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Article

THE CRISIS IN INSURANCE COVERAGE FOR MEDIATORS  
PART 1: EVEN LAWYER-MEDIATORS ARE “GOING BARE”

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## I. INTRODUCTION

“I lost my passion for mediation after the UPL hearing. It was frightening for me.”<sup>1</sup>

-- Dr. Resa Fremed

I was drawn to the story of Dr. Resa Fremed, a Connecticut therapist-mediator, wrongly accused of engaging in the unlawful practice of law (UPL). She learned the hard way that she did not have insurance to cover the costs of her defense in a disciplinary proceeding brought against her by a state bar commission.<sup>2</sup> She eventually settled that claim, at least in part, \*2 because she could no longer afford further representation by counsel. Her lack of coverage under a policy issued by Underwriters at Lloyd's, London (Underwriters)<sup>3</sup> only added to the stress of the situation.<sup>4</sup> In addition, without the help of defense counsel appointed and paid for by her insurer, she had little bargaining leverage over the terms of the consent order that she felt compelled to later sign. Arguably, her lack of insurance led her to sign a consent order that reflects a broad interpretation of UPL in the \*3 context of mediation. Moreover, the outcome in that proceeding could influence the resolution of other UPL disciplinary proceedings filed against mediators in Connecticut and other states.<sup>5</sup>

### *A. Ignorance is not Bliss*

The vast majority of mediators pay premiums for professional liability insurance (or “errors and omissions” or “E&O”) coverage under policies they have never read. The vast majority of people reading this article would not know whether their professional malpractice policies would pay any damages, penalties, or fines assessed by a judge or jury in a lawsuit alleging mediator misconduct, by a regulatory authority in a consumer grievance alleging breach of an ethics standard, or by a court, the state bar, or other regulatory body in a disciplinary proceeding alleging that the neutral had engaged in UPL. Nearly all mediators would be surprised to learn that most policies do not cover these types of claims. In addition, most mediators would not know whether the policy covers the cost of defending those claims or the cost of resisting a discovery subpoena, testimonial subpoena, a motion to compel, or a court order seeking the disclosure of confidential mediation communications.

Even lawyer-mediators would have difficulty discovering the coverage gaps and traps that exist in nearly all professional malpractice policies. The policies cross-reference multiple sections of the contract, use specialized terminology, and often fail to define all the terms used in the policy. We cannot expect mediators who enter the field from other professions-of-origin to decipher the technical jargon used in insurance policies, especially when state and federal courts further interpret the terms of art used in the policies through case law buried in law libraries or in computer databases.<sup>6</sup>

This article, and the other articles in this series, illustrate the complexity of the coverage analysis, outline the many ways in which an insurer could deny coverage for a claim or the costs of defense, show how the language of standard policies invites coverage disputes over the interpretation of policy language, and ask insurers to take greater care in drafting policies that fit the needs of mediators and other persons serving as alternative dispute resolution (ADR) neutrals.

Having said that, I was quite surprised to learn that the policies issued to lawyers offered more coverage and defense of claims arising from mediation services than offered in the other profession-of-origin policies I \*4 examined. These insurers lead the way in recognizing that lawyers increasingly play a role as ADR neutrals. In contrast, the policies available to mediators entering the field from mental health professions attempt to exclude coverage for any claims arising from mediation services.<sup>7</sup>

At the same time, the analysis in this article shows that lawyer-mediators must remain cautious about the coverage or defense provided under policies available to members of the mediation field. The analysis concludes that while the policies cover a surprising variety of malpractice claims, they will not cover or provide a defense of claims arising in ethics grievance proceedings, UPL disciplinary proceedings, or claims seeking discovery of confidential mediation communications. Appendices A and B provide a detailed analysis of each legal E&O policy I analyzed.

Mediators should plan to self-insure most claims and defenses. This vulnerability may encourage members of the field to seek better coverage from insurers. It should also encourage us to adopt practices that provide parties the highest quality mediation service possible. Finally, it suggests we should be using our agreements to mediate to discourage parties from bringing claims against mediators.

### ***B. Related Articles***

Over a series of three articles, I have examined, synthesized, and analyzed seven insurance policies that mediators may expect will provide coverage and defense of the claims they may face. I have analyzed two policies offered to lawyers,<sup>8</sup> three policies offered to mental health professionals,<sup>9</sup> \*5 and two policies offered specifically to mediators through Underwriters and the Pinkham Agency.<sup>10</sup>

## **II. THIS ARTICLE'S SCOPE OF ANALYSIS**

The first article in the series analyzes two policies, one issued to Virginia lawyers,<sup>11</sup> and the other issued to Missouri lawyers.<sup>12</sup> I would like to report that I carefully planned the choice of policies to analyze. However, getting copies of the policies from websites or other public sources proved difficult.<sup>13</sup> So, instead, I took the path of least resistance and obtained the policies from colleagues. As it turned out, the choice allowed consideration of policies offered in two states with very different regulatory schemes for mediators. Virginia has a well-developed regulatory infrastructure for mediation in the state.<sup>14</sup> On the other hand, Missouri has very little statewide regulation of the field.<sup>15</sup>

\*6 I wanted to review as many policies as possible. At the same time, I needed to limit the number of policies analyzed in each article because of the level of detail required by that analysis. The complex wording and organization of the typical E&O policy makes each policy analysis lengthy and potentially confusing. For example, determining the insurer's indemnity obligation requires review of the coverage clause, consideration of any conditions to coverage, careful examination of any exclusions of coverage, and finally, the search for any exceptions to the exclusions of coverage. Determining the insurer's duty to defend first reflects this coverage review, but then relies on several other policy provisions to define its scope.

Accordingly, some readers will be disappointed that I did not analyze the policy applicable in his or her state. Even so, insurance policies share language, provisions, and concepts, so the policies I have analyzed still serve as helpful exemplars. They will highlight the possible traps that may exist in a policy applicable in another state or covering another profession.

### III. THE UPL DISCIPLINARY PROCEEDING FILED AGAINST DR. FREMED<sup>16</sup>

#### A. *Events Leading to the UPL Disciplinary Proceeding*

In an earlier article, I carefully described the events leading to the UPL disciplinary proceeding filed against Dr. Fremed.<sup>17</sup> In summary, Dr. Fremed assisted a husband and wife in their efforts to divorce.<sup>18</sup> During that process, she prepared the draft of the nearly-completed Parenting Plan.<sup>19</sup> She also recorded, by way of a computer word processing program, \*7 those other topics on which the parties had reached agreement.<sup>20</sup> She also tracked the topics on which the parties had not reached an agreement.<sup>21</sup> She provided this information to the husband's lawyer when the parties terminated the mediation before reaching a final agreement on child support and other financial matters.<sup>22</sup> The husband's lawyer, after carefully reviewing Dr. Fremed's work product, drafted a Separation Agreement, and attached to it, as Schedule A, Dr. Fremed's draft of the Parenting Plan.<sup>23</sup> When the husband did not renew his retainer, his lawyer forwarded the draft Separation Agreement to the parties.<sup>24</sup> At that point, the wife made additional changes to the draft Separation Agreement, but not to the Parenting Plan.<sup>25</sup> Dr. Fremed also had further communications, by email, with the wife about the sale of the marital home and the continuation of child support until the kids reached the age of 21.<sup>26</sup>

#### B. *Pro Se Parties' Miscommunication with the Court*

The husband and wife, appearing pro se, took this cobbled-together Separation Agreement with them when they appeared before the family law judge handling the divorce proceedings.<sup>27</sup> The judge expressed numerous concerns about provisions of the Separation Agreement, most of which reflected the wife's edits to the original draft prepared by the husband's lawyer; however, the judge expressed no concerns about the Parenting Plan drafted by Dr. Fremed.<sup>28</sup> Mistaking several comments of the parties as evidence that the mediator had drafted all of the documents,<sup>29</sup> the judge referred the matter to the Chief Disciplinary Counsel of Connecticut for investigation into whether Dr. Fremed, a trained therapist,<sup>30</sup> had engaged in UPL.<sup>31</sup>

#### C. *Dr. Fremed's Insurance Coverage Dispute*

In August 2005, the Chief Disciplinary Counsel referred the complaint to the Statewide Bar Counsel.<sup>32</sup> Dr. Fremed then called Underwriters, \*8 who insured her through the group policy available to members of the Association for Conflict Resolution (ACR).<sup>33</sup> On November 22, 2005-- after the November 2, 2005 disciplinary hearing, but before Dr. Fremed signed the March 21, 2006 Consent Order -- legal counsel for Underwriters wrote her to advise that the policy did not cover the UPL claim.<sup>34</sup>

The nature of the allegations against Dr. Fremed remained undefined for some time. The four-page Pre-hearing Memorandum filed by the Chief Disciplinary Counsel on October 11, 2005, with the Statewide Grievance Committee<sup>35</sup> broadly stated for the first time the nature of the allegations. Bar counsel advised that the record failed to reveal who had drafted the Separation Agreement the divorcing parties had submitted to the court for approval. The memorandum stated:

Disciplinary Counsel's investigator spoke with both Mr. and Ms. [Brady] Wright. Ms. [Brady] Wright reports that she prepared the Separation Agreement. Mr. Wright reports that it was Ms. Fremed who prepared the document. Discussions with counsel for Ms. Fremed reveal that Fremed may have prepared some agreement or memorandum, but it is not clear what it was, and how it related to the document that ultimately was submitted to the Court. For reasons discussed below, it will be necessary to have a hearing to determine on the record who did what here, and whether there was unauthorized practice of law.<sup>36</sup>

For the first time since the trial judge had referred the matter to the Chief Disciplinary Counsel, Dr. Fremed had some idea of the basis for the complaint against her. However, the Chief Disciplinary Counsel chose not to take a position on the situation. Instead, he stated in his Prehearing Memorandum that he would “wait until after the evidentiary hearing to take a position on whether there ha[d] been unauthorized practice of law.”<sup>37</sup> Moreover, the allegations that Dr. Fremed had wrongfully given legal advice did not arise until the evidentiary hearing on November 2, 2005.<sup>38</sup>

\*9 Dr. Fremed contacted her insurer, Underwriters, seeking coverage and defense of the UPL claim. Underwriters denied the claim explaining that the UPL disciplinary proceeding did not seek “damages” and therefore did not trigger coverage.<sup>39</sup> Underwriters also cited the exclusion at paragraph VII(i) of the policy, which excluded claims “[a]rising out of any act, error or omission in the conduct of professional services for which the Assured is not properly licensed where such license is required by applicable law or regulation.”<sup>40</sup> Underwriters asserted that: “Our understanding is that the sole basis for the grievance against you is that you allegedly practiced law without a license . . . [a]s such, this claim is not covered.”<sup>41</sup>

On December 2, 2005, Dr. Fremed's insurance counsel challenged Underwriters' denial of coverage.<sup>42</sup> First, he argued that Underwriters had not considered “the impact upon [Dr. Fremed] (and indeed other members of [[ACR] were they to be in a similar situation) of a finding that it is practicing law without a license. The financial impact to [Dr. Fremed's] reputation of this admittedly landmark, high profile finding would be devastating.”<sup>43</sup> He also argued: “[s]uch a finding opens the door for one of [Dr. Fremed's] clients to commence litigation against [her] for damages arising from [Dr. Fremed's] mediation which was found to constitute practicing law without a license.”<sup>44</sup> Accordingly, her lawyer asserted the claim involved “damages.”<sup>45</sup>

In response to the second basis for denial, Dr. Fremed's lawyer stated:

\*10 It is ironic-to say the least-that the policy, on one hand, covers the very activity, which Connecticut says is illegal, and, for you, on the other, to declare that the policy does not cover the same activity because the state for the first time alleges such activity constitutes the unauthorized practice of law. Your client is basically insuring conduct, which if challenged, it will not defend.<sup>46</sup>

In a response to this letter, Underwriters' counsel further clarified Underwriters' position: “Whatever may be the merits (or lack thereof) of the Statewide Grievance Committee's [UPL] allegation, it appears to me that this single allegation falls squarely within this Policy exclusion.”<sup>47</sup>

After this exchange of letters, Dr. Fremed wrote ACR's director advising him that Underwriters had denied coverage of the claim under its group policy with ACR members.<sup>48</sup> ACR, after the fact, shored up its ability to respond to similar situations.<sup>49</sup>

On March 21, 2006, Dr. Fremed entered a Consent Order, after spending \$6,000 of her own money unsuccessfully on her defense.<sup>50</sup> It stipulated that:

(1) Dr. Fremed was not a licensed attorney; (2) she operates New England Counseling & Mediation in Connecticut; (3) she “provided advice to clients regarding marital property, quitclaim deeds, and child support”; (4) “this action constitutes the practice of law and warrants action”; and (5) she agrees “to cease and desist from conduct constituting the practice of law, including but not limited to, the foregoing conduct” regarding marital property, quitclaim deeds, and child support.<sup>51</sup>

For several years after Dr. Fremed's experience, ACR's home webpage prominently featured a story that seemed to relate to the concern the organization's leadership had about the outcome of the proceeding involving \*11 Dr. Fremed. The story reported that ACR adopted a resolution on UPL in October 2006 affirming:

that mediation is a distinct practice with its own body of knowledge, foundational principles, values and standards of practice. While ACR recognizes that the definition of and penalties associated with the unauthorized practice of law are matters of state law, ACR affirms that mediators who practice mediation consistent with standards of conduct approved by ACR should not be considered to have engaged in the unauthorized practice of law. If an ACR member is charged with unauthorized practice of law, ACR will provide assistance and/or support as may be appropriate.<sup>52</sup>

The second story linked web users to ACR's 2004 Draft Policy Statement on the unauthorized practice of law/authorized practice of mediation.<sup>53</sup>

I provide this background information for context. This article does not analyze the ethical questions raised by a mediator's decision to help parties draft agreements, memorandum of understanding, or parenting plans. It does not analyze whether a mediator may provide legal information, give legal advice, help the parties develop, explore, suggest, and evaluate options, and engage in other activities without engaging in UPL. My earlier article covered those topics.<sup>54</sup>

Instead, this article will begin to show that most mediators unknowingly underinsure their mediation practices. In Dr. Fremed's case, because she lacked coverage, she paid for her defense from her own financial resources.

Sadly, Dr. Fremed advised me that she no longer mediates.<sup>55</sup> In a follow-up email, she explained:

I lost my passion for mediation after the UPL hearing. It was frightening for me. I have always paid a lot of attention to ethical considerations, and [I] have a very good reputation. \*12 Colleagues and others were shocked when they found out that I was a target knowing that I operated with very high standards. I no longer wanted to mediate out of fear and disappointment in the system[,] I didn't have the energy or money to continue the battle.<sup>56</sup>

Accordingly, the field lost a well-trained family mediator after she no longer wanted to practice in such an uncertain environment -- both regulatory and insurance.

#### IV. POTENTIAL CLAIMS AGAINST MEDIATORS

##### A. *Malpractice Suits Filed Against Mediators*

## 1. Nature of Malpractice Claims

Most mediator malpractice claims will allege professional negligence<sup>57</sup> based on a recognized tort theory or on the violation of an ethical rule or guideline that governs mediators. For instance, a party could allege that a mediator:

- negligently inflicted emotional distress;
- negligently failed to get informed consent of the parties to the mediation process;
- negligently breached impartiality based on the attributes of the parties;<sup>58</sup>
- negligently misrepresented the scope of confidentiality;
- negligently breached the confidentiality of mediation communications;
- negligently provided professional information or advice;
- negligently published defamatory, libelous, or slanderous confidential information of a “highly offensive” or “objectionable” nature;
- negligently failed to provide security and safety to the parties, or for their property;
- \*13 • negligently failed to comply with the Americans with Disabilities Act of 1990 (ADA)<sup>59</sup> and other special accommodations required by parties;<sup>60</sup>
- negligently failed to include a typical term in a mediated settlement agreement, like a right to a spouse's pension benefits or maintenance payments; or
- negligently drafted or facilitated an unfair or lop-sided mediated settlement agreement.<sup>61</sup>

Some claims could arise from the doctrine of strict liability,<sup>62</sup> especially the exposure of parties to inherently dangerous instrumentalities like:

- poisons;
- loaded firearms;
- large sheets of unlaminated glass; or
- vicious animals.<sup>63</sup>

Claims could allege a breach of a duty arising by contract,<sup>64</sup> typically the agreement to mediate or a fee agreement. For instance, a mediator could:

- breach the contractual promise to maintain confidentiality;
- maintain confidentiality inappropriately by, for example,
- fail to report child abuse and neglect,<sup>65</sup> or
- fail to warn persons that a party has made a physical threat against him or her;<sup>66</sup> or
- overcharge or improperly charge fees or expenses.<sup>67</sup>

\*14 Claims could allege intentional, criminal, dishonest, fraudulent, or malicious acts of mediator misconduct.<sup>68</sup> For example:

- intentionally or recklessly inflicting emotional distress;
- intentionally showing bias or favoritism towards a party based on the attributes of the parties;

- intentionally misrepresenting the scope of confidentiality;
- intentionally failing to protect the confidentiality of mediation communications;
- intentionally publishing defamatory, libelous, or slanderous statements;<sup>69</sup>
- intentionally disclosing to the public private fact or information about a party that is embarrassing, humiliating, or offensive;
- knowingly putting a party in a false light before the public, if the false light would be offensive to a reasonable person;
- without permission, intruding on a person's solitude, seclusion, private life, or private affairs if highly offensive to a reasonable person, including recording conversations, and engaging in persistent and unwanted communications or close physical presence (invasion of privacy);
- intentionally misrepresenting material facts at the behest of the parties;
- intentionally misrepresenting material facts independently by the mediator;
- applying coercion or duress to reach a settlement of the dispute;
- being an accomplice to a crime or fraud;
- engaging in conspiracy;
- causing physical harm through intentional, unpermitted contact with a party (battery);
- engaging in intentional, unpermitted contact with a party that is hostile, offensive, or insulting (also battery);
- engaging in assault;
- falsely imprisoning a party when a mediator prevents a party from leaving the mediation or refuses to terminate the mediation;
- engaging in false advertising; or
- without permission, appropriating a person's name or likeness in advertising or marketing materials.<sup>70</sup>

\*15 Claims might also raise issues of the breach of a fiduciary duty to the parties.<sup>71</sup>

## 2. Risk of a Successful Malpractice Claim against a Mediator<sup>72</sup>

Twenty years ago, Jay Folberg and Alison Taylor's research indicated that “[t]here are very few claims against mediators and no reported cases in which a mediator has been successfully sued for damages regarding mediation services.”<sup>73</sup> A few years later, in one of the leading ADR textbooks, Len Riskin and James Westbrook reassured new mediators that “[t]he risk of a successful lawsuit for professional negligence (malpractice) is extremely remote. Plaintiffs would have difficulty establishing not only the standard of care but also causation and damages.”<sup>74</sup>

In 1999, Stephen B. Goldberg, Frank E. A. Sander, and Nancy H. Rogers stated:

More frequently, no remedy has been specified for a breach of the mediator's duty. Where no remedy is provided, the laws presumably would be enforced through civil actions, filed by those harmed if the mediator fails to comply. However, there are no reported judgments against mediators and few reports of suits.<sup>75</sup>

Similarly, Michael Moffitt, in the most thoroughly researched work to date, found the following: “As an empirical matter, mediators have enjoyed almost absolute freedom from lawsuits alleging injury stemming from mediation

conduct.”<sup>76</sup> In short, mediators face a small risk of professional malpractice claims. But, when they face a lawsuit or a threatened lawsuit, they face potentially large out-of-pocket costs in defending the claim.

### **\*16 B. Ethics Grievances Filed Against Mediators Working in Court-Connected Programs**

Only a few states operate mediator grievance systems.<sup>77</sup> “Depending on the system, they apply to civil and family mediators operating in court-connected mediation programs or to mediators that the courts or their program administrators have certified, registered, or rostered.”<sup>78</sup>

#### 1. Nature of Ethics Grievances Filed Against Mediators

There are three types of mediator conduct that most frequently trigger grievances against mediators.<sup>79</sup>

Conduct which makes a party believe that the mediator has lost his or her impartiality is the most frequently cited reason for filing [an ethics grievance] in Virginia and Maine. It appears as the second most frequently raised allegation in Florida, Georgia, and Minnesota. Interference with a party's self-determination, by offering legal advice, by giving legal opinions, by recommending settlement, or by engaging in more overt acts of coercion formed the most frequent allegation in Florida and Georgia and the second most frequent allegation in Virginia.<sup>80</sup>

“Poor quality of the process<sup>81</sup> or [the inadequate quality or skill of the \*17 mediator]<sup>82</sup> formed the most frequent allegation in Minnesota, the second most frequent allegation in Maine, and the third most frequent allegation in Virginia.”<sup>83</sup> Surprisingly, breaches of confidentiality gained traction only in Minnesota as a basis for an ethics grievance. Apparently, these grievances arose “because some parenting consultants misunderstood how much confidential information they [could] reveal to the appointing court.”<sup>84</sup>

#### 2. Types of Sanctions Imposed

Regulators in the studied states<sup>85</sup> may impose a variety of sanctions.<sup>86</sup> They “most likely . . . require a mediator to take additional training or to \*18 learn from experienced mediators by observing them, working under their supervision, or co-mediating with them.”<sup>87</sup> Regulators forced only six mediators off the state supreme court's roster of mediators, with five of those sanctions occurring in Maine.<sup>88</sup> Only regulators in Florida and Virginia have the power to impose economic sanctions.<sup>89</sup> “Virginia and Maine may recommend that a mediator get additional training or supervised experience even if the mediator has not violated an ethics rule.”<sup>90</sup>

#### 3. Risk of a Successful Ethics Grievance against a Mediator

“Of the nearly 9,000 mediators regulated by the states [that I analyzed for the period May 1992 to July 2005,] less than 100 mediators have received any type of sanction, remedial recommendation, or intervention for conduct inconsistent with ethical standards.”<sup>91</sup> “The number of claims dismissed by the regulators in these states provides the bigger story.”<sup>92</sup> “In the states reporting dismissal data, the regulators dismissed 67 formal [grievances] for lack of jurisdiction, for failure to state a claim, [or] as a matter of probable cause when the factual investigation did not support the allegations in the [grievance].”<sup>93</sup>



\*19 By including this discussion in this article, I have not intended to provide an exhaustive list of the grievances filed against mediators. Instead, I intend to illustrate the types of sanctions a mediator faces. In most situations, the mediator will not likely incur a penalty, fine, or other economic sanction for violating a provision of a mandatory ethics code. However, in some cases, he or she could incur significant defense costs. These costs could include the cost of legal representation at the hearing, discovery expenses, research expenses, the cost to prepare pre- and post-hearing memoranda, the costs to interview witnesses, an appeal, and other costs associated with protecting the reputation of the mediator, as well as his or her opportunity to provide mediation services. If possible, the mediator would likely want an insurer to pay these defense costs.

### *C. UPL Disciplinary Proceedings Filed Against Mediators*<sup>94</sup>

#### 1. Nature of UPL Disciplinary Claims Against Mediators

Statutes, court decisions, and court rules proscribe the unauthorized practice of law.<sup>95</sup> They regulate: (1) non-lawyers; (2) lawyers who are not licensed in the enforcing state; and (3) persons who assist other persons in practicing law without a license.<sup>96</sup> Typically, they do so in three ways: “(1) by proscribing it without defining the ‘practice of law’; (2) by using a circular definition in which the practice of law is what lawyers do or have done or have the skills and training to do; or (3) by listing activities that constitute the practice of law.”<sup>97</sup> The listed activities typically include: (1) the drafting of legal instruments, forms, and pleadings; (2) giving legal advice; and (3) appearing in court on behalf of a person. One court called the varying tests “consistent only in their inconsistency.”<sup>98</sup> Professor Rhode calls the UPL prohibitions “broad and largely undefined [in] scope” and covering a “breathtaking amount of common commercial activity.”<sup>99</sup>

Some states tolerate practice by non-lawyers “that is common in the community, ancillary to another established business, or restricted to ‘routine’ tasks.”<sup>100</sup> “Legal assistants, accountants, financial planners, real estate \*20 agents, trust officers, insurance adjusters, stock and securities brokers, collection agencies, court clerks, credit counselors, social workers, title companies, and law librarians may fall within the UPL law’s ‘incidental services’ exemption.”<sup>101</sup> “The exception may not apply, however, to professionals who charge a separate fee for the incidental service.”<sup>102</sup> “In addition, some courts look to whether the service involve[d] simple, clerical tasks or complex legal issues.”<sup>103</sup> “At least in the real estate broker context, the majority of courts allow some document drafting, but . . . do not allow a broker to give legal advice or appear in judicial or administrative tribunals on behalf of another person.”<sup>104</sup> “[C]ourts usually reject a defense based on the incidental services exception.”<sup>105</sup> “Other courts . . . severely limit its scope.”<sup>106</sup>

In 2005, the chair of the ABA Standing Committee on Client Protection, Robert D. Welden, noted two “divergent but interrelated trends”<sup>107</sup> in UPL law and its enforcement. “State enforcement of UPL laws and regulations ha[[d] increased, but increasingly more states allowed non-lawyers to provide limited legal services.”<sup>108</sup>

#### 2. Regulatory Bodies Enforcing Prohibitions against UPL

To enforce the statutes, court cases, and court rules prohibiting UPL, “[s]ome states use bar-sponsored committees or counsel (15 jurisdictions).”<sup>109</sup> Other states use supreme court-appointed committees or commissions (ten jurisdictions).<sup>110</sup> The remaining states use county attorneys, district attorneys, or state attorneys general (17 jurisdictions).<sup>111</sup>

#### 3. Types of Sanctions Imposed for Activities Deemed UPL

In 2011 and 2012, the ABA Standing Committee on Client Protection surveyed the bodies charged with UPL disciplinary enforcement, and 29 jurisdictions responded.<sup>112</sup> The Committee then supplemented the report from data it obtained in 2009 for several additional states, however, \*21 nine states failed to respond either to the 2009 or 2012 surveys.<sup>113</sup> The survey revealed that 23 jurisdictions actively enforce UPL laws and regulations.<sup>114</sup> Nine jurisdictions, including New York, do not actively enforce UPL laws and regulations.<sup>115</sup>

Penalties or sanctions for UPL violations include civil injunction in 30 jurisdictions; criminal fines in 24 jurisdictions; prison sentences in 20 jurisdictions; civil contempt in 22 jurisdictions; restitution in 16 jurisdictions; and civil fines in 13 jurisdictions.<sup>116</sup> Some statutes or rules provide for additional remedies, like a cease and desist order.<sup>117</sup>

#### 4. Risk of a Successful UPL Disciplinary Proceeding

Again, thousands of mediators now practice in the United States, many of whom are non-lawyer mediators. Yet, they very infrequently face UPL disciplinary proceedings. Mediators may now face an even lower risk of discipline because many of the ethics opinions indicate an increasingly greater understanding of the differences between mediation and the practice of law.<sup>118</sup> In addition, the earlier poorly reasoned opinions<sup>119</sup> have apparently motivated mediators and mediation associations to develop policy statements, guidelines, and other educational materials to help both mediators and regulators better understand the difference between the unauthorized practice of law and the “authorized practice of mediation.”<sup>120</sup>

#### *D. Resisting Subpoenas, Motions to Compel, or Court Orders Seeking the Disclosure of Confidential Mediation Communications*

Many courts are either unaware of the boundaries of mediation confidentiality or they are not sufficiently respectful of mediation communications \*22 to limit their introduction in court proceedings.<sup>121</sup> Accordingly, mediators may face significant out-of-pocket costs appearing in court to prevent the disclosure of confidential mediation communications, typically by having to resist a subpoena to testify or to produce notes revealing confidential communications. In states with mandatory mediator ethics codes,<sup>122</sup> a mediator likely has an independent obligation to resist the disclosure in court of confidential mediation communications. If a mediator does not meet this obligation, he or she could face an independent grievance or legal action based on mediator misconduct or negligence.<sup>123</sup>

Nearly all of the reported cases that have interpreted the scope of confidentiality arising under state statutes, court rules, or other laws began with a discovery request that required the mediator involved in that case to resist a subpoena, motion to compel, or court order seeking his or her disclosure of confidential mediation communications.<sup>124</sup>

#### *E. Statutory Immunity for Mediators*

Finally, states offering court-ordered mediation programs may offer participating mediators some form of immunity from claims filed against them by unhappy parties or other persons.<sup>125</sup> For example, in Florida, the state legislature has decided to create two types of immunity for mediators. A statute confers judicial immunity to the same extent as a judge on mediators serving in court-ordered mediations and on trainees meeting their observation and supervised mediation requirements. However, mediators serving in privately referred mediations have more limited immunity. The statute protects them from liability arising from the performance of the mediator's duties, so long as the mediators do not act in

“bad faith, with [a] malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.”<sup>126</sup>

\*23 Maine takes a different approach. A statute grants absolute immunity from civil liability to mediators under contract with the Judicial Department of Maine to the same extent provided to governmental employees under the Maine Tort Claims Act, so long as the mediator acts within the scope of the mediator's duties.<sup>127</sup> In addition, the Maine Operational Rules give immunity to “ADR providers under contract with the Judicial Branch” from liability for actions taken in connection with the Maine Operational Rules.<sup>128</sup>

In Virginia, the statutes “confer on certified mediators a qualified immunity that applies even in the private referral context.”<sup>129</sup> Similarly to Virginia, Georgia provides qualified immunity to mediators working in court-annexed or court-referred programs. A person cannot hold a mediator liable for any “statement, action, omission, or decision made in the course of any ADR process unless that statement, action, omission, or decision is: (1) grossly negligent and made with malice; or (2) is in willful disregard of the safety or property of any party to the ADR process.”<sup>130</sup> Like Virginia and Georgia, Minnesota has created a qualified immunity for mediators.<sup>131</sup>

These immunities, to a greater or lesser extent, insulate certain mediators from certain classes of claims, typically negligence claims, brought by parties to a mediation.

#### **\*24 F. *With the Risks So Low, Why Worry? The Cost of Defending Claims***

##### 1. Introduction

This discussion indicates that most mediators will never face a malpractice claim, ethics grievance, UPL disciplinary proceeding, or subpoena. So why should any mediator spend his or her hard-earned money to buy a policy of insurance that protects him or her against these types of claims? The simple answer: mediators can incur significant costs in defending even unmeritorious claims.

The insurance industry recognizes two general factors that create two kinds of risk profiles for any book of insurance business: frequency of claims and severity of claims. In the first type of risk profile, like auto collision insurance, an insurer knows that claims arise frequently, but the cost or severity of each claim will not exceed the current value of the car. Moreover, based on the insurer's experience with a vast number of similar claims in the past, the insurer can predict approximately how much money it will pay out in claims for repair or replacement of the insured vehicle. It can also accurately set premiums, deductibles, and limits of liability. These risks are of high frequency, but of low severity.<sup>132</sup>

In the second type of risk profile, like a hurricane hitting New Orleans or a deep sea well blowing out in the Gulf Ocean, the likelihood of either event is quite infrequent, but the events can cause millions (or billions) of dollars in insured losses. These risks are of low frequency, but of high severity.<sup>133</sup>

A mediator accused of malpractice, facing an ethics grievance, defending an alleged UPL violation, or resisting a subpoena to testify experiences a rare event. However, when it comes, it feels like a hurricane. The mediator defending against even rare allegations of professional misconduct -- like Dr. Fremed -- can feel overwhelmed, persecuted, confused, humiliated, alone, and financially threatened. These feelings increase when the mediator must face these proceedings without help from his or her professional malpractice insurer and the resources -- including time, expertise, and money -- the insurer can bring to the mediator's defense of the claim.

##### 2. Data on the Costs of Defending Claims Filed Against Mediators

In his survey, Robert A. Badgley, former counsel for Underwriters, identified ten claims brought against mediators from 2002 to 2010 alleging \*25 violations of some professional duty to one of the mediating parties.<sup>134</sup> In nearly all the cases, either the courts dismissed the suits or the parties settled the claim.<sup>135</sup> However, the costs of resolving the disputes, including settlement and defense costs, ranged from \$10,000 to \$400,000.<sup>136</sup>

In a 2004 case, in which the mediator tried to protect the confidentiality of mediation communications, the mediator incurred costs approaching \$10,000.<sup>137</sup> In a 2004 child custody dispute, a father alleged that a Minnesota mediator showed bias to the mother and misrepresented the mediator's credentials to handle the matter.<sup>138</sup> The defense costs approached \$40,000.<sup>139</sup> In a 2002 dispute, in which the party alleged that the mediator had coerced the party to enter the settlement, the mediator incurred almost \$11,000 in defense costs.<sup>140</sup> In another claim-alleging mediator bias-the summary describes the defense costs as "significant," without revealing a dollar amount.<sup>141</sup> The survey also identified a suit involving allegations of conspiracy and bias that resulted in \$400,000 in defense costs.<sup>142</sup>

Badgley's 2013 updated survey provides summaries of eight more civil cases filed (or threatened) against mediators, many of which cover some surprising allegations involving post-mediation advice to a party, a post-mediation murder of a party, a faulty settlement agreement, defamation, subpoenas for deposition, conspiracy and bias, and nondisclosure of a potential conflict of interest.<sup>143</sup> At the time of the updated survey's distribution, a number of the cases had not yet resolved by settlement, motion, or trial. But, in one case, defense costs exceeded \$20,000.<sup>144</sup> In a second case involving alleged mediator bias, Badgley describes defense costs as "significant."<sup>145</sup> In the murder case, the combined settlement amount and \*26 defense costs exceeded \$100,000.<sup>146</sup> In the remaining case, one involving appeals to the U.S. Supreme Court, defense costs exceeded \$560,000.<sup>147</sup>

### 3. Does Insurance Provide Mediators Peace of Mind? Answer: No!

Based on this information, a cautious and risk adverse mediator would choose to purchase professional malpractice insurance to cover the defense and liability arising from these rare, but possible claims. As the following discussion illustrates, even if a mediator purchases insurance that applies to his or her profession-of-origin, as well as specialized insurance available for mediators, these policies will not provide the scope of coverage most mediators would likely expect. Both types of policies have significant coverage gaps and impose costs on mediators through deductibles, self-insurance retentions, and limits on total payouts. In addition, many of the policies invite coverage disputes.

## V. BASIC INSURANCE CONCEPTS DISCUSSED IN THIS ARTICLE

Liability insurers, including professional malpractice insurers, give policyholders three contractual promises. First, the insurer promises to indemnify the policyholder against any money judgments or settlements arising from claims covered under the policy of insurance.<sup>148</sup> Second, the insurer promises to arrange a defense for the policyholder in the suit or proceeding arising from covered claims and to cover specified costs associated with that defense, including, perhaps, the costs of an appeal.<sup>149</sup> Third, the insurer promises to attempt to resolve the claim by accepting and paying a reasonable settlement offer.<sup>150</sup>

Policies have multiple sections outlining these contractual promises. The coverage provisions (or insuring agreements) describe the general scope of coverage. Typically, professional malpractice policies cover claims of negligence or strict liability.<sup>151</sup> This limited scope of coverage creates the first gateway issue for the mediator seeking coverage. As one

treatise notes, the professional malpractice or E&O policy is not a security blanket or a comprehensive hold harmless agreement.<sup>152</sup> Typically, these liability \*27 policies cover only “sums” the policyholder becomes obligated to pay “as damages” to third parties.<sup>153</sup> The insuring agreement may also provide additional benefits in other sections of the policy that cover specified situations, depending on the type of insurance provided.<sup>154</sup>

The professional malpractice or E&O policy typically covers liability arising from “professional services” offered by a person with special skills, expertise, or training. Policies may take three approaches to characterizing the covered services. First, they may define this coverage term. Second, they may incorporate by reference a particular profession identified in the declarations page to the policy. Third, they may leave the term undefined in the policy. In addition, case law defines acts considered professional services for the various professions.<sup>155</sup> A leading case defines the term as an act or service “arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill.”<sup>156</sup> A few courts focus on the professional act, error, or omission giving rise to the claim of negligence rather than on the character or profession of the person engaging in the act.<sup>157</sup> A few other courts focus on the services performed by the professional in the ordinary course of his or her practice for paying clients.<sup>158</sup> This term creates the second gateway issue for coverage under the standard professional malpractice policy.

Next, policies use limitations to narrow the scope of the grant of coverage under the coverage provisions of the policy. These limitations take the form of per claim and aggregate limits on liability,<sup>159</sup> conditions subsequent to coverage,<sup>160</sup> the policyholder's warranties or representations about existing circumstances,<sup>161</sup> occurrence or claims-made coverage,<sup>162</sup> and the duration of coverage.<sup>163</sup>

\*28 The policy further limits coverage through specific exclusions to it.<sup>164</sup> An exclusion, in turn, may have exceptions that expand or maintain coverage despite the limitation found in the exclusion.<sup>165</sup> Practitioners and scholars agree that policies can use exclusionary language that is ambiguous, difficult to understand, and difficult to apply in some circumstances.<sup>166</sup> Most courts impose the burden on insurers to show that the policy excludes a claim.<sup>167</sup> If a coverage dispute arises, a court will likely narrowly construe an exclusion or other limitation, by interpreting the contract against the drafter.<sup>168</sup> In nearly all cases, the insurer, using form contracts, drafts the policy.<sup>169</sup>

In most circumstances, absent the bad faith of the insurer, the policyholder can never recover more money than the policy limits provide.<sup>170</sup> In the liability situation, the insurer measures the loss as the judgment entered against the policyholder or the reasonable settlement agreed by the plaintiff and policyholder.<sup>171</sup> Typically, policies also cover interest accruing on judgments and costs taxed in the litigation.<sup>172</sup>

The limits of liability take two forms: per claim and aggregate.<sup>173</sup> Per claim limits of liability impose a cap on the payment of sums for any one claim. Aggregate limits impose a cap on the amount an insurer will pay for multiple claims arising in the policy period.<sup>174</sup> The costs of providing a defense of the claim can be either “inside” or “outside” the limits of liability. If they are outside the limits of liability, they become additional funds available to the policyholder on top of the liability caps. However, if the policy specifies that they count against the limits of liability, they are inside the limits. As a result, they erode or burn the money available from the insurer ultimately to pay a judgment or settlement of the claim.<sup>175</sup>

The policies also define the scope of the insurer's duty to defend, the covered costs of defense,<sup>176</sup> and the promises relating to settlement of the \*29 claim.<sup>177</sup> The duty to defend obligates the insurer to arrange and provide a defense of any suit alleging a covered claim. The scope of the duty depends on the policy language. One treatise calls it “litigation

insurance” designed to “protect[ ] insureds against the financial costs associated with being sued.”<sup>178</sup> The insurer will typically defend a meritless suit if the suit alleges claims within the coverage of the policy.<sup>179</sup> Thus, the duty to defend functions independently of the duty to indemnify against losses for covered claims, although both duties tie to the definition of covered claims.<sup>180</sup>

The insurer typically covers the defense costs (as defined in the policy) of pre-trial preparation, of the trial, of post-trial motions, and any appeal taken by a plaintiff who loses at trial.<sup>181</sup> Courts often impose a duty on the insurer to bring an appeal on behalf of the policyholder if he or she loses at trial, unless the appeal is clearly futile.<sup>182</sup> The appeal must therefore advance, in some non-incidental way, the interest of the policyholder.<sup>183</sup>

The policy typically gives the insurer the right to control the defense by selecting defense counsel and monitoring his or her performance in defending the claim.<sup>184</sup> This right ensures that the insurer can bring its resources and expertise to defeat meritless claims or mitigate the losses arising under successful claims.<sup>185</sup> It also allows the insurer to control defense costs, to value claims, and to respond to settlement offers in a way that can help the insurer keep policy premiums affordable for consumers.<sup>186</sup> To a large extent, it also relieves the insured from the stress of actively controlling the defense.<sup>187</sup>

Policies do not tend to impose a duty to settle on the insurer, but they typically give discretion to settle to the insurer, who may often settle without the consent of the insured.<sup>188</sup> Nonetheless, courts require the insurer to act in good faith and give due regard to the interests of the insured.<sup>189</sup> If the insured rejects a reasonable settlement offer, the insurer may “tender” the defense to the insured, who must then arrange the ongoing defense \*30 and pay accruing defense costs. If, in that situation, the claim settles at a higher amount or ends in a higher judgment after trial, the policy typically limits the insurer's liability for the claim to the amount of the earlier-offered, and rejected, settlement.<sup>190</sup> In addition, only a few courts have imposed an obligation on the insurer to affirmatively investigate or seek settlement opportunities.<sup>191</sup> The insurer can only breach its settlement duties if it ignores a reasonable offer presented by the plaintiff.<sup>192</sup>

“Other insurance” clauses regulate relationships between insurers who may offer coverage for a claim under overlapping policies. They prioritize, coordinate, and allocate the loss among the policies that could respond to the claim.<sup>193</sup> They take three forms: pro rata, excess, and escape. Pro rata clauses attempt to limit the insurer's liability for a loss to the proportion of the loss that the policy's limit of liability bears to the total amount of insurance available to cover the loss.<sup>194</sup> The excess clause limits the insurer's liability to the amount of the loss that exceeds the coverage of “other valid and collectable insurance,” subject -- of course -- to the policy's limits of liability as the cap on coverage.<sup>195</sup> The escape clause attempts to eliminate the insurer's liability for the loss if any “other valid and collectible insurance” exists to cover the claim.<sup>196</sup> Insurers tend to use escape clauses rarely.<sup>197</sup>

Policies specify the amount of the claim the policyholder will cover him or herself under the deductible and the co-insurance obligation, how and when a policyholder should make a claim, and the termination or cancellation of the policy.<sup>198</sup> Insurers typically require the policyholder to pay a deductible amount that applies before the policy triggers the insurer's duty to pay insurance proceeds.<sup>199</sup> The insurer may further limit its exposure to covered risks by making the policyholder a co-insurer. Co-insurance (or self-insured retention) describes a loss-sharing relationship between the insurer and the policyholder. It tends to increase the policyholder's incentive to prevent or to mitigate a loss.<sup>200</sup>

\*31 Policy forms change from time to time to reflect the insurer's loss experience, any new case law defining the responsibilities of the parties, or new statutes reflecting the public policy governing insurance contract law.<sup>201</sup>

All policies define some of the terms used in the policy. Some of the terms used in policies get further interpretation from state courts. The precise meaning of other terms may remain ambiguous in some states, thereby inviting coverage disputes with insurers.<sup>202</sup> Principles of contract interpretation, further refined to protect policyholders, will often determine how a court interprets terms, resolves ambiguities in the policy language, or concludes which provisions prevail when a conflict between policy terms exists.<sup>203</sup> In most states, a court would construe the policy against the insurer-drafter, unless evidence exists showing that the policyholder played an active role in negotiating the terms of the policy.<sup>204</sup> In this article, I have considered only the language of the policies. I encourage readers to discuss coverage issues with a legal counselor or other professional advisor. The reader can find coverage information and a number of specimen policies on the Internet.<sup>205</sup>

## VI. INSURANCE COVERAGE FOR LAWYER-MEDIATORS

As noted above, the legal malpractice policies available in Virginia and Missouri serve as exemplars of the typical language governing coverage for lawyer-mediators. The policies available in other states may contain different wording, so I intend this discussion as a general guide to interpreting other policies.

### *A. Summary of Policy Analysis*

#### 1. Scope of Coverage and Exclusions

For coverage under both the ALPS and Bar Plan policies, the liability need not arise from a “professional incident,” “wrongful act,” or “occurrence” \*32 as required by the mental health care liability policies I have analyzed. Instead, the ALPS policy covers acts or omissions arising from “professional services . . . including, services as a mediator.”<sup>206</sup> The Bar Plan policy covers any act or omission arising “in a professional capacity providing Legal Services.”<sup>207</sup> The term “Legal Services” is then defined as including mediation.<sup>208</sup> Both operative terms are, therefore, expressly defined to include acts as a mediator.

The policies limit coverage to “sums” the policyholder becomes “legally obligated to pay as damages” as a result of “claims” made against the policyholder.<sup>209</sup> The policies define “damages” as a monetary judgment, final arbitral award, or a settlement.<sup>210</sup> Thus, they would cover a monetary award imposed in a typical negligence suit. Both policies expressly exclude coverage of punitive or exemplary damages.<sup>211</sup> They also expressly exclude coverage of claims for fines, penalties, sanctions, or fee restitution.<sup>212</sup> Accordingly, they would not likely cover any sanctions imposed in an ethics grievance or UPL disciplinary proceeding. However, the policies use limiting language in these exclusions, which could give rise to coverage, in very state-specific contexts, for these types of sanctions or for a defense of these types of proceedings.

As with the other policies, the focus of coverage is on negligence, but some provisions of both policies expand the coverage to include some intentional torts that the policies specifically name.<sup>213</sup> They both, however, exclude coverage of dishonest, fraudulent, or criminal acts.<sup>214</sup>

While both policies cover some personal injury claims, they limit the scope of that coverage through “bodily injury” exclusions.<sup>215</sup> And, both policies exclude coverage of claims based on discrimination, which might \*33 interest a mediator concerned about parties who complain about a lapse in mediator impartiality.<sup>216</sup>

Unlike the Underwriters policy that applied to Dr. Fremed's claim, the ALPS and Bar Plan policies do not expressly exclude claims alleging that the insured did not have a required license. However, the ALPS policy limits coverage to properly licensed attorneys.<sup>217</sup> Thus, an attorney practicing mediation across state lines could still face a claim for UPL not covered by the policy.

Both policies may also offer some coverage for some claims arising out of contract, like the agreement to mediate.<sup>218</sup> The ALPS policy does not expressly exclude contract-based claims.<sup>219</sup> The Bar Plan policy may cover them if the obligation arises independently of the contract by way, for instance, under a mandatory ethics code.<sup>220</sup>

## 2. Other Insurance Clauses

Like the mental health professional liability policies I have analyzed, the ALPS policy contains an “excess” insurance clause.<sup>221</sup> Surprisingly, the Bar Plan policy is the only analyzed policy with a “pro rata” other insurance clause.<sup>222</sup> Even so, both policies set up a conflict with the “escape” clause found in the Underwriters policy.<sup>223</sup>

## 3. Duty to Defend and Defense Costs

Both policies expand the duty to defend to groundless claims that are still covered claims under the policy.<sup>224</sup> Both policies may give rise to a duty to defend an ethics grievance or UPL disciplinary proceeding in very state-specific contexts because of limiting language used in the policies.<sup>225</sup>

Under both policies, defense costs “erode” limits available to pay claims. Both policies cover the typical costs of a defense and cover the costs of an appeal.<sup>226</sup> No language, however, suggests that either policy would cover the cost of keeping mediation communications confidential. \*34 Both policies suggest that the insured can play a role in designating defense counsel.<sup>227</sup>

## 4. Endorsements

Finally, neither insurer offers any endorsements specifically designed to provide specialized coverage for mediators.

## VII. CONCLUSION

I was genuinely surprised that the profession-of-origin policies available to lawyers in Virginia and Missouri expressly covered acts and omissions arising from services as a mediator.

Even with this expanded scope of coverage, lawyer-mediators will not find comprehensive protection against all the claims they could face. They are “going bare” by being underinsured. Lawyer-mediators cannot expect that the professional liability policies will cover sanctions or the costs of defending an ethics grievance proceeding or UPL disciplinary proceeding. In addition, they will not cover the costs of resisting discovery subpoenas, witness subpoenas, or court orders seeking the disclosure of confidential mediation communications. In short, the ALPS and Bar Plan policies are not a security blanket or a comprehensive hold harmless agreement.<sup>228</sup>



Given the language of the policies, lawyer-mediators must rely on the good faith of the insurers to read their policies broadly to provide coverage. In a worst-case scenario, the mediator may need to enforce the insurance obligation in a court of law, where the court is likely to construe the policy language against the drafter-insurer. A lawyer-mediator can supplement the profession-of-origin policy with a policy providing specialized coverage for mediators, like those policies offered by Underwriters or Pinkham. Finally, a lawyer-mediator should expect to self-insure many of the claims an unhappy party might bring against the mediator.

## \*35 APPENDIX A

### LAWYERS' MALPRACTICE INSURANCE POLICY OFFERED BY ATTORNEYS LIABILITY PROTECTION SOCIETY

Attorneys Liability Protection Society (ALPS) insures more lawyers in Virginia than any other carrier based on statistics available to ALPS.<sup>229</sup>

#### I. COVERAGE PROVISIONS OF ALPS POLICY

The ALPS policy<sup>230</sup> provides coverage as follows:

[T]he Company agrees to pay on behalf of the Insured all *sums* (in excess of the Deductible amount) that the Insured becomes legally obligated to pay as *Damages*, arising from or in connection with a Claim first made against the Insured and first reported to the Company during the Policy Period, provided that . . . the Claim arises from an act, error, omission or Personal Injury . . . and that Claim arises from or is in connection with: (a) an act, error or omission in *Professional Services* that were or should have been rendered by the Insured, or (b) a Personal Injury arising out of the *Professional Services* of the Insured.<sup>231</sup>

Thus, this coverage provision ties coverage to “Professional Services.” The policy then defines “Professional Services” as “services or activities performed solely for others as an Attorney in an attorney-client relationship on behalf of one or more clients applying the Attorney's specialized education, \*36 knowledge, skill, labor, experience and/or training.”<sup>232</sup> The definition includes “*services as mediator, arbitrator, or other facilitator in a dispute resolution process.*”<sup>233</sup> Of the profession-of-origin policies I examined in this series, only the policies available to lawyer-mediators define this important term as including mediation services.

The policy also defines a “Claim” to include “a demand for money or services, including but not limited to the service of suit or institution of arbitration proceedings against the Insured.”<sup>234</sup> Thus, it specifically contemplates arbitral claims, but does not define the term.<sup>235</sup> This expanded definition of recognized venues may allow increased coverage for some claims against mediators in grievance or UPL disciplinary proceedings, as discussed below.<sup>236</sup>

The definition for “Personal Injury” results in coverage for a number of acts of intentional or negligent tort. It limits the term, however, to

[f]alse arrest, detention or imprisonment; wrongful entry or eviction or other invasion of private occupancy; malicious prosecution; publication or utterance of libel, slander or other defamatory or disparaging material; invasion of privacy; or publication or utterance in violation of an individual's right of privacy.<sup>237</sup>

Thus, unlike the mental health professional policies I have analyzed,<sup>238</sup> this policy covers a number of claims arising from intentional acts that might be brought against a mediator.<sup>239</sup> In a later provision, it excludes some intentional acts,<sup>240</sup> but then covers them under an exception called the “innocent-insured” provision.<sup>241</sup>

The types of claims alleging malpractice by a mediator go beyond the listed types of personal injury set out in the policy definition.<sup>242</sup> The policy arguably does not cover invasion of privacy, defamation, libel, or slander based on disclosures of confidential information of a highly offensive \*37 or objectionable nature; or the intentional or negligent infliction of emotional distress. It would also not likely cover injuries arising from the failure to provide security and safety to the parties; or the failure to comply with the ADA and other special accommodations required by parties. It would likely not cover a situation in which the mediator maintains confidentiality inappropriately that results, for example, in child abuse and neglect or the successful completion of a physical threat against a third-party.

The definition of “Damages” would limit coverage in nearly all the contexts of concern to lawyer-mediators, except certain tort claims falling within the definition of “Personal Injury” or arising from an act, error or omission in “Professional Services.”<sup>243</sup> The policy provides this definition:

Damages means any monetary award by way of judgment or final arbitration, or any settlement; provided, however, that Damages does not mean nor include . . . punitive, multiple, or exemplary damages, fines, sanctions, penalties or citations, regardless against whom the same is levied or imposed and regardless of whether the same were levied or imposed in a separate matter or proceeding; . . . awards deemed uninsurable by law; . . . injunctive, declaratory, or other equitable relief, or costs or fees incident thereto; . . . restitution, reduction, disgorgement or set-off of any fees, costs, consideration or expenses paid to or charged by an Insured, or any other funds or property of any person or entity presently or formerly held or in any manner directly or indirectly controlled by an Insured; or . . . any injury or damage to, destruction of, loss of, or loss of use of any funds or property.<sup>244</sup>

While judgments and verdicts issued by judges or juries in successful tort litigation typically give rise to “Damages,” ethics grievances filed against mediators do not typically result in a “monetary award” as a result of a “judgment” or by “final arbitration,” as defined in the policy.<sup>245</sup> A “monetary award” might arguably arise, however, from settlement of the grievance with the regulatory authority. ALPS might also consider an ethics grievance a covered claim if it deems the Virginia’s Complaint Hearing Committee<sup>246</sup> as an “arbitration panel” for purposes of the applicable \*38 venues.<sup>247</sup> Any sanction that would require the restitution of mediator fees would fall outside the scope of coverage.<sup>248</sup> An insured would also need to research how Virginia’s courts have interpreted the term “Damages” and determine those types of “awards deemed uninsurable by law.”<sup>249</sup> In short, the definition of “Damages” places a significant hurdle to the coverage of a claim filed by a mediator.

In addition, based on the definitions alone, the policy probably does not cover the cost of resisting a subpoena or a court order seeking the disclosure of confidential mediation communications.<sup>250</sup>

In short, the scope of coverage under this policy creates significant coverage gaps that could leave a lawyer-mediator financially exposed. Accordingly, lawyer-mediators may need a separate policy to close this gap. Or, they may need to work with the insurer to improve policy language and coverage.

At the same time, the coverage language of the new version of the policy is an improvement over the 2003 version I first examined.<sup>251</sup> In the 2003 version, the definition of “Professional Services” presupposed an *attorney-client* relationship, which is inconsistent with the typical definition of the mediator's role.<sup>252</sup> In fact, the Virginia Standards of Ethics (SOE) require the mediator to expressly disclaim that he or she will provide parties with legal representation or offer legal advice.<sup>253</sup> Some of the policies analyzed in this series, also impose a condition that the mediator disclose to the parties that he or she will not assume an advocacy role on behalf of either party,<sup>254</sup> and that he or she will remain neutral, in fact.<sup>255</sup> The ALPS policy does not impose this requirement.

## II. EXCLUSIONS OF THE ALPS POLICY

### A. *Intentional, Wrongful, or Harmful Acts*

Several exclusions of the ALPS policy could preclude coverage for mediator conduct that may give rise to a malpractice suit, an ethics grievance, or a UPL disciplinary proceeding. Like the Bar Plan policy analyzed \*39 in this article, the ALPS policy excludes from coverage intentional or criminal acts leading to a claim.<sup>256</sup> Like the policies analyzed in other articles in this series,<sup>257</sup> the ALPS policy excludes any claim based on or arising out of “any dishonest, fraudulent, criminal, malicious, or intentionally wrongful or harmful act, error or omission committed by, at the direction of, or with the consent of the Insured.”<sup>258</sup> Accordingly, it would not likely cover malpractice claims against mediators alleging intentional infliction of emotional distress, intentional breach of impartiality or neutrality, conspiracy, or arising when the mediator is accused of being an accomplice to a crime or fraud.<sup>259</sup> It would not likely cover a mediator's misrepresentations about the scope of confidentiality, or his or her intentional breaches of confidentiality.<sup>260</sup> It would also not likely cover mediator coercion, duress, fraud, or misrepresentation of material fact made at the behest of the parties or independently by the mediator.<sup>261</sup>

Yet, if someone on the mediator's staff committed these acts, the policy might cover the lawyer-mediator under the “innocent-insured” provision of the policy. That part of the policy provides coverage to:

any individual Insured who did not personally commit, or personally participate in committing, any such act, error or omission . . . and who did not remain passive after learning of the act, error or omission . . . provided that each such individual Insured shall have immediately notified the Company . . . once said Insured obtained knowledge of the act, error, or omission.<sup>262</sup>

### B. *Personal Injury or Bodily Injury*

While the policy covers personal injuries arising out of professional services offered by the insured, the definition of “Personal Injury” excludes “Bodily Injury.”<sup>263</sup> “Bodily Injury” is then defined as:

any injury to the body, any sickness or disease, or any death. Bodily Injury also includes any mental, psychological, or emotional injury, anguish, tension, distress, pain, suffering, or shock, or death resulting therefrom, regardless of whether \*40 or not such condition results from any physical injury, sickness or disease, or from the death of any person.<sup>264</sup>

Thus, the ALPS policy would likely exclude claims arising when a party or non-party suffered bodily injury because the mediator maintained confidentiality inappropriately by, for example, failing to report child abuse and neglect or failing to warn persons that a party has made a physical threat against him or her.

The “Bodily Injury” exclusion could also prevent coverage of malpractice claims that allege the mediator was negligent in protecting the safety of parties or their health. For instance, a brother committed suicide after he shot his sister five times in the head when he became frustrated by the pace and outcome of an estate-related mediation, which prompted the son of the sister to file suit for wrongful death against the law firm hosting the mediation.<sup>265</sup> In 2013, an estranged wife, with a history of domestic violence, shot her husband at least four times after leaving a divorce mediation session right at the front entrance to the mediator's office.<sup>266</sup> Could the husband successfully sue the mediator? Barbara Madonik describes the peril she endured trying to navigate steps, while on crutches, to the second story office of a mediator when the office did not have elevator access.<sup>267</sup> If she had fallen, hurt herself further, and filed a claim against the mediator, would the “Bodily Injury” exclusion preclude coverage or defense of the claim? Perhaps.

I hedge that conclusion because unlike any other policy I have analyzed, the ALPS policy contains a Public Relations Expense provision. Under it, the insurer agrees to pay up to \$25,000 for a “Public Relations Event,”<sup>268</sup> which is defined to include “an act or incident of violence on the Names Insured's business offices.”<sup>269</sup>

In addition, parties to mediations often have health problems requiring the mediator to consider frequent breaks, certain foods at certain times, or other care or accommodation.<sup>270</sup> One video posted on the Hamline \*41 University Law School Mediator Case Law Project, based on a true situation, featured a party who died of an aneurism shortly after the end of the mediation.<sup>271</sup> Had he died during the mediation, after asking for its termination or a break, his survivors might have brought a claim against the mediator. The “Bodily Injury” exclusion would seem to preclude coverage of claims arising out of the mediator's negligence in handling these matters.

Finally, while the exclusion covering intentional acts would likely exclude a claim alleging intentional infliction of emotion distress, the “Bodily Injury” exclusion may even exclude coverage for claims alleging negligent infliction of emotional distress.<sup>272</sup>

### ***C. Fines, Sanctions, and Penalties***

As noted above, the definition of “Damages” limits coverage of certain claims. In addition, the ALPS policy also specifically excludes “punitive, multiple, or exemplary damages, fines, sanctions, penalties or citations.”<sup>273</sup> This exclusion would seem to preclude coverage for *any* fines, sanctions, penalties, or citations a disciplinary body imposed on a mediator, including sanctions imposed in an ethics grievance or any UPL \*42 disciplinary proceeding.<sup>274</sup> As discussed below, the Bar Plan policy also excludes claims leading to fines, penalties and sanctions, although the language used in the Bar Plan policy may limit the exclusion's effect in the context of an ethics grievance or an UPL disciplinary proceedings.<sup>275</sup>

### ***D. Claims Based on Contract***

The 2003 version of the ALPS policy excluded coverage for contract-related claims, specifically “any claim based on or arising out of an obligation assumed by contract other than an obligation to perform professional services.”<sup>276</sup> The current policy no longer contains this exclusion. Thus, unlike the Bar Plan policy,<sup>277</sup> the ALPS policy would arguably cover claims arising under the agreement to mediate -- which is a contract to perform professional services -- as long as they were otherwise covered claims. For example, it would arguably cover negligent disclosure of confidential information that contravenes the promises made in the agreement to mediate.

### *E. Restitution or Reimbursement of Fees and Costs*

The ALPS policy, through its definition of “Damages,” excludes claims for “restitution, reduction, disgorgement or set-off of any fees, costs, consideration or expenses paid to or charged by an Insured.”<sup>278</sup> A later provision, excludes “[a]ny dispute over fees or costs.”<sup>279</sup> These exclusions would preclude coverage for any ethics grievance resulting in the restitution of fees charged in mediation.<sup>280</sup>

### *F. Discrimination by the Mediator*

Another provision would exclude coverage for discrimination based on race, sex, nationality, or sexual orientation, among other attributes.<sup>281</sup> This exclusion could preclude coverage for an ethics grievance based on a party's complaint that the mediator showed bias against that party, or in favor of the other party, based on a party's race, gender, nationality, or sexual orientation.<sup>282</sup>

### *\*43 G. Claims Based on Improper Licensing*

Very significantly, the ALPS policy does not expressly exclude coverage or defense of claims arising out of acts for which the insured is not properly licensed.<sup>283</sup> However, it defines the insured “Attorney” as “an individual attorney who is properly licensed to practice law.”<sup>284</sup> The definition of “Insured” then refers to “Attorney.”<sup>285</sup> Thus, the policy may not cover UPL disciplinary proceedings, for instance, if the lawyer-mediator engaged in the alleged practice of law during a mediation in a state in which he or she was not licensed.<sup>286</sup>

### *H. Proceedings Before Regulatory Agencies*

Unlike most of the policies I examined in this series, the ALPS policy does not expressly exclude coverage for “[any] grievance complaint filed with a bar regulatory agency[.]”<sup>287</sup> “any disciplinary matter”<sup>288</sup> or “disciplinary proceedings.”<sup>289</sup> The ALPS policy, however, provides some defense in these proceedings. It provides \$25,000 for attorneys' fees and expenses incurred in a proceeding “before a state licensing board, peer review committee, or governmental regulatory body . . . concern[ing] an alleged act, error or omission or Personal Injury arising from Professional Services of the Insured that would otherwise fall within the coverage of this Policy.”<sup>290</sup> Accordingly, this policy may provide broader coverage for these types of claims than policies available to lawyer-mediators practicing in states other than Virginia.

## **III. “OTHER INSURANCE” CLAUSE OF THE ALPS POLICY**

The “other insurance” clause of the ALPS policy makes its coverage “excess over any other valid and collectible insurance, whether such insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is specifically written only as excess insurance \*44 over this Policy.”<sup>291</sup> An “excess other insurance” clause provides coverage only if the loss exceeds the limits of liability of any other applicable insurance policy.<sup>292</sup> This language can set up a coverage dispute. A lawyer-mediator who has also obtained a separate policy for mediator malpractice from, for instance, Underwriters, should expect ALPS to argue that Underwriters should respond first to any claim.<sup>293</sup> Underwriters, on the other hand, will invoke its “escape” other insurance clause,<sup>294</sup> thereby creating a conflict between the policies. Courts resolve these disputes using three different approaches, as discussed previously.<sup>295</sup>

#### IV. DUTY TO DEFEND UNDER THE ALPS POLICY

ALPS has a duty to defend any covered claim “even if any or all allegations of the Claim are groundless, false or fraudulent.”<sup>296</sup> However, the insurer has no duty to defend if the claim does not fall within the definition of covered claims or if the policy specifically excludes the claim.<sup>297</sup> It would not defend, like the Bar Plan<sup>298</sup> policy, a malpractice claim alleging an excluded claim.

The policy allows the insurer to “make such investigations as it deems appropriate.”<sup>299</sup> Moreover, the insurer may “undertake such settlement negotiations and make such settlements as it deems appropriate and expedient.”<sup>300</sup> The policy does not require the insurer to defend any claim “after the applicable Limit of Liability has been exhausted by payments of Damages and/or Claim Expenses . . . . In [that] case, the Company shall have the right to withdraw from further defense of the Claim by tendering control of the defense to the Insured.”<sup>301</sup> Under this provision, the insurer could pay the policy limits of liability to the insured or into a court's fund, and then require the mediator to provide his or her own defense against a \*45 malpractice suit, subpoena, ethics grievance, or UPL disciplinary proceeding.

The policy defines “Claim Expenses” as “fees charged by any attorney(s) *designated by the Company* to defend a Claim or otherwise represent the Insured; and all fees, costs, and expenses resulting from the investigation, adjustment, defense, and appeal of a Claim (including a suit or proceeding).”<sup>302</sup> The policy provides that the insurer will pay claim expenses as part of its duty to defend, until the paid damages and claim expenses have exhausted the limits of liability.<sup>303</sup>

Unlike several policies analyzed in other articles in this series,<sup>304</sup> the ALPS policy might provide a defense in an ethics grievance or UPL proceeding. The policy does not expressly exclude these types of claims<sup>305</sup> unless they are excluded as not giving rise to a “monetary award”<sup>306</sup> or as a claim for “fines, sanctions, penalties, or citations.”<sup>307</sup>

ALPS, however, will not likely cover the cost of resisting a subpoena or court order seeking the disclosure of confidential mediation communications. They are not “claims” for which the mediator “shall be legally obligated to pay [sums] as damages.”<sup>308</sup> While “claim” is defined as a “demand for money or services,” “damages” mean a “monetary award by way of judgment or final arbitration, or any settlement,”<sup>309</sup> none of which clearly apply in the situation of a subpoena or court order. An insured seeking to recover the costs of resisting these attempts at disclosure has a very difficult coverage argument to make.

##### A. *Choice of Defense Counsel under the ALPS Policy*

Dr. Fremed assumed that under her insurance policy she would have the opportunity to choose the lawyer providing her defense.<sup>310</sup> The ALPS policy provides: “The Company shall have the right to appoint counsel to provide the defense, after consultation with the Insured, when practicable.”<sup>311</sup> While, the insured may have some input to the decision about whom to retain as defense counsel, most insurers have relationships with a few firms in any state and use these attorneys regularly. The insurer would likely persuade the insured to use counsel the insurer recommends. In \*46 addition, the definition of “Claim Expense” does not seem to contemplate, unlike the definition in the Bar Plan policy,<sup>312</sup> that the insured plays a role in choosing defense counsel.<sup>313</sup>

#### V. ENDORSEMENTS COVERING MEDIATOR GRIEVANCE OR UPL DISCIPLINARY PROCEEDINGS

The agent's website does not show any available endorsements.<sup>314</sup> Endorsements allow the insurer or policyholder to expand or modify the coverage, benefits, or terms offered by the standard policy.<sup>315</sup> They act as “mini-policies” to enhance the policy and to provide coverage that is typically more comprehensive.<sup>316</sup> Each endorsement can lead to conflicts between the terms of the standard policy and the endorsement, when not drafted carefully.<sup>317</sup>

## \*47 APPENDIX B

### THE BAR PLAN'S LAWYERS' MALPRACTICE INSURANCE POLICY

The leading insurer of lawyers in Missouri is The Bar Plan Mutual Insurance Company (Bar Plan). Overall, the Bar Plan's policy<sup>318</sup> provides clearer policy language than the language found in the ALPS policy, but no greater liability coverage for many possible malpractice claims or for the costs of defending discovery or witness subpoenas and court orders seeking the disclosure of confidential mediation communications. It may provide coverage and defense for some ethics grievances or UPL disciplinary proceedings depending on the source of the operative law and so long as an agency, other than a *bar* regulatory agency, handles it.

#### I. COVERAGE PROVISIONS OF THE BAR PLAN'S POLICY

Using language similar to the language of the ALPS policy, the Bar Plan policy covers “all sums . . . which an Insured shall become legally obligated to pay as *Damages* as a result of *Claims* (including Claims for *Personal Injury*) . . . by reasons of any act or omission by an Insured acting in a *professional capacity* providing *Legal Services*.”<sup>319</sup>

The policy does not define “professional capacity,” but it defines “Legal Services” as “[s]ervices performed by an Insured in an Insured's professional capacity as . . . [a] mediator or arbitrator.”<sup>320</sup> Like the ALPS policy,<sup>321</sup> it does not presuppose an attorney-client relationship.<sup>322</sup> Thus, unlike the policies available for mental health professionals,<sup>323</sup> the professional liability policies offered to lawyers seem to contemplate and cover services lawyers provide as mediators.

Like the ALPS policy,<sup>324</sup> the Bar Plan policy defines a “Claim” as “[r]eceipt by an Insured of a demand for money or services (including the service of suit or the institution of arbitration proceedings) against the Insured from one other than that Insured.”<sup>325</sup> Like the ALPS policy,<sup>326</sup> the Bar Plan policy defines “Damages” as “[a] monetary judgment, final arbitration \*48 award or settlement” subject to certain exclusions discussed in the next sub-section of this article.<sup>327</sup>

The Bar Plan policy defines “Personal Injury” as including: “False arrest, humiliation, detention or imprisonment, wrongful entry or eviction or other invasion of private occupancy, publication of libel, utterance of slander or other defamatory or disparaging material or a publication or utterance in violation of an individual's right of privacy.”<sup>328</sup> This definition tracks the definition of the same term found in the ALPS policy.<sup>329</sup>

By way of the definition of “Damages,” both the ALPS and Bar Plan policies limit coverage to acts giving rise to monetary judgments, awards, or settlements.<sup>330</sup> This limitation would likely preclude coverage of sanctions imposed in ethics grievances or UPL disciplinary proceedings, unless the parties settled the claim for a sum of money.<sup>331</sup> In addition, the definition of “Claim,” which is tied to a demand for money or services, could further limit coverage of these types of proceedings.<sup>332</sup> Moreover, as noted below, two or three exclusions in the policy could otherwise preclude coverage of these types of proceedings.<sup>333</sup>

Taken together, the coverage language and definitions of “Claim,” “Damages,” “Legal Services,” and “Personal Injury” provide generally the same coverage as does the ALPS policy. Like the ALPS policy,<sup>334</sup> the Bar Plan policy expressly provides coverage when a lawyer assumes the role of mediator.<sup>335</sup>

## II. EXCLUSIONS OF THE BAR PLAN'S POLICY

### A. *Fines, Sanctions, and Penalties*

Many ethics grievances and UPL disciplinary proceedings end with the imposition of a fine or sanction.<sup>336</sup> The Bar Plan policy seems certain to exclude any coverage or defense of those claims. The exclusions to coverage first appear in the definition of “damages.” The term excludes:

1. *Fines, penalties, sanctions*, costs, expenses or fees imposed *under state or federal laws, regulations, statutes, rules of procedure*, punitive or exemplary Damages and Damages which are a multiple of compensatory Damages[;]

\*49 2. Restitution, reduction or set off of any monies or other consideration paid to an Insured as fees or expenses, which are to be reimbursed or discharged as part of the judgment, settlement or final arbitration award;

...

4. Matters deemed uninsurable by law.<sup>337</sup>

Thus, like the ALPS policy,<sup>338</sup> the Bar Plan policy seeks to avoid liability for any fines, penalties or sanctions. A third provision excludes “[f]ines, penalties, restitution, sanctions, costs, expenses or fees imposed *under state or federal statutes or rules of procedure*.”<sup>339</sup>

For the policy to exclude, under two exclusions, an ethics grievance or UPL disciplinary proceeding, the regulatory body would need to apply in the proceeding “state or federal laws, regulations, statutes or rules of procedure.”<sup>340</sup> As noted above,<sup>341</sup> in the ethics grievance context, sanctions or fines are not typically imposed under state or federal statutes or rules of procedure, except perhaps when a mediator has violated a state statute governing confidentiality.<sup>342</sup> Instead, the regulatory body operates under standards of ethics that may take the form of court procedural rules or professional rules of conduct endorsed or adopted by the court.<sup>343</sup> While these differences seem subtle, the insured would have to argue that the insurer (or interpreting court) should construe the policy language against the insurer-drafter<sup>344</sup> to provide coverage for ethics grievances because “state or federal statutes or rules of procedure” do not govern them. Accordingly, the policy should not exclude them from liability coverage. But, this outcome would be very context specific.

A similar analysis would apply to the exclusion of fines, penalties, or sanctions imposed in a UPL disciplinary proceeding. As noted above, the operative law can arise by state statute or state rules of procedure.<sup>345</sup> These claims may also arise under case law, court rules that regulate attorneys, and other sources of law falling outside the language found in the definition of “damages” or the policy exclusion.<sup>346</sup> Accordingly, the insured could argue, in some state-specific circumstances, that this type of exclusion would not apply to UPL disciplinary proceedings.

### \*50 B. *Restitution or Reimbursement of Fees and Costs*



Like the ALPS policy,<sup>347</sup> the provisions excluding coverage of fees would likely preclude coverage of a sanction imposed by the regulatory body in an ethics grievance that requires the mediator to return fees paid to him or her by the parties.<sup>348</sup> One provision -- found in the definition of “damages” -- excludes “fees imposed under state or federal laws, regulations, statutes or rules of procedure.”<sup>349</sup> That same definition also excludes: “Restitution, reduction, or set off of any monies or other consideration paid to an Insured as fees or expenses, which are to be reimbursed or discharged as part of the judgment, settlement or final arbitration award.”<sup>350</sup> A third provision excludes “fees imposed under state or federal statutes or rules of procedure.”<sup>351</sup>

Thus, the application of the exclusion may depend on context. Ethics grievances are not typically resolved by “judgment,” as used in section I.F.2. of the policy.<sup>352</sup> However, the Bar Plan policy exclusion might operate when the fee-based grievance results in a negotiated settlement in which the mediator agrees to return fees.<sup>353</sup> An insured might also argue that a grievance proceeding is not an arbitration forum so any reimbursement or discharge is not pursuant to an “arbitration award.” In addition, an insured might also argue that the actions of the regulatory body are not, in that particular case, pursuant to state or federal laws, regulations, statutes, or rules of procedure. However, a court could conclude that the use of the term “laws” can include more informal sources of law, including procedural or professional rules of conduct endorsed or adopted by a court.<sup>354</sup> Finally, the insured would need to consult relevant case law to learn how courts have interpreted the term “Damages” in the state, and what matters the courts have deemed uninsurable.

#### **\*51 C. Deliberate Acts, Personal Injury, or Bodily Injury**

Section III of the policy creates additional exclusions.<sup>355</sup> Two of these exclusions relate specifically to the recovery of defense costs,<sup>356</sup> while the remaining ones relate to liability coverage.<sup>357</sup> Like the other policies analyzed in this series of articles,<sup>358</sup> additional coverage problems arise in this policy for mediators as a result of the language of the exclusions. All the policies preclude coverage of dishonest, deliberately wrongful, or criminal acts.<sup>359</sup> The exclusion found in section III.A. of the Bar Plan policy could preclude coverage of malpractice claims alleging:

- deliberate wrongful violation of an ethical rule or guideline;
- false advertising;
- breach of contract;
- breach of fiduciary duty;
- intentional infliction of emotional distress;

#### **\*52 • breach of impartiality or neutrality;**

- conspiracy;
- lack of informed consent to the mediation process;
- mediator coercion or duress;
- unfair or lop-sided agreements;
- the failure to include a typical term in a settlement agreement;
- fraud or misrepresentation of material fact made at the behest of the parties or independently by the mediator;
- being an accomplice to a crime or fraud;
- the overcharge or improper charge of fees;
- misrepresentations about the scope of confidentiality;
- breach of the contractual promise to maintain confidentiality; or

- maintaining confidentiality inappropriately by, for example, failing to report child abuse and neglect or failing to warn persons that a party has made a physical threat against him or her.<sup>360</sup>

The Bar Plan might characterize these types of allegations as involving “dishonest, deliberately fraudulent, criminal, malicious or deliberately wrongful acts or omissions.”<sup>361</sup> Like the ALPS policy,<sup>362</sup> the Bar Plan policy provides coverage even for these deliberate acts under an Innocent-Insurer clause. That clause provides: “This exclusion is waived with respect to each Insured who did not know of, or participate or acquiesce in, the act or omission, but then only to the extent that the act or omission underlying the Claim . . . does not relate to or arise out of the defalcation by any Insured . . . of money or property maintained by . . . any Insured in trust, escrow, or other safekeeping.”<sup>363</sup>

The Bar Plan policy does not clearly indicate how the provision covering “Personal Injury” -- defined as including “humiliation . . . publication of libel, utterance of slander or other defamatory or disparaging material or a publication or utterance in violation of an individual's right of privacy” -- coordinates with the exclusion of “deliberately wrongful” acts.<sup>364</sup> The insurer might argue that the Personal Injury provision precludes coverage for claims involving intentional invasion of privacy, defamation, libel, or slander based on disclosures of confidential mediation information. The insured should argue that a court should construe any conflict in the provisions in favor of the insured and against the insurer-drafter to allow coverage of these types of claims.<sup>365</sup>

\*53 The exclusion at Section III. F. of the Bar Plan policy,<sup>366</sup> governing “Bodily Injury,” could preclude coverage of malpractice claims alleging that the mediator caused another person physical injury by:

- maintaining confidentiality inappropriately by, for example,
- failing to report child abuse and neglect;
- failing to warn persons that a party has made a physical threat against him or her;
- failing to provide security and safety to the parties;<sup>367</sup> or,
- failing to take precautions to protect his or her safety or health in the mediation process.<sup>368</sup>

But just as soon as the exclusion at Section III. F. takes away coverage it then provides coverage for “emotional distress or humiliation arising from rendering or failing to render Legal Services in a professional capacity.”<sup>369</sup> Thus, unlike the ALPS policy,<sup>370</sup> the policy would likely cover malpractice claims alleging negligent infliction of emotional distress and should trigger the insurer's duty to defend. Then again, paragraph III.A of the Exclusions would likely preclude coverage and defense of claims that allege the intentional infliction of emotion distress, because it excludes “deliberately wrongful acts or omissions.”<sup>371</sup> Again, the insured should argue that a court should construe any conflict in the provisions in favor of the insured and against the insurer-drafter.<sup>372</sup>

#### ***D. Claims Based On Contract***

Unlike the ALPS policy,<sup>373</sup> the exclusion at Section III.G. of the Bar Plan policy would arguably preclude coverage of a malpractice claim based on breach of contract, including breach of the provisions of an agreement to mediate guaranteeing parties confidentiality in the process. The policy excludes coverage when “[t]he Insured's alleged liability [arises] under any oral or written contract or agreement, unless such liability would have attached to the Insured in the absence of such agreement.”<sup>374</sup> In theory, a mediator's agreement to mediate could give rise to a cause of action based on breach of contract for failing to provide promised services or providing those services contrary to the promises made in the agreement.<sup>375</sup> Under \*54 Section III.G of the Exclusions, claims arising under this contract theory would not be

covered unless the mediator had an independent, non-contractual obligation that could give rise to the same liability.<sup>376</sup> That obligation would most likely arise under a mandatory code of ethics. But, only 17 states (not including Missouri) impose a code of ethics on some or most of their mediators.<sup>377</sup> As a practical matter then, if the contract claim arose solely out of the agreement to mediate, this exclusion would preclude coverage and the insurer's duty to defend the claim.

### *E. Proceedings before Regulatory Agencies*

Section III.I. of the Exclusions shows how insurance policies have still not considered all possible sources of claims against mediators.<sup>378</sup> While UPL disciplinary proceeding against a mediator may occur through a “bar regulatory agency”,<sup>379</sup> many jurisdictions process complaints through supreme court-created commissions, state attorneys general, or county or district attorneys.<sup>380</sup> So, the Bar Plan's policy may not exclude coverage or defense of ethics grievances or UPL disciplinary proceedings against mediators if brought in these other fora. It only excludes grievances and complaints “filed with a bar regulatory agency.”<sup>381</sup>

As noted above, section III. J of the Exclusions<sup>382</sup> and Paragraph F.1 of the Definitions<sup>383</sup> both raise a question about coverage for disciplinary sanctions or fines. The insured would have to argue that the insurer (or interpreting court) should construe the policy language against the insurer-drafter to provide coverage for ethics grievances or UPL disciplinary proceedings because they are not governed by “state or federal statutes or rules of procedure,” when that argument fits the facts of the situation.<sup>384</sup> However, claims of UPL would likely fall within paragraph III.J of the Exclusions because they typically arise under state statutes, as in the case of Dr. Fremed.<sup>385</sup> Accordingly, the insurer would not cover them and would not have to provide a duty to defend.

Finally, the Bar Plan policy does not expressly exclude coverage or defense of claims arising out of acts for which the insured is not properly licensed.<sup>386</sup> Thus, unlike the ALPS policy,<sup>387</sup> it may cover UPL disciplinary \*55 proceedings when the lawyer-mediator engaged in the alleged practice of law during a mediation in a state in which he or she was not licensed.

### **III. “OTHER INSURANCE” CLAUSE OF THE BAR PLAN'S POLICY**

The Bar Plan's policy has a substantially different “other insurance” clause. While the ALPS policy provides coverage that is “excess” of any other applicable insurance, the Bar Plan's policy pro rates coverage with other policies. No other policy I have analyzed in this series contains a “pro rata” “other insurance” clause. The Bar Plan policy provides:

If any Insured has insurance provided by other companies covering a Claim covered by this Policy, the Company shall not be liable under this Policy for a greater proportion of such Damages and Defense Expenses than the applicable Limits of Liability . . . bears to the total applicable Limits of Liability of all valid and collectible insurance covering such Claim.<sup>388</sup>

Thus, if the Bar Plan's policy provides any coverage for malpractice claims, ethics grievances, or UPL disciplinary proceedings, this clause does not attempt to shift all the liability to any other applicable insurance. For example, if the Bar Plan policy and the Underwriters policy both insured the mediator, the Bar Plan policy would pro rate the coverage of the two policies.<sup>389</sup> In contrast, the ALPS policy would attempt to shift all coverage to the Underwriters policy.<sup>390</sup> And, the Underwriters policy would attempt to escape all liability.<sup>391</sup> A court would resolve these conflicts using three approaches.<sup>392</sup>

#### IV. DUTY TO DEFEND UNDER THE BAR PLAN'S POLICY

The insurer's duty to defend is triggered by “any Claim seeking Damages to which this insurance applies.”<sup>393</sup> As noted above, the term “Damages” limits the scope of covered claims.<sup>394</sup> On the other hand, the exclusion found at section III.A. extends the duty to defend to “dishonest, deliberately fraudulent, criminal, malicious or deliberately wrongful acts or omissions[.]” even when the insurer will not pay any damages arising \*56 from the successful litigation of those claims.<sup>395</sup> The exclusion at section III.I expressly excludes coverage for any “expense incurred . . . in defense of a grievance or complaint filed with a *bar* regulatory agency.”<sup>396</sup> Thus, covered claims and certain claims for which the insurer will not pay damages nonetheless trigger the duty to defend, while expenses incurred to defend a bar regulatory proceeding are not recoverable. In this latter case, the insurance policy remains ambiguous about whether regulatory proceedings in other fora trigger the duty to defend and the payment of defense expenses.

When the policy triggers the duty to defend, the insurer “may investigate any Claim at its discretion . . . [and] pay for all Defense Expenses incurred after its duty to defend begins, until its duty to defend ends.”<sup>397</sup> Its duty to defend ends when payments covering new or existing claims exhausts the limits of liability of the policy, or when a court determines that the policy does not cover the claim.<sup>398</sup> At that point, as in the ALPS policy, the insurer may transfer the defense to the insured.<sup>399</sup>

Like the ALPS policy,<sup>400</sup> the Bar Plan defines “Defense Expenses” as including “fees charged by a lawyer designated by the Company to defend the Claim . . . [a]ll other fees, costs and expenses resulting from the investigation, adjustment, defense and appeal of a Claim or potential Claim . . . [and] [f]ees charged by a lawyer *designated by an Insured* to defend a Claim with the written consent of the Company.”<sup>401</sup> Thus, the Bar Plan policy covers the cost of an appeal.<sup>402</sup>

Like the ALPS policy,<sup>403</sup> the Bar Plan policy will not likely cover the cost of resisting a subpoena or court order seeking the disclosure of confidential mediation communications, but the policy does not expressly exclude this claim. These actions do not constitute “claims” for which the mediator “shall be legally obligated to pay [sums] as damages.”<sup>404</sup> While “Claim” is defined as a “demand for . . . services[.]” the term “Damages” means a “monetary judgment, final arbitration award or settlement,” and none of these terms clearly apply in the situation of a subpoena or court order.<sup>405</sup> Moreover, the definition of “Damages” expressly excludes “costs, \*57 expenses, or fees imposed under state or federal laws, regulations, statutes or rules of procedure.”<sup>406</sup> The insurer could convincingly argue that a subpoena or court order for document production falls within that exclusion.

##### A. *Choice of Defense Counsel Under the Bar Plan's Policy*

The definition of “Defense Expenses” indicates that the insured may designate his or her defense lawyer with the consent of the insurer.<sup>407</sup> However, the provision governing the assistance and cooperation of the insured states that if the insured incurs any obligation or expense without the insurer's consent, the insured will have to pay those obligations and expenses out of his or her own pocket.<sup>408</sup> In addition, if the insured “incur[s] any expense without the consent of the Company it . . . waives coverage for that Claim and any related act or omission.”<sup>409</sup> Accordingly, the policy gives the insurer the control over the selection of the defense lawyer by requiring its consent to any choice in the defense process. In this way, it resembles the provisions found in the ALPS policy.<sup>410</sup>

#### V. ENDORSEMENTS COVERING MEDIATOR GRIEVANCE OR UPL DISCIPLINARY PROCEEDINGS

The Bar Plan does not offer to lawyer-mediators any policy endorsements that would provide coverage and defense of ethics grievances or UPL disciplinary proceedings.<sup>411</sup>

#### Footnotes

d1 Paula Marie Young is a Clinical Professor at Qatar University College of Law. She was the winner of the first Distinguished Mediator Award presented by the Virginia Mediation Network (VMN). Young teaches legal writing, research, and advocacy, negotiation, mediation, arbitration, and dispute resolution system design. Young has thirty years of experience as a commercial dispute litigator, mediator, and arbitrator specializing in insurance, reinsurance, energy, environmental, and other civil disputes. As a private attorney, Young collected over \$57 million from reinsurers, including Underwriters at Lloyd's of London. Young earned degrees from Washington University (B.A. 1978, J.D. 1982) and University of Missouri School of Law (LL.M. 2002 in Dispute Resolution). Young served, at the request of the Executive Secretary of the Virginia Supreme Court, on the Mediator Review Committee, the highest venue for hearing formal complaints filed against certified mediators. Young also helped revise Virginia's mediator qualification rules, mediator ethics code, and mediator grievance procedures as a member of the Virginia Supreme Court-appointed Ethics Committee. Young served two terms on the ABA ADR Section's Standing Committee on Mediator Ethical Guidance and as Co-Chair of the ABA ADR Section Ethics Advisory Opinions Database Subcommittee. These appointments made her a member of the top mediator ethics boards nationally and in Virginia. Young joined VMN's Board of Directors in 2010 and became its President in 2012.

Professor Young thanks Dean Mohammed Abdalaziz Al-Khulaifi and Associate Dean Francis Botchway for supporting her scholarship. She thanks her research assistant, Laura Bowen, for her dedicated and detailed review of the most recent versions of the analyzed policies and for her help in finalizing this article after Young moved to Qatar.

1 E-mail from Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation, to author, *UPL* (Apr. 9, 2012, 6:41 PM) (on file with author).

2 An earlier article -- Paula Marie Young, *A Connecticut Mediator in a Kangaroo Court? Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies*, 49 *S. TEX. L. REV.* 1047 (2008) [hereinafter Young, *Kangaroo Court?*] -- analyzes in detail the disciplinary proceeding brought against Dr. Resa Fremed and the statutes and precedent on which the Connecticut Statewide Grievance Committee relied in finding that she had engaged in UPL. The analysis is highly critical of the decision. As part of that analysis, it discusses the "law practice paradigm" as expressed in the UPL context and then looks at the application of UPL doctrine in the context of mediation, including the state ethics advisory and grievance opinions relating to mediation.

It next describes the "authorized practice of mediation" paradigm. This section of the article considers definitions of mediation, the role of the mediator, the constraints imposed by mediator ethics codes on mediator behavior, and the lack of evidence of any harm to the public from services provided by mediators. The article then suggests that the UPL guidelines for mediators developed in Colorado, Georgia, North Carolina, and Virginia attempt to balance two competing policies while the mediation field establishes the "parallel" paradigm of the "authorized practice of mediation." It summarizes the advice offered by these guidelines about the distinction between legal advice and legal information. It also summarizes the advice they give on drafting memorandum of understanding, settlement agreements, and court forms.

Next, the article suggests some precautions individual mediators can take to avoid UPL charges. It ends by describing the challenges facing the mediation field in "pushing back" against the "law practice" paradigm. The article urges the field to lobby for changes in the definitions of the "practice of law" found in statutes and court rules. Specifically, they should expressly exclude mediation. The field should aggressively use UPL proceedings involving mediators as a way to establish favorable court precedent. The article also urges state courts to build the infrastructures needed to support mediation and to protect the public through codes of ethics, ethics advisory opinions, and grievance systems.

The article concludes that to the extent certain actions of mediators come close to the boundaries of law practice, UPL disciplinary bodies should first scrutinize those actions in light of the core values of mediation and generally accepted ethical constraints on mediators. They should worry first about consumer protection and not turf protection.

3 Throughout this article, I use the word "Underwriters" as a singular noun.

4 Since 2006, I have discussed three versions of the policy issued by Underwriters. I first mentioned the Underwriters policy issued to Dr. Fremed. See Young, *Kangaroo Court?*, *supra* note 2, at 1100. I then examined a later version that amended the

exclusion on which Underwriters relied to deny coverage to Dr. Fremed. Underwriters apparently rewrote that exclusion to make it easier to deny claims like the one filed by Dr. Fremed. *See* Underwriters at Lloyd's, London, *Arbitrators and Mediators Professional Liability Insurance* (revised Apr. 25, 2006) (on file with author) [hereinafter Underwriters Revised Policy]. In 2015, Underwriters provided me its latest version of the policy. *See* Underwriters at Lloyd's, London, *Arbitrators Hearing Officers and Mediators Professional Liability Insurance* (Jan. 2013) (on file with author) [hereinafter Underwriters Current Policy]; email from Kaitlyn Hassall, Sales Representative, Complete Equity Markets, Inc., to author, *Article on Mediator Malpractice* (Sept. 14, 2015, 2:42 PM) (on file with author). Complete Equity, Inc. administers the insurance program and markets the insurance products offered by Underwriters. *See also* email from Robert A. Badgley, Member, Karbal, Cohen, Economou, Silk & Dunne, LLC, to author, *Article on Mediator Malpractice* (Mar. 5, 2015, 4:53 PM) (on file with author).

5 I first began analyzing Dr. Fremed's experience in 2003. Accordingly, I have spent over a decade learning its lessons and sharing them with other ADR professionals.

6 For example, when I asked Dr. Fremed to comment on a draft of this article, she said, "Much of it can be better understood by attorneys and others with the knowledge base." E-mail from Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation, to author (Apr. 9, 2012, 6:36 AM) (on file with author).

7 *See generally* Paula Marie Young, *The Crisis in Insurance Coverage for Mediators: You May as Well Be "Going Bare" Because "There's no There There" -- Part 3: Specialized Coverage for Mediators* (Working Paper, 2016) (on file with author) [hereinafter Young, *Specialized Coverage for Mediators*].

8 *See infra* apps. A, B.

9 The next article in the series -- Paula Marie Young, *The Crisis in Insurance Coverage for Mediators -- Part 2: Coverage for Mediators Entering the Field from the Mental Health Professions -- Still "no There, There" 3-4* (Working Paper, 2016) (on file with author) [hereinafter Young, *Coverage Crisis for Mental Health Professionals*] -- concludes that mediators entering the field from mental health care professions cannot expect their profession-of-origin policies to cover damages and defense costs arising from nearly all of the claims they may face as mediators. "In general, [these policies] cover only professional services provided as a therapist, psychologist, or social worker, not as a mediator."

Second, the [mental health care] profession-of-origin policies will indemnify only negligent acts, errors, or omissions that lead to a claim for "sums" or "damages." Third, they will not provide indemnity or a defense for ethics grievances or UPL disciplinary proceedings. Fourth, without exception, the three profession-of-origin policies analyzed in this article preclude coverage of any fines or penalties that a regulatory body could impose on the mediator for an ethics grievance or a UPL violation. Fifth, [two of the analyzed] policies will not cover the costs of resisting subpoenas, motions to compel, or court orders seeking the disclosure of confidential mediation communications. The remaining policy limits coverage only to subpoenas for record production.

10 *See generally* Young, *Specialized Coverage for Mediators, supra* note 7. This article summarizes the specialized coverage for mediators available through Underwriters in a policy marketed by Complete Equity Markets, Inc. The article also identifies and discusses the separate amendatory endorsements offered by Underwriters for ethics grievances, UPL disciplinary proceedings, and other specialized actions involving mediators. Even Underwriters' specialized endorsements do not fill all coverage gaps. A mediator deciding whether to purchase the additional endorsement coverage will need to consider the premium costs, the deductible amount, any co-insurance obligation, the limits of liability, and the scope of coverage. For nearly all mediators, this cost-benefit analysis could be quite difficult.

This article also evaluates a new entrant to the market of insurance for mediators. The Pinkham Agency offers specialized coverage exclusively for members of the Association for Conflict Resolution (ACR). Ass'n for Conflict Resolution, *Pinkham Insurance Program*, ACR, [http://www.imis100us2.com/acr/ACR/Membership/ProfessionalLiabilityInsurance/ACR/Membership/Professional\\_Liability\\_Insurance\\_for\\_ACR\\_Members.aspx?hkey=e99f22fe-4581-485e-a3eb-bfcf8ded5f25](http://www.imis100us2.com/acr/ACR/Membership/ProfessionalLiabilityInsurance/ACR/Membership/Professional_Liability_Insurance_for_ACR_Members.aspx?hkey=e99f22fe-4581-485e-a3eb-bfcf8ded5f25) (last visited Sept. 8, 2015). The policy should provide better coverage for UPL disciplinary proceedings, especially since Dr. Fremed's experience encouraged ACR to look for a new insurance program for its members. It may offer an example of how the field can influence the insurance coverage available to it.

11 ALPS Attorneys' Professional Liability, *FAQ*, ALPSNET.COM, <http://www.alpsnet.com/home/insurance/faq.aspx> (last visited Sept. 8, 2015).

- 12 The Bar Plan Mutual Insurance Company, *Malpractice Insurance*, THEBARPLAN.COM, <https://www.thebarplan.com/products/product-malpractice-insurance/> (last visited Sept. 8, 2015).
- 13 The unavailability of specimen policies, even on the websites of offering agents, makes informed choices by consumers even more difficult.
- 14 See generally Paula Marie Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 814-30 (2006) [hereinafter Young, *Take It or Leave It*].
- 15 Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303 *passim* (2004). Charles Pou, Jr. has created a “Mediator Quality Assurance Grid” which helps conceptualize the “prototypical” approaches to mediator training and other barriers to entering and staying in the field. The five approaches are: (1) No hurdle/No maintenance; (2) High hurdle/Low maintenance; (3) High hurdle/High Maintenance; (4) Low hurdle/Low maintenance; and (5) Low hurdle/High maintenance. *Id.* at 325. He explains that a “high hurdle” or an initial barrier of entry to the field could include many hours of training, experience, or observation requirements. *Id.* It could also include minimum degree credentials, performance based reviews or tests, moral character reviews, and high application fees. *Id.* Low hurdles are designed to allow people with little training and experience to enter the field. *Id.* at 325-26. Maintenance requirements include continuing education, a minimum number of mediations completed since the initial entry into the field, periodic renewal of the mediator's certification, registration or roster status, and renewal fees. Of the state regulatory systems I analyzed, Florida, Virginia, Georgia, and Maine have high initial entry barriers and high maintenance requirements in comparison with most other states. Missouri has low initial entry barriers and no maintenance requirements.
- 16 The author thanks the South Texas Law Review for permission to use the discussion of Dr. Fremed's disciplinary proceeding originally published in Young, *Kangaroo Court?*, *supra* note 2 *passim*.
- 17 See generally *id.*
- 18 *Id.* at 1275.
- 19 *Id.* at 1065-66.
- 20 *Id.* at 1149.
- 21 *Id.*
- 22 *Id.* at 1061.
- 23 *Id.* at 1061-62.
- 24 *Id.* at 1266.
- 25 *Id.* at 1062, 1279-82. The wife had not retained counsel, but she apparently had access to legal advice through lawyers who were family members or friends. *Id.* at 1277-78.
- 26 *Id.* at 1109-11, 1272-73.
- 27 *Id.* at 1062.
- 28 *Id.* at 1063-64.
- 29 *Id.* at 1065-66, 1099.
- 30 For a description of her training as a mediator, see *id.* at 1055-57.
- 31 *Id.* at 1066-67.
- 32 *Id.* at 1098.

- 33 *Id.* at 1099.
- 34 Young, *Kangaroo Court?*, *supra* note 2, at 1099; letter from Robert A. Badgley, Attorney, Lord Bissell & Brook, LLP, to Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation, *Declining Coverage for UPL Claim*, (Nov. 22, 2005) (on file with author). The letter states that the UPL disciplinary proceeding did not seek “damages” and therefore did not trigger coverage.
- 35 Young, *Kangaroo Court?*, *supra* note 2, at 1100-01. The judges of the Superior Court of Connecticut appoint the twenty-one members of the Statewide Grievance Committee. State of Conn. Judicial Branch, *Statewide Grievance Committee*, STATE OF CONN. JUDICIAL BRANCH, <http://www.jud.ct.gov/SGC/> (last visited Sept. 8, 2015).
- 36 Young, *Kangaroo Court?*, *supra* note 2, at 1101.
- 37 *Id.*
- 38 *Id.* at 1100-04.
- 39 Letter from Robert A. Badgley, *supra*, note 34.
- 40 *Id.*
- 41 *Id.* Ironically, Underwriters later revised the policy to exclude even more claims tied to licensing issues. It excluded claims “[a]rising out of any act, error or omission in the conduct of professional services for which the Assured is alleged to be not properly licensed where which license is *allegedly* required by applicable law or regulations.” Underwriters Revised Policy, *supra* note 4, at § VII(i) (emphasis added). Thus, Underwriters’ policy, like no other policy I have analyzed, excluded claims even if the regulatory body has wrongly alleged that the law requires the identified license. I have speculated that Underwriters added this language because the insurer was unsure of the merits of the coverage decision they gave Dr. Fremed based on the language found in the policy at that time. For a more in depth analysis of the Underwriters Current Policy, *see* Young, *Specialized Coverage for Mediators*, *supra* note 7.
- 42 Letter from Martin Bressler, Attorney, to Robert A. Badgley, Attorney, Lord Bissell & Brook, LLP, *Challenge to Denial* (Dec. 2, 2005) (on file with author). Dr. Fremed retained separate counsel, Kate W. Haahonsen, to represent her in the UPL disciplinary proceeding. *See* Young, *Kangaroo Court?*, *supra* note 2, at 1104-05.
- 43 Letter from Martin Bressler, *supra* note 42. Bressler also sent a copy of this letter to ACR. *Id.*
- 44 *Id.*
- 45 *Id.* I do not find this argument convincing, but without a definition of “damages” appearing in the policy itself, Underwriters makes interpretation of the policy that much more difficult for insureds. Insureds would have to be familiar with applicable state case law defining the term.
- 46 *Id.*
- 47 Letter from Robert A. Badgley, Attorney, Lord Bissell & Brook, LLP, to Martin Bressler, Attorney, *Response to Challenge of Denial* (Dec. 16, 2005) (on file with author). As noted later in this article, some insurers defend claims that fall within coverage even if they are groundless, false, or fraudulent. *See infra* text accompanying notes 174-78.
- 48 Young, *Kangaroo Court?*, *supra* note 2, at 1099.
- 49 Young, *Kangaroo Court?*, *supra* note 2, at 1163. For a copy of the standards of conduct adopted by ACR, *see generally* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf) (last visited Sept. 8, 2015).
- 50 Young, *Kangaroo Court?*, *supra* note 2, at 1050, 1113.
- 51 *Id.* at 1112-13.



- 52 *Id.* at 1163.
- 53 ACR B D. OF DIRS., THE AUTHORIZED PRACTICE OF MEDIATION: PROPOSED POLICY STATEMENT OF THE ASSOCIATION FOR CONFLICT RESOLUTION *passim* (Aug. 28, 2004) [hereinafter THE AUTHORIZED PRACTICE OF MEDIATION], available at <https://alternativedisputeresolution.nmcourts.gov/index.php/admin/publications/1167-acr-proposed-authorized-practice-of-mediation/ACR%20Proposed%20Authorized%20Practice%20of%20Mediation.pdf> (last visited Sept. 8, 2015) (identifying mediation as a practice distinct from law; listing those mediation activities a mediator should be able to conduct without engaging in UPL so long as they are conducted consistently with mediation's core values; identifying activities improper for a mediator).
- 54 *See generally* Young, *Kangaroo Court?*, *supra* note 2.
- 55 E-mail from Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation, to author, *UPL* (Mar. 9, 2012, 6:13 PM) (on file with author).
- 56 E-mail from Dr. Resa Fremed, *supra* note 1.
- 57 *See generally* 57A Am. Jur. 2d *Negligence* §§ 110-12 (2004). *See also* SARAH RUDOLPH COLE, NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW POLICY & PRACTICE* § 11.3, nn.38-67 (2d ed. 2007).
- 58 Allegations could include mediator bias based on a party's race, creed, gender, religion, ethnic background, national origin, age, disability, sex, or sexual orientation. Paula Marie Young, *Teaching the Ethical Values Governing Mediator Impartiality Using Short Lectures, Buzz Group Discussions, Video Clips, a Defining Features Matrix, Games, and an Exercise Based on Grievances Filed Against Florida Mediators*, 11 PEPP. DISP. RESOL. L.J. 309, 309-10, 341-46 (2011) [hereinafter Young, *Mediator Impartiality*].
- 59 42 U.S.C. §§ 12101-12213 (2015).
- 60 *See* Michael Moffitt, *Suing Mediators*, 83 B.U. L. R EV. 147, 150-51 (2003) [hereinafter Moffitt, *Suing Mediators*].
- 61 *See generally* 57A Am. Jur. 2d *Negligence* §§ 112, 177-79 (2004).
- 62 *See generally id.* at §§ 377-408.
- 63 *Id.* at § 303.
- 64 *See generally id.* at §§ 110-13; *see also* COLE ET AL., *supra* note 57, at § 11.3, n.68; 4 JEFFERY E. THOMAS, *NEW APPELMAN ON INS. LAW LIBRARY ED.* § 25.06[11] (LexisNexis 2015) (E&O policies typically exclude coverage for breach of contract or liability assumed under a contract).
- 65 VA. CODE ANN. § 63.2-1509(A)(9) (2015) (making mediators mandatory reporters); *see also* COLE ET AL., *supra* note 57, at § 9.31.
- 66 *See generally* *Tarasoff v. Regents of Univ. of Cal.*, 551 P. 2d 334 (Cal. 1976).
- 67 For a discussion of fees in the mediation context, *see generally* Hamline Univ., *Mediation Case Law Summaries* 9, DIGITALCOMMONS@HAMLINE (Aug. 11, 2008), [http://digitalcommons.hamline.edu/dri\\_mclsummaries/3/](http://digitalcommons.hamline.edu/dri_mclsummaries/3/); *see also* NEW APPELMAN ON INS. LAW LIBRARY ED., *supra* note 64, at §§ 25.06[2], nn.216, 226 (return of excessive attorney fees), and 25.06[8] (most policies expressly exclude coverage for claims involving fee disputes).
- 68 *See generally* 57A Am. Jur. 2d *Negligence* §§ 58-59 (2004). The typical professional liability (E&O) policy excludes coverage of intentional torts, or dishonest, malicious, or wrongful acts. *See generally* NEW APPELMAN ON INS. LAW LIBRARY ED., *supra* note 64, at §§ 25.01, 25.06[2]; *but see id.* at § 25.03[7] (some courts have construed E&O policies to cover intentional non-negligent errors).
- 69 *See* COLE ET AL., *supra* note 57, at § 11.3, n.73.

- 70 *Id.*
- 71 *Id.* at § 11.3, n.74.
- 72 The author thanks the Ohio State Journal on Dispute Resolution for permission to reproduce the discussion of malpractice claims and ethics grievances originally published in Young, *Take It or Leave It*, *supra* note 14 *passim*.
- 73 JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 280 (1984).
- 74 Ben Carroll, *Liability in Mediation*, NAFCM PRACTICE NOTES, [www.mediate.com/nafcm/docs/y%20In%20Mediation.doc](http://www.mediate.com/nafcm/docs/y%20In%20Mediation.doc) (last visited Jan. 7, 2016) (citing to LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 214 (1987)).
- 75 STEPHEN B. GOLDBERG, FRANK E. A. SANDER & NANCY H. ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 204 (3d ed. 1999).
- 76 Moffitt, *Suing Mediators*, *supra* note 60, at 150-51.
- 77 *See* Young, *Take It or Leave It*, *supra* note 14, at 748.
- 78 *Id.*
- 79 *Id.* at 774. For the period May 1992 to July 2005, parties filed 98 grievances relating to party-self-determination, 97 grievances relating to mediator impartiality, 86 grievances relating to the quality of the process, 46 grievances relating to the quality of the mediator, 22 grievances relating to confidentiality, and 14 grievances relating to other matters, including fees and advertising. *Id.* at apps. C-I.
- 80 *Id.* Grievances either alleged or suggested that the mediator had used coercion; used improper influence; made substantive decisions for the parties; provided information the mediator was not qualified to give; failed to advise parties of their right to seek legal or other professional advice; offered a personal or professional opinion about how the court in a particular case would resolve the dispute; provided an evaluation; offered legal advice; required a party to stay in a session against his or her will; pressured the parties for settlement; offered a solution; or recommended settlement. *Id.* at apps. C-I.
- 81 Parties filed grievances alleging or suggesting that the mediator failed to show diligence and procedural fairness (26 grievances); improperly continued, adjourned, or terminated the mediation (14 grievances); did not properly initiate the process (11 grievances); provided a poor quality process (ten grievances); failed to conduct an appropriate orientation session before beginning the main session (eight grievances); poorly assessed the appropriateness of mediation for the case or the parties (five grievances); provided a poor process in drafting or reaching agreement (five grievances); engaged in unfair scheduling practices (two grievances); failed to appear at the scheduled session (one grievance); did not properly convene a caucus (one grievance); or left the mediation prematurely (one grievance). *Id.*
- 82 Parties filed grievances alleging or suggesting that the mediator had insufficient knowledge or competence to conduct the mediation (11 grievances); lacked integrity (six grievances); had an ineffective style of mediation (six grievances); was insensitive to domestic violence issues in the divorce context (four grievances); was rude (three grievances); had a demeanor not befitting a mediator (three grievances); was ineffective in working with attorneys (two grievances); was confrontational (one grievance); had a poor appearance (one grievance); acted unprofessionally (one grievance); and was arrogant (one grievance). *Id.*
- 83 *Id.* at 774.
- 84 *Id.* at 774-75.
- 85 For a description of the regulators handling ethical grievances in the studied states, *see id.* at 792-95, 814-15, 830-32, 848-49, 863-65, 882-89.
- 86 Sanctions can include:
- “[c]losing the [grievance], with an explanation to the mediator and/or the complainant”;

- “[c]ontacting a mediation program or roster manager or mediator certification group with concerns about the mediator and [making] recommendations about how to address those concerns”;
- giving an oral admonishment;
- restricting the types of cases the mediator can mediate in the future;
- requiring additional “training for the mediator at the [m]ediator's cost”;
- requiring the mediator to observe an experienced mediator;
- requiring the mediator to establish a mentoring relationship with an experienced mediator;
- requiring the mediator to provide “[p]ublic service to benefit the complainant or the mediation community”;
- requiring “[a] written apology”;
- requiring the mediator to reimburse the complaining party's fee payment;
- “[p]aying restitution to compensate the complainant for damages”;
- “[p]aying for the cost of the investigation”;
- “[s]ending a warning letter or written reprimand”;
- “paying for the cost of [the grievance] hearing”;
- “paying for the cost of [the grievance] appeal”;
- removing any certification that may exist;
- suspending a mediator from the court-connected mediation program;
- barring the mediator from service in a court-ordered case (even if not certified as a mediator);
- removing or de-certifying or de-rostering a mediator from the court-connected mediation program; and
- “Such other sanctions as are agreed to by the mediator” (sanctions have included research and writing of an article and compliance with attorney assistance program). *Id.* at 811, 893.

87 *Id.* at 751, 755, 757, 770, 773-74.

88 *Id.* at 773-74, 775.

89 *Id.* at 812; see OFFICE OF THE EXEC. SEC. OF THE SUP. CT. OF VA., PROCEDURES FOR COMPLAINTS AGAINST CERTIFIED MEDIATORS, MEDIATION TRAINERS, AND MEDIATOR MENTORS § 8.b.(8)-(9) (July 1, 2011) available at <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/forms/adr1004proc.pdf> (reimbursement of fees or expenses received by the mediator; reimbursement of certain expenses of the complaint hearing process).

90 Young, *Take It or Leave It*, *supra* note 14, at 755.

91 *Id.* at 775. “Florida, with the most rostered mediators, applied 40 interventions or sanctions against mediators. Maine, with the least number of rostered mediators, applied 43 interventions or sanctions against mediators. In both situations, regulators imposed more than one intervention or sanction on a single mediator, or the mediator may have accepted more than one intervention or sanction. In all, regulators sanctioned only thirty-six mediators[,] including those who voluntarily resigned from the roster. *Id.* at 775, apps. C-I.

92 *Id.* at 775.

93 *Id.* “Not every state keeps records of the number of informal [[grievances] received. However, the directors of these court-connected mediation programs believe that their grievance systems offer parties a place to express their concerns about a mediator or mediation even if those persons do not wish to take the next step to formalize the [grievance]. *Id.* at 775, n.183. “For instance, in Virginia, [claimants] did not pursue [fifty-five] of the [sixty-eight] informal [grievances]. Thus, the [grievance] processes in these states may protect mediators from frivolous claims that might otherwise result in malpractice suits or grievances filed with other professional organizations.” *Id.* at 775.

94 The author thanks the South Texas Law Review for permission to use the discussion of UPL law and enforcement originally published in Young, *Kangaroo Court?*, *supra* note 2 *passim*.

95 *Id.* at n.417-25.

96 *Id.* at n.439-40. In theory, a regulatory body could sanction a licensed attorney-mediator for aiding UPL if he or she co-mediated with a nonlawyer-mediator who engaged in some act deemed the practice of law.

- 97 *Id.* at 1132-34.
- 98 [State Bar v. Cramer](#), 249 N.W.2d 1, 7 (Mich. 1976).
- 99 Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STA. L. REV. 1, 46-47 (1981).
- 100 *Id.* at 47-48.
- 101 *See* Young, *Kangaroo Court?*, *supra* note 2, at 1146-48.
- 102 *Id.* at 1148.
- 103 *Id.*
- 104 *Id.*
- 105 *Id.*
- 106 *Id.*
- 107 Mark Hansen, *At the Crossroads*, A.B.A. J., May 2005, [http://www.abajournal.com/magazine/article/at\\_the\\_crossroads](http://www.abajournal.com/magazine/article/at_the_crossroads) (quoting Robert D. Welden).
- 108 Young, *Kangaroo Court?*, *supra* note 2, at 1152-53 (citing Hansen, *At the Crossroads*, *supra* note 107).
- 109 *See id.* at 1152.
- 110 *Id.*
- 111 *Id.*
- 112 ABA STANDING COMM. ON CLIENT PROT., 2012 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES 1, 1 (2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2012\\_upl\\_report\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_final.authcheckdam.pdf) [hereinafter 2012 ABA SURVEY OF UPL].
- 113 *Id.*
- 114 *Id.*
- 115 *Id.* at chart II *passim*.
- 116 *Id.* at 2, chart II.
- 117 *Id.* at 1, chart II.
- 118 *See, e.g.*, ABA Standing Comm. on Mediator Ethical Guidance, Formal Op. SODR 2010-1 (2012); *see also* Young, *Kangaroo Court?*, *supra* note 2, at 1165-72.
- 119 *Compare* Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 83-F-39 (1983), *and* Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 85-F-98 (1985), *with* Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 90-F-124 (1990). Seven years after the first opinion, the Tennessee regulators reconsidered the earlier opinions that had defined secular, for-profit mediation as the practice of law. They based the later opinion on additional information apparently provided by family law practitioners about mediation ethics and best practices.
- 120 THE AUTHORIZED PRACTICE OF MEDIATION, *supra* note 53 *passim*.
- 121 *See* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 57-73 (2006).

- 122 For a list of states with mandatory ethics codes for mediators, see Young, *Take It or Leave It*, *supra* note 14, at n.47.
- 123 See COLE ET AL., *supra* note 57, at §§ 9.18-9.22.
- 124 See, e.g., *Hauzinger v. Hauzinger*, 842 N.Y.S.2d 646 (N.Y. App. Div. 2007), *aff'd*, 892 N.E. 2d 849 (N.Y. 2008) (subpoena to appear at deposition); *Addesa v. Addesa*, 919 A.2d 885 (N.J. Super. Ct. App. Div. 2007) (court order for discovery); *Town of Clinton v. Geological Servs. Corp.*, 2006 WL 3246464 (Mass. Super. Ct. 2006) (motion to compel); *Gaskin v. Gaskin*, 2006 WL 2507319 (Tex. App. 2006) (subpoena to testify at court hearing); *Riner v. Newbraugh*, 563 S.E.2d 802 (W. Va. 2002) (subpoena to testify in court); *Royal Caribbean Corp. v. Modesto*, 614 So. 2d 517 (Fla. Dist. Ct. App. 1993) (subpoena to testify at court hearing).
- 125 COLE ET AL., *supra* note 57, at § 11.3 (summarizing approaches taken by states when providing mediator immunity).
- 126 FLA. STAT. ANN. § 44.107(2)(c) (2015).
- 127 ME. REV. STAT. tit. 4 § 18-B.3 (2015).
- 128 State of Me. Jud. Branch, COURT ALTERNATIVE DISPUTE RESOLUTION SERVICE OPERATIONAL RULES (Sept. 2010) at IV, available at [http://www.courts.maine.gov/maine\\_courts/adr/pdfOp%20Rules%20FINAL%201-14-11.pdf](http://www.courts.maine.gov/maine_courts/adr/pdfOp%20Rules%20FINAL%201-14-11.pdf).
- 129 Young, *Take It or Leave It*, *supra* note 14, at 821; see VA. CODE ANN. § 8.01-581.23 (2015) (“When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, or who is trained and serves as a mediator through the statewide mediation program ... then that mediator ... shall be immune from civil liability for, or resulting from any act or omission done or made while engaged [in] mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.”) Four of the states I analyzed confer immunity by statute. One state confers it by court rule. See Young, *Take It or Leave It*, *supra* note 14, at 821, n.419.
- 130 Ga. Sup. Ct., ALTERNATIVE DISPUTE RESOLUTION RULES VII(C), at 6 (May 28, 2014), [http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/CURRENT%20ADR%20RULES%20COMPLETE%205-28-2014.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/CURRENT%20ADR%20RULES%20COMPLETE%205-28-2014.pdf).
- 131 The statute provides: “A person presiding at an alternative dispute resolution proceeding is not subject to civil liability for the person's conduct in presiding over the proceeding, except for injury caused by malice, bad faith, or reckless conduct. This section does not restrict or affect immunity from liability that may be available under other law.” MINN. STAT. ANN. § 604A.32 (2015).
- 132 Int'l Risk Mgmt. Inst. ., *Frequency*, IRMI.COM, <http://www.irmi.com/online/insuranceglossary/terms/f/frequency.aspx> (last visited Sept. 8, 2015).
- 133 Int'l Risk Mgmt. Inst. ., *Severity*, IRMI.COM, <http://www.irmi.com/online/insurance-glossary/terms/s/severity.aspx> (last visited Sept. 8, 2015).
- 134 Robert A. Badgley, MEDIATOR LIABILITY: A SURVEY (Feb. 2010), <http://www.cemins.com/pdf/medarticle.pdf> [hereinafter 2010 Badgley Survey].
- 135 *Id.*
- 136 *Id.*
- 137 *Id.* at 3.
- 138 *Id.* at 2.
- 139 *Id.*
- 140 *Id.* at 4.

- 141 *Id.*
- 142 *Id.*
- 143 Robert A. Badgley, MEDIATOR LIABILITY CLAIMS: A SURVEY OF RECENT DEVELOPMENTS (May 2013), [http://www.lockelord.com/~media/Files/NewsandEvents/Publications/2013/05/Mediator%20Liability%20Claims%20A%20Survey%20of%20Recent%20Dev\\_\\_\\_/Files/201305-mediatorliabilityclaims\\_badgley/FileAttachment/201305-mediatorliabilityclaims\\_badgley.pdf](http://www.lockelord.com/~media/Files/NewsandEvents/Publications/2013/05/Mediator%20Liability%20Claims%20A%20Survey%20of%20Recent%20Dev___/Files/201305-mediatorliabilityclaims_badgley/FileAttachment/201305-mediatorliabilityclaims_badgley.pdf) [hereinafter 2013 Badgley Survey Update].
- 144 *Id.* at 2.
- 145 *Id.* at 5.
- 146 *Id.* at 2-3.
- 147 *Id.* at 5.
- 148 *See generally* ROBERT H. JERRY, II & DOUGLAS R. RICHLAND, UNDERSTANDING INSURANCE LAW 391-580, 637 (4th ed. 2007) [hereinafter UNDERSTANDING INSURANCE LAW].
- 149 NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 17.01[1][a]; NEW APPELMAN ON INS. L. PRACTICE GUIDE § 30.17[5] (LexisNexis 2016).
- 150 *See generally* NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 16.06[4]; NEW APPELMAN ON INS. L. PRACTICE GUIDE, *supra* note 149, at § 11.07[1]; *see also* UNDERSTANDING INSURANCE LAW, *supra* note 148, at 866-80.
- 151 NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 25.01[1]; *see also* NEW APPELMAN ON INS. L. PRACTICE GUIDE, *supra* note 149, at § 38.13[4][b].
- 152 NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 16.07[1][f].
- 153 *Id.* at §§ 16.07[1][a]-16.07[1][f], 25.01[1].
- 154 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 391-97; NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 21.02[3].
- 155 NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 25.03[9]; NEW APPELMAN ON INS. L. PRACTICE GUIDE, *supra* note 149, at § 38.13[2].
- 156 NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 25.03[8] (discussing *Marx v. Hartford Accident & Indem. Co.*, 157 N.W.2d 870 (Neb. 1968)).
- 157 *Id.* at 168.
- 158 *Id.* at 169.
- 159 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 406. *See also* HOW THE LIMITS APPLY IN THE CGL (July 2004), <http://austinstanovich.com/pdf/Articles/How-the-Limits-Apply-in-the-CGL-Policy.pdf> (last visited Sept. 8, 2015).
- 160 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 418-31.
- 161 *Id.* at 771.
- 162 Insurers sell two types of liability insurance: “occurrence” policies and “claims-made” policies. *Id.* at 507. All the policies analyzed in this article are claims-made policies. This type of policy covers claims only if the insured discovered the act or neglect and reported it to the insurer during the policy's term, no matter when the insured committed the act. *Id.* at 508.
- 163 *Id.* at 406-18.

- 164 *Id.* at 405-06; NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 25.06[1].
- 165 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 405-06.
- 166 *Id.* at 392.
- 167 *Id.* at 393.
- 168 *Id.* at 154-56.
- 169 *Id.* at 406.
- 170 *Id.* at 637, 647-52, 672-73.
- 171 *Id.* at 672.
- 172 *Id.* at 673.
- 173 *See id.* at 406; *see also* HOW THE LIMITS APPLY IN THE CGL, *supra* note 159.
- 174 *See* HOW THE LIMITS APPLY IN THE CGL, *supra* note 159.
- 175 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 865-66; *see also* NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 16.09[3][a][i].
- 176 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 825-65; NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 17.01[6][i].
- 177 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 866-82; NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 25.05.
- 178 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 826.
- 179 *See infra* text accompanying notes 296-98, 393-96.
- 180 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 827.
- 181 *Id.* at 882.
- 182 *Id.*
- 183 *Id.* at 884.
- 184 *Id.* at 828-29, 851.
- 185 *Id.* at 827-28.
- 186 *Id.*
- 187 *Id.* at 829.
- 188 *Id.* at 866; NEW APPELMAN ON INS. L. PRACTICE GUIDE, *supra* note 149, at § 30.16[3].
- 189 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 867.
- 190 *See generally id.* at 867-74.
- 191 *Id.* at 874-75.
- 192 *Id.* at 874.

- 193 *See id.* at 708-27; *see generally* Ronald R. Robinson, *Coverage Allocation Law: A Primer on the History, Evolution and Current State of Court Mandated Shared Indemnity and Defense Obligations*, PLILITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES, § IX A-C (1995) (discussing the three types of other insurance clauses and the typical language used to express them).
- 194 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 710.
- 195 *Id.* at 711.
- 196 *Id.*
- 197 *Id.* at 711-12.
- 198 *See id.* at 12, 599-610, 652-57, 729.
- 199 *See id.* at 12, 729.
- 200 *See id.* at 652-57.
- 201 *See id.* at 64-142.
- 202 *Id.* at 145-48.
- 203 *See id.* at 148-611; *see generally* NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 5.04[1]-[2].
- 204 UNDERSTANDING INSURANCE LAW, *supra* note 148, at 160; NEW APPELMAN ON INS. L. PRACTICE GUIDE, *supra* note 149, at § 4.07[8].
- 205 *See generally* Axis Prof'l Ins., *Miscellaneous Professional Liability*, AXIS PRO, [http://www.axiscapital.com/en-us/insurance-site/Documents/AXIS%20PRO\\_MPLI.pdf](http://www.axiscapital.com/en-us/insurance-site/Documents/AXIS%20PRO_MPLI.pdf) (last visited Sept. 8, 2015); Chubb Group of Ins. Cos., *ChubbPro Lawyers Professional Liability*, CHUBB.COM, <http://www.chubb.com/businesses/csi/chubb829.html> (last visited Sept. 8, 2015); AIG, *Professional Liability*, AIG.COM, [http://www.aig.com/professional-liability\\_295\\_391900.html](http://www.aig.com/professional-liability_295_391900.html) (last visited Sept. 8, 2015); Monitor Liability Managers, *Lawyers Professional Liability*, MONITERLIABILITY.COM, <http://www.monitorliability.com/products/lawyers-professional-liability> (last visited Sept. 8, 2015).
- 206 *See infra* app. A; ALPS Property & Casualty Ins. Co., *Lawyers Professional Liability Insurance Policy*, ALPS LPL ENH (07-14) § 2.24.2 [[hereinafter ALPS policy].
- 207 *See infra* app. B; Bar Plan policy, *supra* note 12, at § II A.
- 208 *See infra* app. B; Bar Plan policy, *supra* note 12, at §§ I K., I.K.4.
- 209 *See infra* apps. A, B; ALPS policy, *supra* note 206, at § 1.1; Bar Plan policy, *supra* note 12, at § I.D.
- 210 *See infra* apps. A, B; ALPS policy, *supra* note 206, at § 2.6; Bar Plan policy, *supra* note 12, at § I.D.
- 211 *See infra* apps. A, B; ALPS policy, *supra* note 206, at §§ 2.6-2.6.1; Bar Plan policy, *supra* note 12, at § I.F.1.
- 212 *See infra* apps. A, B; ALPS policy, *supra* note 206, at §§ 2.6-2.6.1; Bar Plan policy, *supra* note 12, at § I.F.1.
- 213 *See infra* apps. A, B; ALPS policy, *supra* note 206, at § 2.6; Bar Plan policy, *supra* note 12, at § I.F.
- 214 *See infra* apps. A, B; ALPS policy, *supra* note 206, at § 3.1.1; Bar Plan policy, *supra* note 12, at § III.
- 215 *See infra* apps. A, B; ALPS policy, *supra* note 206, at § 2.20; Bar Plan policy, *supra* note 12, at § III. F.
- 216 *See infra* apps. A, B; ALPS policy, *supra* note 206, at § 2.3-2.3.1; Bar Plan policy, *supra* note 12, at § III. H (violation of federal law).
- 217 *See infra* app. A; ALPS policy, *supra* note 206, at § 2.24.1.



- 218 *See infra* apps. A, B.
- 219 *See infra* app. A.
- 220 *See infra* app. B.
- 221 *See infra* app. A; ALPS policy, *supra* note 206, at § 4.5.
- 222 *See infra* app. B; Bar Plan policy, *supra* note 12, at § VIII B.
- 223 *See infra* apps. A, B; Underwriters Current policy, *supra* note 4, at § VIII(h).
- 224 *See infra* apps. A, B; ALPS policy, *supra* note 206, at § 1.2.1; Bar Plan policy, *supra* note 12, at § III. F.
- 225 *See infra* apps. A, B.
- 226 *See infra* apps. A, B; ALPS policy, *supra* note 206, at § 2.4-2.4.2; Bar Plan policy, *supra* note 12, at § VI.A.
- 227 *See infra* apps. A, B.
- 228 NEW APPELMAN ON INS. L. LIBRARY ED., *supra* note 64, at § 16.07[1][f].
- 229 Email from Robert D. Reis, Chief Operating Officer, to author, *ALPS* (Mar. 15, 2005, 1:34 PM) (on file with author).
- 230 Over the last decade, I have also analyzed an earlier version of the ALPS policy. ALPS Property & Casualty Ins. Co., Attorneys Liability Protection Society, Inc. (Oct. 1, 2003) [hereinafter Earlier ALPS policy].
- 231 ALPS policy, *supra* note 206, at § 1.1.1. In quoting the language of all policies, I have not reproduced emphasis of the policy language indicated by bold or all capitalized (all caps) letters.  
In contrast, the October 1, 2003 version of this policy provided coverage for claims arising:  
[B]y reason of any act, error or omission in *professional services* rendered or that should have been rendered by the Insured ... while providing legal or notary services for others, *including acts, errors, or omissions as mediator, arbitrator, or other facilitator in a dispute resolution process* ... or because of personal injury and arising out of the professional services of the Insured as an attorney, *mediator, arbitrator or other facilitator in a dispute resolution process*. Earlier ALPS policy, *supra* note 230, at § 1.1.2 (emphasis added). Coverage for dispute resolution professionals now arises under the 2014 version of the policy by virtue of the definition of “Professional Services” rather than by express language found in the coverage provision. *See infra* text accompanying notes 232-33.
- 232 ALPS policy, *supra* note 206, at § 2.24.1.
- 233 *Id.* at § 2.24.2 (emphasis added). Additional definitions cover other services provided by lawyers. *Id.* at §§ 2.24.3, 2.24.4.
- 234 *Id.* at § 2.3. Thus, the definition may cover subpoenas and court orders seeking the disclosure of confidential communications as a “claim” for “services.”
- 235 *See id.* at §§ 2.1-2.29.2.
- 236 *See supra* text accompanying notes 246-49.
- 237 ALPS policy, *supra* note 202, at §§ 2.20-2.20.5.
- 238 *See* Young, *Coverage Crisis for Mental Health Professionals*, *supra* note 9, at 10-11, 20, 25, 37, 46, 50, 57.
- 239 *See infra* text accompanying notes 298-304.
- 240 ALPS policy, *supra* note 206, at § 3.1.1 (excluding “[a]ny dishonest, fraudulent, criminal, malicious, or intentionally wrongful or harmful act, error, or omission”).
- 241 *See infra* text accompanying note 262.

- 242 ALPS policy, *supra* note 206, at §§ 1.1.1(b), 2.20-2.20.5, 3.1; *see supra* text accompanying notes 60-74.
- 243 ALPS policy, *supra* note 206, at §§ 2.20-2.20.5, 2.24.1-2.24.7.
- 244 *Id.* at §§ 2.6-2.6.5.
- 245 *See supra* text accompanying notes 60-74.
- 246 Office of the Exec. Sec'y of the Sup. Ct. of Va., COMPLAINT PROCEDURES FOR MEDIATORS CERTIFIED TO RECEIVE COURT-REFERRED CASES § 2.c (July 1, 2011), *available at* <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/forms/adr1004proc.pdf>.
- 247 This comment assumes that the parties have not resolved the ethics grievance at an earlier, informal stage of the disciplinary process. *Id.* at §§ 3, 4; *see generally* Young, *Take It or Leave It*, *supra* note 14, at 826-28.
- 248 *See supra* text accompanying notes 85-100.
- 249 ALPS policy, *supra* note 206, at § 2.6.2.
- 250 *See id.* at § 2; *see also infra* text accompanying notes 308-09.
- 251 *See generally* Earlier ALPS policy, *supra* note 230.
- 252 ALPS policy, *supra* note 206, at § 3.1.11.
- 253 Office of the Exec. Sec'y of the Sup. Ct. of Va., STANDARDS OF ETHICS AND PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS § D.2(a)-(b) (July 1, 2011), *available at* <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf>.
- 254 *See* Young, *Coverage Crisis for Mental Health Professionals*, *supra* note 9, at 12, 40.
- 255 *Id.* at 12.
- 256 ALPS policy, *supra* note 206, at § 3.1.1.
- 257 *See* Young, *Coverage Crisis for Mental Health Professionals*, *supra* note 9, at 5, 11, 20, 25, 37, 50.
- 258 ALPS policy, *supra* note 206, at § 3.1. However, as noted above, it does cover certain specified acts of intentional conduct under the Innocent-Insured provision. *Id.* at §§ 3.1.1, 4.3.1.
- 259 *See supra* text accompanying notes 71-73.
- 260 *See supra* text accompanying notes 71-73.
- 261 *See supra* text accompanying notes 60-69.
- 262 ALPS policy, *supra* note 206, at § 4.3.1.
- 263 *Id.* at § 2.20.
- 264 *Id.* at § 2.2. The policy's definition of "Claim" also excludes "any Bodily Injury of any person." *Id.* at § 2.3.4.
- 265 Cohen Milstein, *Case Involving Murder at Boca Raton, Florida Law Firm Offices Settles on the Eve of Trial-Landmark Case Settles*, LEOPOLD-LAW.COMM (Mar. 3, 2002), <http://www.leopold-law.com/index.cfm?fuseaction=news.details&ArticleId=403>.
- 266 Ben Benton, *Estranged Wife had Fired Shots Before Manchester, Tenn. Shooting*, TIMESFREEPRESS.COM (Dec. 7, 2013), <http://www.timesfreepress.com/news/local/story/2013/dec/07/estranged-wife-had-fired-shots-before/126023/>.

- 267 Barbara G. Madonik, *Managing the Mediation Environment*, MEDIATE.COM, <http://www.mediate.com/articles/madonik.cfm> (last visited Sept. 26, 2015).
- 268 ALPS policy, *supra* note 206, at §§ 1.3.4, 2.25-2.25.3, 2.26.
- 269 *Id.* at § 2.25.3.
- 270 Young, *Take It or Leave It*, *supra* note 14, at 911 (Florida ethics grievance alleging mediator “[f]ailed to postpone mediation when one party was unable to participate for physical reasons”), 912 (Florida ethics grievance alleging that mediator prolonged session past the time parties “were willing to participate, especially when one party had a health condition”), 914 (Florida ethics grievance alleging mediator would not let a “party obtain food at her request”), 915 (Florida ethics grievance alleging mediator “[f]ailed to terminate [the] mediation when one party was physically unable to participate”), 918 (Florida ethics grievance alleging that mediator failed to make provisions for a party who suffered from panic attacks), 930 (Florida ethics grievance alleging mediator “[f]ailed to accommodate a disabled party”), 931 (Florida ethics grievances alleging mediator failed to provide an interpreter and failed to terminate the session when a party suffered an anxiety attack).
- 271 *In re Rains*, 428 F.3d 893, 897, 901-02 (9th Cir. 2005); *see also* Mitchell Hamline School of Law, *Scholarship and Applied Practice Projects*, MITCHELL HAMLINE SCHOOL OF LAW, <http://mitchellhamline.edu/dispute-resolution-institute/scholarship-and-projects/> (last visited Dec. 15, 2015); Resolution Systems Institute, *Court ADR Research Library*, RESOLUTION SYSTEMS INSTITUTE, <http://courtadr.org/library/view.php?ID=3326> (last visited Dec. 15, 2015); Hamline University, *Mediation Case Law Teaching Videos*, DIGITALCOMMONS@HAMLINE, [http://digitalcommons.hamline.edu/dri\\_mclvideo/](http://digitalcommons.hamline.edu/dri_mclvideo/) (last visited Dec. 15, 2015); James Coben, *Mediation Case Law Teaching Videos: In re Rains*, 428 F.3d 893 (9th Cir. 2005), DIGITALCOMMONS@HAMLINE, [http://digitalcommons.hamline.edu/dri\\_mclvideo/12/](http://digitalcommons.hamline.edu/dri_mclvideo/12/) (“Concluding that bankruptcy court did not clearly err in finding a debtor mentally competent to enter into a mediated settlement where witnesses to the day-long mediation testified that the debtor ‘participated actively and appeared to have ... full understanding of what was transpiring and of the terms of the settlement,’ notwithstanding that immediately following the conclusion of mediation the debtor drove himself to the hospital where he was admitted and diagnosed with a cerebral aneurysm and stroke and his treating physician and psychologist opined that a person with his diagnosis would not have had mental capacity to conduct business affairs.”) (last visited Dec. 15, 2015).
- 272 *See* ALPS policy, *supra* note 206, at §§ 2.2, 2.3, 2.3.4, 3.1.1.
- 273 *Id.* at §§ 2.6-2.6.1.
- 274 Another provision of the policy would reinforce this exclusion where the insurer agrees to pay up to \$25,000 in attorneys’ fees and expenses associated with a proceeding before a “state licensing board, peer review committee or governmental regulatory body.” The provision fails to mention coverage of fines or other sanctions. *Id.* at § 1.3.2.
- 275 Bar Plan policy, *supra* note 12, at §§ I.F.1., III.J.
- 276 Earlier ALPS policy, *supra* note 230, at § 2.1.18.
- 277 Bar Plan policy, *supra* note 12, at § III.G.
- 278 ALPS policy, *supra* note 206, at §§ 2.6, 2.6.4.
- 279 *Id.* at § 3.1.9.
- 280 *See supra* text accompanying notes 85-90.
- 281 ALPS policy, *supra* note 206, at §§ 2.3-2.3.1.
- 282 Young, *Mediator Impartiality*, *supra* note 58, at 341-46.
- 283 *See* ALPS policy, *supra* note 206, at § 3.
- 284 *Id.* at § 2.1.

- 285 *Id.* at §§ 2.15, 2.15.2.
- 286 Young, *Kangaroo Court?*, *supra* note 2, at 1139-40.
- 287 Bar Plan policy, *supra* note 12, at § III.I.
- 288 *See* Young, *Coverage Crisis for Mental Health Professionals*, *supra* note 9, at 54 (American Home policy at exclusion B).
- 289 Underwriters Current Policy, *supra* note 4, at § II.
- 290 ALPS policy, *supra* note 206, at § 1.3.2. Similarly, the Underwriters Current Policy does not cover damages arising from grievance or UPL disciplinary proceedings, but in a significant change from the last iteration of this policy, the current policy now provides a defense in those proceedings. *Compare* Underwriters Revised Policy, *supra* note 4, at § VII(n) *with* Underwriters Current Policy, *supra* note 4, at § I.2.
- 291 ALPS policy, *supra* note 206, at § 4.5. Insurers use “other insurance” clauses because they want to limit the risk that an insured will be paid by two insurers for the same claim under two separate policies. Robinson, *supra* note 193, at § XI.
- 292 Two other forms of other insurance clauses exist: escape clauses and pro rata clauses. The Bar Plan policy contains a “pro rata” other insurance clause. Bar Plan policy, *supra* note 12, at § VIII.B. The Underwriters Current Policy contains an “escape” other insurance clause. Underwriters Current Policy, *supra* note 4, at § VIII(i). *See generally* Robinson, *supra* note 193, at § IX A-C (discussing the three types of other insurance clauses and the typical language used to express them).
- 293 *See supra* text accompanying notes 193-96.
- 294 Underwriters Current Policy, *supra* note 4, at § VIII(h).
- 295 Robinson, *supra* note 193, at § IX A-C.
- 296 ALPS policy, *supra* note 206, at § 1.2.1.
- 297 *Id.*
- 298 Bar Plan policy, *supra* note 12, at §§ I.B.1., I.D., II.B.1., III.A.
- 299 ALPS policy, *supra* note 206, at § 1.2.2.
- 300 *Id.* at § 1.4.1.
- 301 *Id.* at § 1.5.1. In addition, the clause allows the insurer to deposit the policy limits with a court of competent jurisdiction and then tender the defense to the insured. *Id.*
- 302 *Id.* at §§ 2.4-2.4.2 (emphasis added).
- 303 *Id.* at § 4.2.2.
- 304 *See* Young, *Coverage Crisis for Mental Health Professionals*, *supra* note 9, at 54-55, 57-58.
- 305 *See* ALPS policy, *supra* note 206, at § 3.
- 306 *Id.* at § 2.6.
- 307 *Id.* at § 2.6.1.
- 308 *Id.* at § 1.1.
- 309 *Id.* at §§ 2.3, 2.6.
- 310 Telephone Interview with Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation, in Ridgefield, Conn. (Feb. 20, 2007).

- 311 ALPS policy, *supra* note 206, at § 1.2.1.
- 312 Bar Plan policy, *supra* note 12, at § I.G.3.
- 313 ALPS policy, *supra* note 206, at § 2.4.1 (limiting the definition, in part, to “fees charged by any attorney(s) designated by the Company”).
- 314 Attorneys Liability Protection Society, *Policy Highlights*, ALPSNET.COM, <https://www.alpsnet.com/#PolicyHighlights> (last visited Sept. 8, 2015).
- 315 *See generally* About.com, *Insurance Endorsement*, ABOUT.COM, <http://personalinsure.about.com/od/insurancetermsglossary/g/Insurance-Endorsement.htm> (last visited Sept. 8, 2015); IRMI, *Endorsement*, IRMA.COM, <http://www.irmi.com/online/insurance-glossary/terms/e/endorsement.aspx> (last visited Sept. 8, 2015).
- 316 *Id.*
- 317 *Id.*
- 318 In the summer of 2015, my research assistant asked the Bar Plan administrators to provide me an updated version of the policy. Despite repeated requests, and a promise to provide a copy of the policy, the Bar Plan did not provide it. Accordingly, this article analyzes the policy available in 2006, identified as Form TBP-2 (1-2006).
- 319 Bar Plan policy, *supra* note 12, at § II A (emphasis added).
- 320 *Id.* at §§ I K., I.K.4.
- 321 ALPS policy, *supra* note 206, at §§ 1.1-1.1.1(b), 2.24-2.24.2.
- 322 Bar Plan policy, *supra* note 12, at §§ I.K.1, I.K.4 (listing both a “lawyer” and a “mediator or arbitrator”).
- 323 *See Young, Coverage Crisis for Mental Health Professionals*, *supra* note 9, at 4, 8-9, 21-22, 33-35, 47-48.
- 324 ALPS policy, *supra* note 206, at § 2.3.
- 325 Bar Plan policy, *supra* note 12, at § I.D.
- 326 ALPS policy, *supra* note 206, at §§ 2.6-2.6.5.
- 327 Bar Plan policy, *supra* note 12, at § I F.
- 328 *Id.* at § I.L.
- 329 ALPS policy, *supra* note 206, at §§ 2.20-2.20.5.
- 330 *Id.* at § 2.6; Bar Plan policy, *supra* note 12, at § I.F.
- 331 Bar Plan policy, *supra* note 12, at § I.F.
- 332 *Id.* at § I.D.
- 333 *See infra* text accompanying notes 226-54, 378-86.
- 334 ALPS policy, *supra* note 206, at §§ 2.24, 2.24.2.
- 335 Bar Plan policy, *supra* note 12, at §§ I.K., I.K.4., II.A.
- 336 *See supra* text accompanying notes 85-90, 112-117.
- 337 Bar Plan policy, *supra* note 12, at §§ I.F.1., I.F.2, I.F.4 (emphasis added).

- 338 ALPS policy, *supra* note 206, at §§ 2.6-2.6.1.
- 339 Bar Plan policy, *supra* note 12, at § III.J (emphasis added).
- 340 *Id.* at § I.F.1; *see also id.* at § III.J (“imposed under state or federal statutes or rules of procedure”).
- 341 *See supra* text accompanying notes 85-90.
- 342 *See generally* Young, *Take It or Leave It*, *supra* note 14.
- 343 *Id.* at n.47.
- 344 *See supra* text accompanying notes 202-205.
- 345 *See supra* text accompanying notes 16-17.
- 346 *See supra* text accompanying notes 77-90, 95-106.
- 347 ALPS policy, *supra* note 206, at § 2.6.4.
- 348 *See supra* text accompanying notes 243-49, 273-75.
- 349 Bar Plan policy, *supra* note 12, at § I.F.1 (emphasis added).
- 350 *Id.* at § I.F.2 (emphasis added).
- 351 *Id.* at § III.J (emphasis added).
- 352 The policy excludes: “Restitution, reduction or set off of any monies or other consideration paid to an Insured as fees or expenses, which are to be reimbursed or discharged as part of the judgment, settlement, or final arbitration award.” *Id.* at § I.F.2.
- 353 For instance, under Virginia's mediator grievance system, the unhappy party and the mediator can settle the complaint filed by the party. *See* Young, *Take It or Leave It*, *supra* note 14, at 826.
- 354 *Id.* at n.47.
- 355 A. Any dishonest, deliberately fraudulent, criminal, malicious or *deliberately wrongful acts* or omissions by an Insured; however, the Company will provide a defense for any Claim alleging such acts or omissions by an Insured acting in a professional capacity providing Legal Services ... but the Company will not pay any sums the Insured shall become legally obligated to pay as Damages for any such Claim ... [U]nder no circumstances will the Company provide a defense for any criminal prosecution.... F. Bodily injury, sickness, disease or death of any person, or injury to or destruction of any tangible property, including loss of use resulting therefrom, except that this exclusion does not apply to mental illness, emotional distress or humiliation arising from rendering or failing to render Legal Services in a professional capacity. G. The Insured's alleged liability under any oral or written contract or agreement, unless such liability would have attached to the Insured in the absence of such agreement.... I. Any expense incurred by an Insured in defense of a grievance or complaint filed with a bar regulatory agency. J. Fines, penalties, restitution, sanctions, costs, expenses or fees imposed under state or federal statutes or rules of procedure, punitive or exemplary Damages or multiple damages.  
Bar Plan policy, *supra* note 12, at §§ III.A-J (emphasis added).
- 356 *Id.* at §§ II.B.1., III.A (regarding criminal prosecutions), III.I (“defense of a grievance or complaint filed with a bar regulatory agency”).
- 357 *Id.* at §§ III.A.1., III.F., III.G., III.J; *see supra* note 355 (policy language).
- 358 *See generally supra* text accompanying notes 164-67; *see, e.g., supra* text accompanying notes 256-90.
- 359 *See, e.g.,* Young, *Coverage Crisis for Mental Health Professionals*, *supra* note 9, at 5, 11, 20, 25, 37, 50. The ALPS policy also excludes an “intentionally wrongful or harmful act, error or omission.” ALPS policy, *supra* note 206, at § 3.1.1.

- 360 *See supra* text accompanying notes 71-73.
- 361 Bar Plan policy, *supra* note 12, at § III.A.
- 362 ALPS policy, *supra* note 206, at § 4.3.1; *see supra* text accompanying note 262.
- 363 Bar Plan policy, *supra* note 12, at § III.A.
- 364 Compare Bar Plan policy, *supra* note 12, at § I.L., with *id.* at §§ II.A., III.A.
- 365 *See supra* text accompanying notes 168-69, 203-205.
- 366 Bar Plan policy, *supra* note 12, at § III.F.
- 367 *See supra* text accompanying notes 265-68.
- 368 *Id.*
- 369 Bar Plan policy, *supra* note 12, at § III F.
- 370 *See* ALPS policy, *supra* note 206, at §§ 2.2, 2.3, 2.3.4.
- 371 Bar Plan policy, *supra* note 12, at § III A.
- 372 *See supra* text accompanying notes 168-69, 203-205.
- 373 *See supra* text accompanying notes 276-77.
- 374 Bar Plan policy, *supra* note 12, at § III.G.
- 375 *See supra* text accompanying notes 67-68.
- 376 Bar Plan policy, *supra* note 12, at § III.G.
- 377 *See* Young, *Take It or Leave It*, *supra* note 14, at n.47 (providing citations to mandatory ethics standards for mediators).
- 378 Bar Plan policy, *supra* note 12, at § III.I (emphasis added).
- 379 *Id.* (emphasis added).
- 380 Young, *Kangaroo Court?*, *supra* note 2, at 1152.
- 381 Bar Plan policy, *supra* note 12, at § III.I (emphasis added).
- 382 *Id.* at § III.J.
- 383 *Id.* at § I.F.1.
- 384 *See infra* text accompanying notes 168-87.
- 385 *See infra* text accompanying notes 176-80.
- 386 Bar Plan policy, *supra* note 12, at § III.
- 387 *See* ALPS policy, *supra* note 206, at §§ 1.1, 2.1., 2.15.2.
- 388 Bar Plan policy, *supra* note 12, at § VIII B.
- 389 *See supra* text accompanying notes 193-96.
- 390 *See* ALPS policy, *supra* note 206, at § 4.5.

- 391 Underwriters Current Policy, *supra* note 4, at § VIII(h).
- 392 *See supra* text accompanying notes 193-96 (which discusses the pro rata, excess, and escape approaches).
- 393 Bar Plan policy, *supra* note 12, at § II.B.1; *see also id.* at §§ I.D., I.F (definitions of “Claim” and of “Damages”).
- 394 *Id.* at § I.F.
- 395 *Id.* at § III.A.
- 396 *Id.* at § III.I (emphasis added).
- 397 *Id.* at § II.B.2.a., II.B.2.b.
- 398 *Id.* at § II.B.3.
- 399 *Id.*
- 400 ALPS policy, *supra* note 206, at §§ 1.2.1, 2.4.1, 2.4.2.
- 401 Bar Plan policy, *supra* note 12, at § I.G (emphasis added). The insurer will pay defense expenses first and those payments reduce the amount payable as damages under the limits of liability. *Id.* at § VI.A.
- 402 *Id.* at § I.G.2.
- 403 *See supra* text accompanying notes 308-09.
- 404 Bar Plan policy, *supra* note 12, at § III.
- 405 *Id.* at § I.F.
- 406 *Id.* at § I.F.1.
- 407 *Id.* at § I.G.3.
- 408 *Id.* at § VII.B.
- 409 *Id.*
- 410 *See supra* text accompanying notes 311-13.
- 411 Telephone Interview with Gayle Tegtmeier, Vice President, Underwriting, The Bar Plan (July 24, 2005).