, *Decisionmaking in Mediation: The Old Grid and the New New Grid System*, 79 Notre Dame L. Rev. 1 (2003).

<sup>10</sup> *Id.*

East occupied by the field of psychology.<sup>11</sup> It is from that vantage point that this paper can hopefully renew the discussion surrounding *northeastern* mediation without proper credentials.<sup>12</sup>

In 1983, Joan Kelley contributed an article titled *Mediation and Psychotherapy* to the first ever volume of the *Mediation Quarterly* (now the *Conflict Resolution Journal*).<sup>13</sup> Kelly's goal was to start distinguishing "what has early emerged as an important issue—the differences between divorce mediation and psychotherapy or counseling."<sup>14</sup> Kelly further contended, "[j]ust as mediation has been defined as an entity different from the practice of law, experienced mediators have recognized that the mediation process is distinct from counseling..."<sup>15</sup> Still, the similarities of the novice discipline of Alternative Dispute Resolution (ADR) and the more senior psychotherapy discipline, had in Kelly's opinion, created confusion for some mediators.<sup>16</sup> While ADR has outgrown its infancy, the exact boundary between these two professional fields has yet to be exposed.

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<sup>11</sup> Prof. Riskin informed me at the 2010 Harvard Negotiation Law Review Symposium, which focused on *The Negotiation Within*, that during his LLM studies he focused on the intersection of law and psychology. <http://www.law.ufl.edu/faculty/riskin/resume.pdf>.

<sup>12</sup> This paper was originally written, in part, for a class taught by Peter Robinson, managing director of the Straus Institute at Pepperdine University. It was Prof. Robinson who suggested a map-like viewing of Riskin's Grid and the need for more discussion concerning "far east" mediation. I owe all remaining interest to Harvard instructor Ellsworth Lapham Fersch, a licensed attorney and psychologist, who first introduced me to both *Law & Ethics* and *Law & Psychology*.

<sup>13</sup> Joan B. Kelly, *Mediation and Psychotherapy: Distinguishing the Differences*, 1 *Mediation Q.*, Sept. 1983, at 33. See also Jessica Pearson, *A Portrait of Divorce Mediation Services in the Public and Private Sector*, 21 *Fam. Cr. Rev.* 1 (June 1983) (astonishingly revealing that at the time of Kelly's original article, almost all Family Law mediators came from a psychology rather than legal background).

<sup>14</sup> Kelly *supra* note 13, at 33.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* See also Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 *U. Ill. L. Rev.* 1119, 1172 (viewing it as an "imbalance" that more psychologists than lawyers were practicing family mediation in the early 80's).

In fact, seventeen years later Kelly expressed concerns for the new millennium.<sup>17</sup> The three issues Kelly specifically acknowledged were, “the extent to which divorce and family mediation will remain an interdisciplinary field, how to ensure competence in family mediators, and the question of certification of family mediators.”<sup>18</sup> Kelly also noted both attorney-mediators and therapist-mediators should “refrain from advice-giving.”<sup>19</sup>

### CONTRASTING MEDIATION AND PSYCHOTHERAPY

In 2006, a Massachusetts citizen received two years supervised probation for ten years of mental health counseling without a license.<sup>20</sup> At the time, such cases were left to the control of the state attorney general.<sup>21</sup> As a result of that case, the responsibility to investigate such activity now falls directly under the authority of the state Board for Registration of Psychologists.<sup>22</sup> Whether the mental health community and states also decide to draw a more definite line between mediating and counseling, as the legal community and other states have done with mediating and lawyering,<sup>23</sup> it is important for both mediators and attorneys involved in mediation to recognize the distinctions between mediation and psychotherapy.

Stewart Gabel is a former psychiatry professor at the University of Colorado Medical School and a promoter of ADR within the healthcare industry. Gabel has acknowledged, “some

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<sup>17</sup> Joan B. Kelly, *Issues Facing The Family Mediation Field*, 1 Pepp. Disp. Resol. L.J. 37 (2000).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 39.

<sup>20</sup> Ami Albernaz, *Unlawful practice case draws attention to licensing issues*, New England Psychologist (Mar. 2007), available at [http://masspsy.com/leading/0703\\_ne\\_unlawful.html](http://masspsy.com/leading/0703_ne_unlawful.html). This is not the only Massachusetts case. For instance, in 2005, a woman faced similar charges for 15 years of unauthorized counseling at the Perkins School for the Blind (made famous by its affiliation with Helen Keller). Kevin Rothstein, *Authorities: Fraud shrink treated kids at Perkins*, Boston Herald (Jan. 6, 2005), available at [http://parentadvocates.org/nicecontent/dsp\\_printable.cfm?articleID=5276](http://parentadvocates.org/nicecontent/dsp_printable.cfm?articleID=5276).

<sup>21</sup> Albernaz *supra* note 20.

<sup>22</sup> *Id.*

<sup>23</sup> See John W. Cooley, *Shifting Paradigms: The Unauthorized Practice of Law or The Unauthorized Practice of ADR*, 55 Disp. Resol. J. 72, 74 (2000).

forms of psychotherapy (e.g., psychoanalysis) and some forms of mediation (e.g., evaluative) are quite far apart in basic assumptions and approaches.”<sup>24</sup> Moreover, Gabel has noted it “should be clear that some forms of mediation (i.e., transformative and facilitative) and some forms of psychotherapy (e.g., couples counseling or psychotherapy with couples) have a great deal in common.”<sup>25</sup>

There are obvious reasons for concern when a mediator, regardless of orientation, utilizes behavioral or healing sciences without the requisite training. Nevertheless, multiple searches, including review of the National Clearinghouse for Mediator Ethics Opinions, has yet to produce mention of any mediator who has been disciplined for the unauthorized practice of counseling.<sup>26</sup> It should not follow, however, that such discipline has not occurred and activity warranting such regulation is not ongoing.

Any unauthorized practice benefits from secrecy. For example, disciplinary action against attorneys by bar associations is often difficult to review because of confidentiality policies.<sup>27</sup> This same systematic obstacle precludes review of mediations since so much of it occurs behind closed doors.<sup>28</sup> Indeed, while a strict confidentiality policy for mediation is certainly not without merit, it does eliminate the joy or misery of comparison for both practitioners and participants. This may explain in part why the growing calls for mediator certification include only “little pressure from consumers of mediation.”<sup>29</sup>

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<sup>24</sup> Stewart Gabel, *Mediation and Psychotherapy: Two Sides of the Same Coin?*, 19 *Negot. J.* 315, 321 (2003).

<sup>25</sup> *Id.*

<sup>26</sup> ABAnet.org, Natl. Clearinghouse for Mediator Ethics Opinions (ABA-SDR), <http://new.abanet.org/ethics/dispute/Pages/default.aspx> (last visited on July 6, 2009).

<sup>27</sup> Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 *Geo. J. Legal Ethics* 1 (2007).

<sup>28</sup> See John D. Feerick, *What's Fair: Ethics for Negotiators*, 18 *Geo. J. Legal Ethics* 251, 256 (2004) (book review).

<sup>29</sup> Kelly, *supra* note 17, at 41.

In situations where unauthorized practice of counseling arises, it is actually unlikely disciplinary action will be conducted by an affiliate of the American Bar Association (ABA) or the American Psychological Association (APA). After all, not being affiliated with any trade group may be an early indicator of a problem. At least one family found this out the hard way.<sup>30</sup>

To start, this family mediator negotiated for herself the high paying role of child supervisor.<sup>31</sup> While at lunch she terrified the child by telling a waitress that she was his mother.<sup>32</sup> As the family of this child discovered, when such a traumatizing slip occurs by a mediator who does not belong to any professional group, in the status quo there are few places to turn besides the media.<sup>33</sup> Ignoring this fact, Canadian authorities refused to intervene in the case on the grounds ADR is a self-regulating profession.<sup>34</sup> The truth remains, however, in mediation nearly “anybody can hang a shingle and plunge into a highly sensitive area of working with divorcing couples and their children at a time when most are financially and emotionally vulnerable.”<sup>35</sup>

## **EDUCATIONAL FACTORS IN MEDIATOR METHODS**

While the United States lacks uniform regulation of mediation, many states have at least some standards on family mediators.<sup>36</sup> Michigan and Missouri, for example, both require either

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<sup>30</sup> Linda Diebel, *Unqualified mediators prey on broken families*, Toronto Star, Jan. 14, 2008, <http://thestar.com/News/article/293746>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* Some may laugh, but reading this I recalled being unexpectedly asked by my mother at five years old if I would like to be adopted. ADOPTED!?! What my mom failed to explain before the bad memory had been made was my stepfather was the one who wanted to adopt me.

<sup>33</sup> Diebel, *supra* note 30.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Timothy Lohmar et al, *A Survey of Domestic Mediator Qualifications and Suggestions For a Uniform Paradigm*, 1998 J. Disp. Resol. 217.

licenses to practice psychology or a graduate degree in the healing sciences.<sup>37</sup> Such regulation, however, seemingly allows for those having the latter (i.e. counseling training) who may have been denied or stripped of the former (i.e. counseling license). Such regulation also fails to address the countless other disputes besides familial that cause people to voluntarily attend or be court-ordered to mediation. What these regulations do highlight is a need to focus on mediator education.

Organization development experts David Bradford and Wyatt Burke have provided three reasons why since 1980 conflict resolution has become more uniform between academic departments as well as between academia and practitioners.<sup>38</sup> First, The Hewlett Foundation and the National Institute for Dispute Resolution supported collaborative centers at numerous universities.<sup>39</sup> Second, law schools started to promote ADR.<sup>40</sup> Third, efforts by ADR associations started to combine theory and practice.<sup>41</sup> However, while “the field of conflict resolution practice is much more sophisticated today,” Bradford and Burke contend practitioners still only consume a miniscule amount of disciplinary and interdisciplinary developments.<sup>42</sup>

Brian Jarrett, who already held credentials in psychology, law, and ADR, interviewed forty distinguished mediators as part of his doctorate dissertation in sociology. Jarrett concluded, “on its current trajectory, given the socio-economic pressures of the marketplace and struggle for professional identity, mediation is likely to continue to become more formalistic and legalistic as

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<sup>37</sup> *Id.* at 218-219.

<sup>38</sup> David L. Bradford & Wyatt Warner Burke, *Reinventing Organization Development: New Approaches To Change In Organizations*, 169-70 (2005).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

a discipline.”<sup>43</sup> If Jarrett’s prediction came true, the risk of unauthorized practice of counseling would surely rescind. For better or worse, law schools have been notoriously slow at adopting a healing perspective and increased formalism alludes to increased regulation.<sup>44</sup> Because so little information may filter down from academia to practitioners, however, many mediators will undoubtedly retain a less legalistic approach.

Indeed, a rarely discussed reason some mediators choose a healing perspective is that not all mediation programs are affiliated with legal education. Founded in 1973, the Department of Peace Studies at Bradford University became the first of its kind in either the United Kingdom or the United States.<sup>45</sup> It was not until a decade later, when Harvard Law School formed the Program on Negotiation, that ADR made a noticeable addition to legal scholarship.<sup>46</sup>

Today there are a variety of disciplines offering mediation programs. Although standards of quality also vary, academic departments such as social work, psychology, public policy, humanities, and theology are all willing to underwrite doctorates with concentrations in mediation.<sup>47</sup> One school even introduces its mediation certificate as “an alternative to the legal

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<sup>43</sup> Brian Jarrett, *The Future of Mediation: A Sociological Perspective*, 2009 J. Disp. Resol. 49, 74.

<sup>44</sup> Jean R. Sternlight and Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 Ohio St. J. on Disp. Resol. 437, 439 (2008).

<sup>45</sup> University of Bradford Peace Studies Homepage, <http://www.brad.ac.uk/acad/peace/index.php>

<sup>46</sup> <http://pon.harvard.edu> (follow “about” hyperlink)

<sup>47</sup> Univ. of South Australia School of Psychology, Social Work and Social Policy webpage, <http://unisa.edu.au/swp/Postgrad/default.asp>; Univ. of the Rockies Homepage, <http://rockies.edu/online/psydcip.php>; Univ. of Massachusetts-Boston Ph-D in Public Policy webpage, <http://www.publicpolicy.umb.edu/gradprogram.php>; Nova Southeaster Univ. Degree and Program Offerings Webpage, <http://www.nova.edu/academics/degrees.html>; Graduate Theological Foundation, <http://gtfeducation.org/Academics/Degrees/DMed.html>.

system, therapy or counseling...”<sup>48</sup> However, the bottom-line remains, “training in mediation is much less standardized and regulated than it is in psychotherapy.”<sup>49</sup>

### COMPREHENSIVE LAW MOVEMENT AND INTEREST-BASED MEDIATION

A simpler way to frame our underlining issue might be to consider the difference between *defuse* and *diffuse*. Defuse means to neutralize. Diffuse means to disperse. Either can technically resolve. In one of the only empirical studies to evaluate the healing potentials of mediation, these opposite extremes were titled *repair* and *separation*.<sup>50</sup> That study revealed approaches which incorporate aspects of mental health counseling were not the only way to achieve healing.<sup>51</sup> To some, a quick and successful diffuse may be all the “psychological and emotional benefits from mediation” that they seek.<sup>52</sup>

Whether it is related to their educational background, attorneys are notorious for preferring diffuse over defuse.<sup>53</sup> For instance, Dwight Golann has admitted, “I sometimes don’t feel that I’m being professional when I work with emotions. It’s not what lawyers do.”<sup>54</sup> His clinical psychologist wife, Helaine Scarlett Golann, feels like “a mediator could make himself quite valuable as someone prepared to handle the messy emotions that some attorneys don’t feel in a position to confront, yet know are preventing a resolution of the dispute.”<sup>55</sup>

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<sup>48</sup> Colorado State University, <http://ssw.caahs.colostate.edu/outreach/mediation/>.

<sup>49</sup> Gabel, *supra* note 24, at 326.

<sup>50</sup> Dwight Golann, *Is Legal Mediation a Process of Repair—Or Separation? An Empirical Study, And Its Implications*, 7 Harv. Neg. L. Rev. 301 (2002).

<sup>51</sup> *Id.* at 335.

<sup>52</sup> *Id.*

<sup>53</sup> Melissa L. Nelken, *Negotiation and Psychoanalysis: If I’d Wanted to Learn About Feelings, I Wouldn’t Have Gone to Law School*, 46 J. Legal Educ. 420, 421 (1996).

<sup>54</sup> Helaine Scarlett Golann and Dwight Golann, *Why Is It Hard For Lawyers to Deal With Emotional Issues? A Dialogue between a Lawyer-Mediator and a Therapist*, 9 Disp. Resol. Mag. 26, 25 (Winter 2003).

<sup>55</sup> *Id.* at 29. See also Carbonneau, *supra* note 16, at 1173 (contending that in the emotional arena of Family Law, for instance, that “[e]xcluding lawyers from the process and expecting psychologically-oriented mediators to deal

There is another set of related scholars who have an interest in law and psychology, twin brothers Robert and Ralph Gable. In fact, each is both an accomplished psychologist and an accomplished lawyer.<sup>56</sup> In the introduction of their classic book, *Law and Psychological Practice*, the Gable brothers wrote:

“The law does not solve legal problems—it creates them. It systematically restructures social or interpersonal conflicts into a particular, logical matrix.... Such restructuring may have a social useful function in one situation but a destructive result in another. Perhaps there are some matters that should *not* be the law’s business. Some mental health specialists feel this way about the intrusion of recent court decisions that set standards for psychotherapeutic practice.”<sup>57</sup>

Attorney-mediators, however, currently have unofficial blessing in many jurisdictions to handle these other matters. Numerous bar associations, for instance, do not “require any mediation training for listings on referral panels.”<sup>58</sup> Moreover, a growing number of academics have proposed a mediation mix of law and psychotherapy.

At least one proponent of the Comprehensive Law Movement has promoted the merger of law and psychology without regard to the liability of unauthorized practice of counseling.<sup>59</sup>

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inexpertly with the legal implications of divorce disputes would place a greater onus upon the courts to supervise mediation procedures and results.”)

<sup>56</sup> Winner’s Way Biography Webpage, <http://winnersway.net> (follow “biography” hyperlink).

<sup>57</sup> Robert L. Schwitzgebel and R. Kirkland Schwitzgebel, *Law and Psychological Practice* (John Wiley & Sons 1980) (referencing A.A. Stone, *The Tarasoff decisions: Suing psychotherapists to safeguard society*, 90 Harv. L. Rev. 358 (1976))

<sup>58</sup> Kelly, *supra* note 17, at 40.

<sup>59</sup> Jeffrey L. McClellan, *Marrying Positive Psychology to Mediation: Using Appreciative Inquiry And Solution-Focused Counseling To Improve The Process*, 62 J. Disp. Resol. 29 (Jan. 2008). See also Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Law Conflicts: What Lawyers Think About Them*, 14 J. Am. Acad. Matrimonial Law. 353, 358-360 (1997) (slightly dated but data driven discussion of the legal versus psychological perspective).

Others have recognized, “[a]dopting a therapeutic mindset and applying it in one’s [mediation] practice requires... adequate education and training.”<sup>60</sup> Still, as another warned, “lawyers may resist retooling and change, feel as if they are being asked to practice psychology without the appropriate training and credentials, and worry about committing malpractice.”<sup>61</sup> It has also been duly noted that with certain parties in certain disputes, even the most open-minded and well-educated mediator may be unable to prevail as a healing scientist.<sup>62</sup>

Though rarely expressed as such, in many respects, Interest-Based Mediation (IBM)<sup>63</sup> is akin to the Comprehensive Law Movement. Today, this style of mediation no longer arises solely in response to family disputes. IBM has been studied in commercial and community contexts.<sup>64</sup> Whether it entails relatively more expertise, as this paper purports, IBM can certainly entail more effort and expense.<sup>65</sup> Team Mediation, an extension of IBM, includes the additional presence and additional fees for attorneys, attorney-mediator and therapist-mediator.<sup>66</sup>

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<sup>60</sup> Omer Shapira, *Joining Forces In Search For Answers: The Use Of Therapeutic Jurisprudence In The Realm of Mediation Ethics*, 8 Pepp. Disp. Resol. L.J. 243, 271 (2008). See also Carbonneau, *supra* note 16 (suggesting the converse is also true for “[p]sychologically-oriented mediators” who seek to adopt a legal perspective).

<sup>61</sup> Susan Daicoff, *Law As A Healing Profession: The “Comprehensive Law Movement”*, 6 Pepp. Disp. Resol. L.J. 1, 59 (2006).

<sup>62</sup> Zhang, *supra* note 3, at 250; Gabel, *supra* note 24, at 327. See also Randy Frances Kandel, *Which Came First: The Mother or The Egg? A Kinship Solution to Gestational Surrogacy*, 47 Rutgers L. Rev. 165, 239 (1994) (suggesting parties to a surrogacy agreement should use both mediation and counseling during and after pregnancy).

<sup>63</sup> Carole J. Brown, *Facilitative Mediation: The Classic Approach Retains its Appeal*, 4 Pepp. Disp. Resol. L.J. 279, 280-281 (2004). Interest-Based Mediation is an emerging style which is often expressed using negotiation terms, such as, Collaborative, Integrative, Win-Win, Positive-sum, Problem-Solving, Transformative, etc.. There are distinctions between these approaches and the context in which they are employed (i.e. attorney or consumer of mediation versus mediator; party-to-party negotiation versus mediated negotiation). For reasons of simplicity, these similar concepts are combined under the abbreviation IBM.

<sup>64</sup> Golann, *supra* note 50, at 302-304.

<sup>65</sup> Jaime Abraham, Note, *Divorce Mediation—Limiting the Profession to Family/Matrimonial Lawyers*, 10 Cardozo J. Conflict Resol. 241, 262 (2008).

<sup>66</sup> David C. Hesser and Elizabeth Jarrell Craig, *Team Mediation: An Interdisciplinary Model Balancing Mediation in the “Matrix”*, 7 Pepp. Disp. Resol. L.J. 113, 124 (2007). See also Carbonneau, *supra* note 16, at 1173 (arguing “the dual-mediator model provides a greater guarantee of professional competence in both the legal and psychological aspects of mediation...[even though it] may increase the cost of mediation and add to the number of mediation sessions.”)

There are no doubt added difficulties when conducting IBM.<sup>67</sup> Likewise, some have argued because of the complexity which often accompanies divorces, only attorneys who practice primarily in family law should be able to practice family mediation.<sup>68</sup> However, it is often more than intricate legal issues which make family mediations complex. Others, recognizing this predicament, have argued “the exclusion or discouragement of nonlawyers, particularly mental health practitioners would not only impoverish the field, but would change the unique character of the mediation process.”<sup>69</sup>

That said, even mental health professionals must be especially careful in conducting IBM. Ben Carroll, a current member of the policy committee at the National Association For Community Mediation, has stated therapist-mediators may lack the authority to practice counseling when in the role of mediator.<sup>70</sup> Furthermore, Carroll warned therapist-mediators “could be exposing the center to problems since the center purports to offer mediation service not whatever the mediator is dispensing.”<sup>71</sup>

## CONCLUSION

An older survey of British solicitors found that while they appreciated the potentials of ADR, they referred their clients less often to mediation due to questions of mediator training.<sup>72</sup> One can reasonably suspect some business is still being lost across the globe due to real and

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<sup>67</sup> This may explain, in part, why at least one study found encouragement from the mediator to be mindful of their opposites actually produced lower joint outcomes than situations where the mediator did not encourage such empathy. Vairam Arunachalam, Anne Lytle and James A. Wall Jr., *An Evaluation of Two Mediation Techniques, Negotiator Power, and Culture in Negotiation*, 31 J. Applied Soc. Psychol. 951, 952 (May 1, 2001).

<sup>68</sup> Abraham, *supra* note 63, at 242.

<sup>69</sup> Nancy J. Foster and Joan B. Kelly, *Divorce Mediation: Who Should Be Certified?*, 30 U.S.F. L. Rev. 665, 666 (1996).

<sup>70</sup> Ben Carroll, *Liability in Mediation*, NAFCM PRACTICE NOTES (Spring 2000), at <http://nafcm.org/pg1016.cfm>.

<sup>71</sup> *Id.*

<sup>72</sup> Linda Neilson, *Solicitors Contemplate Mediation—Lawyers’ Perceptions of the Role and Education of Mediators*, 4 Int. Jnl. of Law, Policy and the Family 235-69 (1990),

presumed issues of mediator qualification. However, it is well documented that mediation can play a valuable role in a civil society, particularly when dealing with complex disputes.<sup>73</sup>

It has been warned that the expressed preference of one mediator orientation over another should be skeptically viewed considering the competitive market of the mediation profession.<sup>74</sup> Cautious assessments by attorneys and non-attorneys alike are not, however, unqualified praises of a legalistic approach.<sup>75</sup> It is instead, a self-appraisal which all mediators should make on a routine basis given the prospect for civil and criminal liability.<sup>76</sup> Moreover, given the open-door policy that can harm the mediation profession simply by appearance, creation of additional regulation based on mediator aptitude is likely warranted.

Failure to separate mediation from either legal or mental health counseling is ethically troublesome. It is also counterintuitive to the promotion of mediation as a progressive alternative for resolving disputes. While a precise boundary between mediation and psychotherapy has yet to be drawn, it is safe to say, when parties begin to look more like patients and mediation begins to look more like a form of medicine, you are drawing dangerously near the unauthorized practice of counseling.

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<sup>73</sup> Researchers have found, for example, that more than a decade later, individuals who mediated their divorce but did not gain full custody of their children spent more time and had more influence with their children than similarly situated divorcees who had litigated. Robert Emery, et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. of Consulting and Clinical Psychology 323, 330 (2001).

<sup>74</sup> Jarrett, *supra* note 43, at 54.

<sup>75</sup> See Lee Borden, Attorney-Mediator, Alabama Family Law Center, *Why I Don't Work To Save Marriages*, available at <http://divorceinfo.com/dontsave.htm>. See also Dispute Prevention & Resolution James K. Hoenig, Attorney/Psychologist-Mediator Biography, available at <http://dprhawaii.com/d.aspx?nid=34> (disclaiming "Mr. Hoenig does not practice law, psychology, or marriage & family therapy. Clients who require or desire such assistance may be referred to qualified professionals.").

<sup>76</sup> Ami Albernaz, *Woman who practiced without a license receives suspended sentence*, New England Psychologist, Aug.-Sept. 2007, [http://masspsy.com/leading/0708\\_9\\_ne\\_license.html](http://masspsy.com/leading/0708_9_ne_license.html).