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**PaulaMarieYoung**<sup>d1</sup>

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**\*79 THE CRISIS IN INSURANCE COVERAGE FOR MEDIATORS PART 2: COVERAGE FOR MEDIATORS ENTERING THE FIELD FROM THE MENTAL HEALTH PROFESSIONS - YOU MAY AS WELL BE “GOING BARE” BECAUSE “THERE’S NO THERE, THERE”**

**I. Introduction**

A couple looking for a cheap divorce, a confused judge, a poorly informed and over-zealous prosecutor, and a disciplinary committee that failed to follow existing legal precedent ended Dr. Resa Fremed's Connecticut mediator career. For many years, Dr. Fremed served as a therapist. Later, she trained as a mediator with one of the most respected mediators in the world, John Haynes. Dr. Fremed sharpened her skills through extensive training and was granted the status of “Advanced Practitioner” by the Association of Conflict Resolution. She offered her mediation services to divorcing couples in New York and Connecticut. Then one day, a family law judge misinterpreted a divorcing couple's statements and referred Dr. Fremed for disciplinary action, concerned that she had **\*80** engaged in the unauthorized practice of law (UPL). Facing a costly disciplinary proceeding, without the aid of her malpractice insurer, Dr. Fremed reluctantly entered a consent judgement that effectively excluded her from practice in Connecticut.<sup>1</sup>

I first learned of Dr. Fremed's story over a decade ago, during an ethics session offered at a conference sponsored by the Association for Conflict Resolution. I was drawn to her story as a mediation ethicist. Over three years, I helped revise the ethics code, training requirements, and grievance procedures for Virginia mediators. For two terms, I served on the Virginia Mediator Review Board, which is the highest state disciplinary body for mediators. I also served on the Virginia ADR Advisory Council offering advice and guidance to help implement Virginia's court-connected ADR programs. I have written about complaints filed against mediators by unhappy parties, about UPL in the mediation context, about how to creatively teach mediation ethics, and about insurance coverage for lawyer-mediators.<sup>2</sup>

One of the unifying themes to my work is the raw deal Dr. Fremed received in the UPL disciplinary hearing, as well as the abandonment of her defense by her insurer. Frightened, confused, and having spent \$6,000 of her own money on her defense, she signed a Consent Order filled with vague language that made her decide to forever quit offering mediation services in Connecticut. In an earlier article, I suggested that Dr. Fremed “faced the power and perhaps the ignorance and pride of the court-sponsored disciplinary proceeding under the direction of the Office of Chief Disciplinary Counsel of Connecticut.”<sup>3</sup>

**\*81** I wrote a book-length article about UPL in the mediation context in which I exhaustively analyzed Dr. Fremed's case.<sup>4</sup> The more I read the disciplinary record, the more disgusted I became with how the event unfolded. In my opinion, the prosecutor pursued a claim even though he had not concluded that Dr. Fremed had violated any state rule governing UPL.<sup>5</sup> The brief filed by the prosecutor was short (a mere four pages), poorly researched, and failed to consider any of the distinctions between the authorized practice of mediation and UPL.<sup>6</sup> Then during the proceeding, the prosecutor asked Dr. Fremed to respond to additional claims which arose from testimony offered during the hearing, but gave her insufficient time to prepare a defense.<sup>7</sup>

The Reviewing Committee of the Connecticut Statewide Grievance Committee's (SGC's) decision did not follow court decisions in the state.<sup>8</sup> Arguably, state government or judicial authorities did not properly supervise the SGC.<sup>9</sup> Accordingly, the Supreme Court decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*<sup>10</sup> would likely have required a much closer scrutiny of its deliberations and the substantive outcome. I concluded that the proceeding resulted in a miscarriage of justice.<sup>11</sup> The whole thing stank. Who or what did the SGC protect by ending this woman's mediation career in Connecticut? The public or the monopoly of lawyers?<sup>12</sup>

On top of the stress Dr. Fremed experienced by having to face the UPL allegations, she also had to fight with her insurer. In the end, her insurer escaped defending or covering the claim.<sup>13</sup> I am dedicating three articles in a series to help other mediators avoid that surprise. This article is the second in the series and focuses on insurance coverage offered to mental healthcare professionals who enter the field of mediation. It analyzes three typical insurance policies.<sup>14</sup> The first article looked at professional liability policies offered to lawyers serving as mediators.<sup>15</sup> In the third article, I examine the policy offered by Complete Equity Markets, Inc. (Complete Equity) on behalf of Underwriters at Lloyds, London (Underwriters).<sup>16</sup> Dr. Fremed relied on an earlier version of this policy to cover the cost of her defense but later learned that Underwriters, citing an exclusion, denied coverage or a defense.<sup>17</sup>

\*83 I have learned that most mediators likely assume that they have more insurance coverage than they in fact have. In other words, they are “going bare”<sup>18</sup> for many of the claims they could face over a career as a mediator.

## II. This Article

Section III of this article briefly discusses the UPL proceeding filed against Dr. Fremed and her insurance coverage dispute.

Section IV briefly recaps the information I provided in Part 1 of the series without repeating that detailed discussion here.<sup>19</sup> It describes potential claims against mediators, the risk of a claim against mediators, and basic insurance concepts, terms, and clauses. I intend that the two articles work together to provide needed information.

Section V summarizes the detailed analyses of three professional malpractice (or E&O) policies as examples of the types of coverage available to mediators coming to the field with mental health backgrounds (the profession-of-origin policies). The section analyzes policies available to a therapist-mediator, a psychologist-mediator, and a social worker-mediator. It also includes a summary of the policy provisions governing scope of coverage, listed exclusions, special conditions, “other insurance” clauses, the duty to defend, settlement options, choice of defense counsel, deductibles, and available endorsements.

Section VI of this article concludes that nearly all mediators fail to realize that their current profession-of-origin malpractice policies will not provide the coverage or defense mediators likely need, expect, and are willing to buy. The coverage gaps exist especially if the mediator is facing an ethics grievance, a UPL disciplinary proceeding, or a subpoena seeking the disclosure of confidential information. This article recommends that those in the mediation field should approach insurers asking for policies with clearer language terms, fewer coverage ambiguities, and more coverage options, including a duty to defend ethics grievances, UPL disciplinary proceedings, and subpoenas seeking confidential mediation communications. Mediation ethicists could help insurers draft policies that give mediators more value for their insurance dollars.

Appendices A to C of this article analyze in detail three professional malpractice policies as exemplars of the typical language governing coverage \*84 for mediators entering the field from mental healthcare professions. Appendix A analyzes the type of policy held by the Connecticut therapist-mediator, Dr. Fremed.<sup>20</sup> Philadelphia Insurance Companies (Philadelphia Insurance) provides that policy<sup>21</sup> through its agent, CPH & Associates.<sup>22</sup> Next, Appendix B analyzes a policy available in Maryland for the psychologist-mediator, which specifically contemplates coverage of “Divorce Mediation Services.” Allied World Assurance

Company (Allied World) now provides that coverage<sup>23</sup> for psychologists through its agent American Professional Agency, Inc.<sup>24</sup> Finally, Appendix C analyzes a policy available in Virginia for social worker-mediators. CNA offers that policy<sup>25</sup> through its agent, Healthcare Providers Service Organization (HPSO).<sup>26</sup>

### III. Brief Recap of the Context for this Article

#### A. *UPL Proceeding Filed Against Dr. Fremed*

For over a decade, I have used the UPL disciplinary action brought against Dr. Fremed as a cautionary tale.<sup>27</sup> Dr. Fremed's story started in 2005, when she agreed to represent a divorcing couple as a family mediator. At the time, Dr. Fremed was a well-trained and experienced mediator who had completed over 300 mediations. She was cautious in outlining the role she played in the mediation and was very familiar with the ethical restraints on that role.<sup>28</sup>

\*85 The parties in this mediation negotiated many aspects of their divorce, including a parenting plan, but could not agree on a few items. Eventually, the parties terminated the mediation. Dr. Fremed sent a draft Memorandum of Understanding (MOU) to the husband's attorney covering the parenting plan agreement, which the parties had finalized. At that time, the husband was the only party formally represented by counsel, although the wife later revealed she was informally consulting with an attorney. All along, both parties intended that a lawyer, not the mediator, would draft the final settlement agreement submitted to the court for approval.<sup>29</sup>

The husband's lawyer drafted a settlement agreement and decided to attach, as an exhibit to the agreement, the MOU prepared by Dr. Fremed. I have to assume the lawyer made this decision after reviewing and approving the MOU. Then it gets messy. The husband did not renew his retainer and discharged his lawyer. Unfortunately for Dr. Fremed, the wife then assumed responsibility for trying to finalize the divorce and commit it to writing. The wife re-wrote the settlement agreement and added additional information.<sup>30</sup>

Next, the parties appeared before a family law judge. This busy judge read the draft settlement agreement, had several questions for the now, *pro se* parties, and concluded that the agreement was inconsistent with Connecticut family law. The transcript shows confusion and impatience on the part of the judge. At some point in the dialogue, the judge wrongly assumed that Dr. Fremed had drafted the entire settlement agreement rather than just the MOU. The judge did not realize that the husband's attorney and then the wife had written the final draft of the settlement agreement.<sup>31</sup>

Then, the judge wrote a letter to the Chief Disciplinary Counsel of Connecticut asking him to consider whether Dr. Fremed had engaged in UPL. I will not go into the details of that disciplinary hearing because I set it out, along with a transcript, in my earlier article.<sup>32</sup> Here are the highlights. The Chief Disciplinary Counsel conducted a very superficial investigation that mostly consisted of asking his colleagues throughout the U.S. what their views were of a mediator drafting a settlement agreement. His interviews of the husband and wife failed to reveal who had drafted which part of the settlement agreement. Without having probable cause (in my opinion), the Chief Disciplinary Counsel referred the matter to the Statewide Grievance Committee (SGC) and a hearing date was set.<sup>33</sup>

\*86 The Chief Disciplinary Counsel's referral letter stated that Dr. Fremed, as a divorce mediator, was “draft[ing] legal documents, including the one presented to [the judge].”<sup>34</sup> The Chief Disciplinary Counsel also reflected an opinion of the Chief Justice of the Connecticut Supreme Court, which may have improperly influenced the outcome in this proceeding. He said, “[i]n his recent remarks to the Conn. Bar Association's annual meeting, our Chief Justice raised the issue of whether non-lawyers should be engaged in this business.”<sup>35</sup>

The notice of the hearing did not detail the charges against Dr. Fremed. The Reviewing Committee of the SGC assigned to hear the matter advised that the hearing could go as long as a day, but they typically scheduled a hearing for only one hour. Dr. Fremed could offer testimonial and documentary evidence.<sup>36</sup>

The Chief Disciplinary Counsel submitted a four-page Prehearing Memorandum. For the first time, Dr. Fremed had a better understanding of the concerns raised in the matter. The Chief Disciplinary Counsel did not state a position based on the facts he had discovered through his interviews. Instead, he planned to wait until the conclusion of evidence at the hearing. His brief focused on the “unauthorized practice of law” paradigm, without discussing the “authorized practice of mediation” paradigm.<sup>37</sup>

At the hearing, an exceptionally competent lawyer represented Dr. Fremed. Dr. Fremed's lawyer provided a well-reasoned and comprehensive discussion of UPL. She reviewed prior cases involving mediators.<sup>38</sup> She presented a nuanced understanding of the various tests for UPL and the “customary function” exception. However, she spent only one paragraph on the authorized practice of mediation. Dr. Fremed's lawyer attached several exhibits which showed the care that Dr. Fremed took in explaining her role to parties to ensure that she did not cross the line into the practice of law. She also included copies of the settlement agreement, with the MOU attached as an exhibit.<sup>39</sup>

The hearing took a day and a half. Only the wife, the husband's lawyer, and Dr. Fremed testified. During the wife's testimony, she referred to several e-mails that neither counsel had seen before. The Reviewing Committee gave Dr. Fremed's lawyer a very short break to review them. Then, it was back to sworn testimony about them.<sup>40</sup>

\*87 Several months later, the Reviewing Committee issued its Proposed Decision. The Proposed Decision claimed that Dr. Fremed had engaged in three acts of UPL. Two of the unauthorized acts were reflected in the emails and the third act was reflected in the “detailed document” Dr. Fremed had prepared. At that time, they had still not figured out that other persons--the husband's lawyer and the wife--had drafted the settlement agreement. The Reviewing Committee suggested that Dr. Fremed not be sanctioned if she signed a stipulation within 14 days, which admitted the facts of the violation, and agreed “to cease and desist from conduct constituting the practice of law ....”<sup>41</sup> The SGC voted to adopt the Proposed Decision.<sup>42</sup>

Dr. Fremed signed the stipulation despite its vague prohibition and decided never to mediate in Connecticut again. Her lawyer transmitted the stipulation under a letter designed to show how the SGC had acted incorrectly. However, the process did not allow for reconsideration by the SGC. With no other option but an expensive appeal, the lawyer asked that the SGC admit her letter to the record.<sup>43</sup>

My point of view on this disciplinary proceeding continued to crystalize as my own understanding of mediation ethics deepened. I believe the proceeding failed to guarantee due process to Dr. Fremed because of the way the Reviewing Committee handled the notice of the hearing without specifying the charges against her, as well as the way it handled the defense of the late-filed emails. Also, the Reviewing Committee failed to understand the difference between drafting an MOU (which the lawyer reviewed and approved) and drafting the overall settlement agreement. They did not apply their prior precedent with any sophistication or examine the nuances of UPL and its exceptions. In their two-page decision, they made no attempt to understand or apply the “authorized practice of mediation” paradigm.<sup>44</sup> In my earlier article, I made this conclusion:

In the end, the Fremed decision turns back the clock to 1999, when the Reviewing Committee in *Carney* found that the mediator had engaged in UPL “by performing divorce mediation, which the committee conclude[d] [was], per se, the practice of law.” Luckily for nonlawyer-mediators in the state and for the parties who wish to use them, the Connecticut court created a new court rule in June 2007 ... exempting services provided by a mediator from the definition of the practice of law. It also expressly allows persons “to provide information of a general nature about the law \*88 and legal procedures to members of the public.” Accordingly, Dr. Fremed could be the last mediator in Connecticut to face UPL disciplinary proceedings.<sup>45</sup>

That, however, is not the entire story. While Dr. Fremed was dealing with the stress of the disciplinary proceeding, she was also fighting with her insurer to cover and fund her defense.

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

In Part 3 of this series of articles, I plan to analyze Dr. Fremed's coverage dispute in detail,<sup>46</sup> but I will briefly describe the dispute to provide context. Dr. Fremed bought a policy written by Underwriters through its agent Complete Equity.<sup>47</sup> Complete Equity offers specialized coverage for some claims brought against mediators, arbitrators, and other ADR neutrals.<sup>48</sup>

For some time, Complete Equity has marketed the Underwriters' policy to ADR neutrals.<sup>49</sup> Complete Equity has made this policy available for inspection at every national ADR conference I have attended over the last two decades.<sup>50</sup> As part of that marketing program, an attorney for Underwriters provided two summaries of claims brought against mediators for malpractice, ethics grievances, and UPL disciplinary proceedings.<sup>51</sup> In the summaries, the attorney advised potential policyholders:

In addition to potential exposure to civil liability, mediators also face exposure to disciplinary proceedings which address potential misconduct. Although an adverse outcome will not result in payment of money damages, the imposition of disciplinary \*89 measures can be costly in other ways. And, of course, it costs money to respond to the disciplinary allegations.<sup>52</sup>

His first summary concludes:

As these cases demonstrate, with the growing number of [ADR proceedings], mediators are frequently exposed to situations with the potential to spark a variety of expensive claims. Although the defendants may avoid liability in many cases, defense costs can be significant .... Given the current trend of increased use of ADR, these examples demonstrate that mediators cannot afford to be unprotected. These claims are often expensive to defend and sanctions can lead to other costs. In many jurisdictions, mediators cannot rely on strong immunity defenses, and thus must look to other safeguards to protect their business assets.<sup>53</sup>

The summary specifically generates anxiety about defense costs and disciplinary sanctions. His second summary iterates the same conclusion.<sup>54</sup> The overall marketing program suggests to unwary mediators that the Underwriters policy provides comprehensive coverage for any claim the mediator may face, including ethics grievances, UPL disciplinary proceedings, and the costs of preserving mediation confidentiality. But, as Dr. Fremed learned the hard way, the policy does not provide this comprehensive coverage.<sup>55</sup> In fact, the standard policy severely limits the coverage provided, as it covers only negligent acts, errors, or omissions leading to claims for damages arising from professional services provided by the mediator.<sup>56</sup>

Because of these limitations, Underwriters denied coverage of Dr. Fremed's UPL claim and asserted that the policy did not create a duty to defend it. In denying the claim, Underwriter's counsel explained:

Our understanding is that the proceedings against you before the [SGC] do not seek damages. As such, there is no coverage, or defense obligation, under the Policy. We also direct your attention to Policy Section VII, Exclusions, which states in relevant part:

This policy shall not indemnify the Assured in respect of any claim:

(i.) Arising out of any act, error or omission in the conduct of professional services for which the Assured is not \*90 properly licensed where such license is required by applicable law or regulation.

Our understanding is that the sole basis for the grievance against you is that you allegedly practiced law without a license. It appears that such allegation falls within the scope of the above-quoted Policy exclusion. As such, this claim is not covered.”<sup>57</sup>

Under this interpretation of the policy, most mediators accused of UPL, whether lawyers or nonlawyers,<sup>58</sup> would have no coverage under the standard policy offered by Underwriters.<sup>59</sup>

Dr. Fremed retained legal counsel to try to convince Underwriters that its interpretation of the policy was not correct.<sup>60</sup> In the end, however, Dr. Fremed paid for her own defense.<sup>61</sup> Once she had paid \$6,000 to her lawyer, she felt she had no additional funds to support an appeal of the decision of the SGC. Thus, she signed the stipulation ending her mediation career in Connecticut.<sup>62</sup>

#### **IV. Coverage for Mediators - Caution Required**

##### ***A. Ignorance is not Bliss***

Mediators entering the field from mental health professions face great difficulty in determining whether they have sufficiently insured their mediation practices. As I noted in Part 1 of this series of articles, most people buying professional liability insurance would not have the training or experience to decipher the typical insurance policy to see if it applied to claims arising from mediation.<sup>63</sup> Insurance policies contain complex wording and use a structured and interrelated organization of clauses, terms, and concepts. For instance,

\*91 [d]etermining the insurer's indemnity obligation requires review of the coverage clause, consideration of any conditions to coverage, careful examination of any exclusion 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.<sup>64</sup>

Claims for coverage could include damages arising from negligent or intentional misconduct.<sup>65</sup> Claims might also cover fines, sanctions, and penalties imposed for a violation of an ethics code, a statute, or rule governing UPL.<sup>66</sup> What about subpoenas or court orders compelling the disclosure of confidential communications?<sup>67</sup> Most profession-of-origin policies do not provide coverage for these types of claims when they arise in the mediator's practice. Moreover, most policies would not cover the cost of defending those claims.

As Part 1 of this series illustrated, even after a very careful review of the policy language, coverage can remain unclear.<sup>68</sup> Despite my long experience in the insurance law field,<sup>69</sup> it took hours of research to discover the coverage gaps and traps that

exist in nearly all professional malpractice policies. Problems arise because “the policies cross-reference multiple sections of the contract, use specialized terminology, and fail to define all the terms used in the policy.”<sup>70</sup> I do not expect mediators with a mental health background to understand the difficult legal language of insurance policies but hope this article bridges that gap in understanding and provides that knowledge.<sup>71</sup>

In short, mediators would find that a close reading of the policies reveals “there is no there there.”<sup>72</sup> In the terminology of the insurance industry, mediators might as well be “going bare” given the coverage of available policies.<sup>73</sup>

As I noted in Part 1 of the series, in which I analyzed two insurance policies for lawyer-mediators, some readers may be disappointed that I have not examined the policy they have bought or covered a policy providing insurance in their states.<sup>74</sup> Nonetheless, insurance policies contain similar language and structures. My analysis should help you understand your own policy. In the end, however, you should consult with your attorney about the scope of coverage or discuss the issues with a knowledgeable insurance agent.<sup>75</sup>

### ***B. Insurance Coverage for Mediators***

Insurance policies try to strike a balance between offering coverage that is not likely to bankrupt an insurer over time and offering enough coverage (or the perception of coverage) to entice people to buy the policies. That balance reflects experience with a particular book of business, interpretations of policy language by courts that either broaden or narrow coverage, and an understanding of the needs and desires of the market for insurance.

When I first began talking about these issues, insurers were less aware of the problems mediators might face in practice. They had little understanding of the ethics codes and best practices that helped define good mediation practice. They did not often understand the distinction in the roles of mediators versus the roles mediators played in their professions of origin. Accordingly, insurance policies reflected that lack of experience and understanding. I am happy to say that my conversations with some insurers have improved the language found in policies, even if those conversations did not necessarily broaden coverage.

This article analyzes coverage for mediators with mental health backgrounds by considering several key elements of three different policies. My analysis points out that the typical insurance policy would invite a coverage dispute for a mediator trying to defend a claim brought against him or her by an unhappy party<sup>76</sup> or by an ethics or disciplinary body.<sup>77</sup>

Mediators cannot expect that the profession-of-origin policies issued to them will cover damages and defense costs that arise from many of the claims they may face as mediators. In general, they cover only professional services provided as a therapist, psychologist, or social worker, not as a mediator.<sup>78</sup> Only Allied World offers a policy that covers negligence committed by a mediator engaged in undefined “Divorce Mediation Services.”<sup>79</sup> However, to discover this coverage, a mediator must read the coverage provisions in section I, two definitions in section III, an exclusion at section IV, and the exception to that exclusion at section IV.A. (20).<sup>80</sup> The vast majority of mediators, especially nonlawyer mediators, do not carefully read their policies. In addition, Allied World seems to be the only insurer (or one of the few insurers) that has realized the increasing role mediation plays in dispute resolution or the role mediators with mental healthcare backgrounds play in this field.<sup>81</sup>

Second, the profession-of-origin policies will indemnify only negligent acts, errors, or omissions that lead to a claim for “sums” or “damages.”<sup>82</sup> Third, they will not likely provide indemnity or a defense for ethics grievances or UPL disciplinary proceedings.<sup>83</sup> 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.<sup>84</sup> Fifth, all three policies limit coverage of the costs of resisting subpoenas, motions to compel, or court orders seeking the disclosure of

confidential mediation communications, especially if the disclosure comes at trial.<sup>85</sup> Accordingly, mental health professionals working as mediators should not expect their profession-of-origin policies to cover claims arising from their mediation practices.

As I noted in my earlier article:

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 .... Finally, a lawyer-mediator \*94 should expect to self-insure many of the claims an unhappy party might bring against the mediator.<sup>86</sup>

I would draw the same conclusions about insurance coverage available for mediators entering the field from mental health professions. In short, the mediation field must continue to ask for the coverage it needs to give a practitioner piece of mind in the event he or she receives a claim, ethics grievance, UPL complaint, subpoena, or motion to compel.

### ***C. Potential Claims Against a Mediator***

In Part 1 of this series, I detail the potential claims against mediators. To summarize, a party may sue a mediator for (1) professional negligence; (2) strict liability; (3) breach of a contractual duty; (4) intentional, criminal, dishonest, fraudulent, or malicious acts; or (5) breach of a fiduciary duty. Mediators could also face an ethics grievance or UPL disciplinary proceeding. Finally, a mediator may receive a subpoena or motion to compel disclosure of confidential communications.<sup>87</sup> A mediator would likely want to retain a lawyer to represent him or her in these claims or proceedings. In addition, a mediator would want his or her malpractice insurer to cover the cost of that defense.

### ***D. Risk of a Claim Against a Mediator***

In Part 1 of this series, I discussed the risk that a mediator may face a professional malpractice claim, ethics grievance, or UPL proceeding. The available evidence shows the risk is quite low. I carefully looked at that evidence in my earlier articles.<sup>88</sup> Out of curiosity, I recently surveyed the database of ethics opinions maintained by the American Bar Association's Section of Dispute Resolution. In a database with hundreds of opinions, only four opinions involved mediators with mental health backgrounds.<sup>89</sup>

### ***E. With Risks So Low, Why Worry About Insurance?***

Next in Part 1 of the series, I discussed why a mediator would still want to get the best insurance coverage possible. I explained:

\*95 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.



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>90</sup>

For Dr. Fremed, the UPL disciplinary claim felt like a Category 5 hurricane. It overwhelmed her resources quickly and forced her into settlement.<sup>91</sup>

My earlier article also summarized data Underwriters provided as part of its marketing for its professional malpractice policy. In two newsletter summaries, Underwriters described cases involving mediators and the cost of settlement or defense of the claims. In one summary discussing ten claims, the author advised that the cost of resolving the disputes ranged from \$10,000 to \$400,000. In a later newsletter discussing eight more cases, the author noted defense costs of over \$20,000 in one case, of a “significant” amount in a second case, over \$100,000 (settlement amount and defense costs) in a third case, and over \$560,000 (defense costs only) in a fourth case.<sup>92</sup>

Good marketing, right? Yet, a close reading of the available policies brings only limited peace of mind for mediators faced with a claim, grievance, UPL complaint, or subpoena.

## **\*96 V. Insurance Coverage for Mediators Entering the Field from Mental Healthcare Professions-of-Origin**

### **A. Basic Insurance Concepts, Terms, and Clauses**

In Part 1 of the series, I spent over six pages describing the different types of insurance clauses. I am not repeating that detailed discussion primarily because though essential, it is quite dry. In that earlier article, I discussed the scope of coverage set out in the insuring agreements; any limitations on the scope of coverage; exclusions from coverage; per claim and aggregate limits of liability; the scope of the insurer's duty to defend; coverage of defense costs and of providing a defense; the right to control the defense of claims; the duty to settle; “other insurance” clauses; deductibles and co-insurance obligations; the definition of terms used in the policies; and specimen policies available to the public. Accordingly, if you need a refresher on these concepts, please refer to that earlier article.<sup>93</sup>

### **B. Profession-of-Origin Policies**

As noted above, Appendices A to C of this article analyze the professional malpractice (or E&O) policies available in Connecticut, Maryland, and Virginia as exemplars of the typical language governing coverage for mental healthcare professionals. Appendix A analyzes the Philadelphia Insurance policy held by the Connecticut therapist-mediator, Dr. Fremed.<sup>94</sup> Appendix B analyzes the Allied World Assurance Company (Allied World) policy for Maryland psychologists.<sup>95</sup> Finally, Appendix C analyzes the CNA policy available in Virginia for social workers.<sup>96</sup>

The policies available in other states may have different wording, so I intend the discussion appearing in those Appendices as a general guide to interpreting other policies. The analysis outlines the following approach to interpreting insurance policies. First, the policyholder should evaluate the scope of the coverage provided. This analysis often requires a close parsing of defined words and phrases. In addition, courts may have further interpreted the meaning of policy terms, especially the terms “sums,” “damages,” “occurrence,” or “accident.” Next, the policyholder must carefully review any conditions to, or limitations on, coverage and any express exclusions of coverage. The policyholder should then consider listed exceptions to the exclusions of coverage, as well “other insurance” clauses. After that, the policyholder should carefully examine the language governing \*97 the duty to defend, settlement options, choice of defense counsel, and deductibles. Finally, and perhaps most importantly,

the policyholder should consider the existence of any special endorsements (or “riders”) covering mediation practices.<sup>97</sup> Endorsements can add insureds, add covered risks, modify or remove existing terms or exclusions, and add supplemental coverage.<sup>98</sup> The policyholder typically must request these endorsements, and the insurer usually requires the payment of additional premiums to provide the expanded coverage offered under the endorsements.

### **C. Coverage Provisions of Professional Liability Policies Issued to Mental Healthcare Professionals**

The three profession-of-origin policies analyzed at Appendices A to C offer little coverage to therapists, psychologists, and social workers for *any* claims arising against them for errors or omissions committed *as mediators*.<sup>99</sup> In addition, the insurers' failure to either expressly exclude from coverage, or expressly include in coverage, mediation services performed by therapists, psychologists, or social-workers invites a coverage dispute under these policies. A court might construe any ambiguity against the insurer to allow claims not expressly excluded by the policy.<sup>100</sup> However, the policyholder would need to fund, out-of-pocket, coverage litigation against its insurer, either concurrently with, or after defending any claim brought by a third-party against the mediator for negligence or other professional misconduct. As noted below, only one policy, Allied World, through an exception to an exclusion, offers coverage to psychologist-mediators in the narrow practice context of “Divorce Mediation Services,” but only if the policyholder satisfies very specific conditions to coverage.<sup>101</sup>

The biggest hurdles to coverage for a mediator are the profession-of-origin limitations found in each policy. The Philadelphia Insurance and CNA policies impose this limitation through the professions listed on the Declarations page or the Certificate of Insurance, respectively.<sup>102</sup> The Allied World policy does this by defining “Psychologist” and “Mental Health Counselor.”<sup>103</sup> Thus, mediators must ensure, if possible, that mediation \*98 is a listed profession on the policy if they want to avoid coverage disputes.

The coverage provisions of these profession-of-origin policies typically limit coverage to “sums” or “amounts” the policyholder becomes “obligated to pay as damages,” to pay as “judgments,”<sup>104</sup> “awards,”<sup>105</sup> or in “settlement” of claims.<sup>106</sup> The policyholder's liability to third-parties must arise from a “professional incident”<sup>107</sup> or “medical incident”<sup>108</sup> tied to the named profession-of-origin. The definitions of the terms used in the coverage provisions--specifically the terms “professional incident” and “medical incident”--further narrow coverage under these profession-of-origin policies.<sup>109</sup>

On the other hand, the profession-of-origin policies add coverage not found in policies issued to lawyers.<sup>110</sup> Two policies--Philadelphia Insurance and Allied World--cover bodily injury.<sup>111</sup> All three policies cover some property damage.<sup>112</sup> Two policies--Philadelphia Insurance and CNA--cover some personal injury claims.<sup>113</sup> All three policies cover assault to the insured but may limit coverage depending on where the assault occurs.<sup>114</sup> The policy language leaves open the question of whether coverage exists for injuries occurring on premises outside the residence or business office of the mediator.<sup>115</sup> After all, many mediators use law office conference rooms or other locations to hold mediation sessions.

Defining coverage in terms of “damages,” “judgments,” “awards” and “settlements” likely precludes any coverage for ethics grievances and UPL disciplinary proceedings because those actions do not typically end in monetary compensation to a third-party. The exclusions of the policy, discussed below, reinforce this conclusion.<sup>116</sup>

### **D. Definitions of Terms Found in the Coverage Provisions**

A policyholder could not be certain of the scope of coverage without carefully reading the definitions of terms used in the coverage provisions \*99 and exclusions, as well as terms used in the definitions themselves. Unfortunately, no policy analyzed

in this article defines all the terms used in the policy.<sup>117</sup> Accordingly, this intentional or unintentional oversight can lead to a coverage dispute.

For instance, the Philadelphia Insurance policy defines “claim,” “damages,” and “professional incident.”<sup>118</sup> It also defines “bodily injury” and “personal injury.”<sup>119</sup> However, it fails to define “professional services” as used in the definition of “professional incident” or the term “assault.”<sup>120</sup> It also fails to define with further specificity the “profession shown in the Declarations.”<sup>121</sup>

The Allied World policy defines “damages,” “claim,” “occurrence,” “professional incident,” “professional services,” “psychologist,” “mental health counselor,” “assault,” and “bodily injury,”<sup>122</sup> but fails to define “judgments” or “settlements.”<sup>123</sup>

The CNA policy defines “personal injury (in two provisions),” “professional services,” “medical incident,” “assault,” “complaint,” “professional liability claim,” and “license protection incident.”<sup>124</sup> These definitions avoid using the terms negligence or wrongful acts, which could lead to a coverage dispute.

Thus, one policy fails to define a key term: “professional services.” In that case, disputes about whether mediation constitutes a professional service within the context of the policyholder’s profession-of-origin listed on the Declarations page would depend on existing case law or on the creation of new case law.

### ***E. Exclusions of Coverage***

All four policies analyzed in this article contain predictable uniformity in the types of claims expressly excluded from coverage. They exclude coverage of claims that do not arise out of the stated profession-of-origin. They also exclude, with some exceptions, claims arising out of (1) criminal acts;<sup>125</sup> (2) intentional acts;<sup>126</sup> (3) dishonest, fraudulent, or malicious acts or omissions;<sup>127</sup> (4) fines and penalties, and perhaps sanctions;<sup>128</sup> (5) contracts \*100 or agreements;<sup>129</sup> (6) fee disputes;<sup>130</sup> (7) discrimination;<sup>131</sup> (8) professional services when the policyholder is not properly licensed or certified to perform those services as required by state laws;<sup>132</sup> and (9) professional services not permitted by state laws.<sup>133</sup>

The Allied World policy expressly excludes claims “alleging, arising out of, based upon or attributable to Professional Services as a mediator,”<sup>134</sup> unless the mediator is engaged in “Divorce Mediation Services” and complies with the three conditions discussed below.<sup>135</sup> The policy, however, fails to define “Divorce Mediation Services,” thereby creating an opportunity for a coverage dispute.

As a general assessment, the narrow coverage provisions found in the three profession-of-origin policies, combined with their long lists of exclusions, likely guarantee that the insurer will pay very few, if any, claims on behalf of a policyholder acting as a mediator.

### ***F. Conditions to Coverage***

As noted above, one policy--the Allied World policy--expressly excludes coverage for services performed as a mediator, except if the policyholder meets three conditions and engages only in “Divorce Mediation Services.”<sup>136</sup> This coverage structure shows that policyholders must carefully review all aspects of the policy to determine if it covers claims arising from mediation services, and if so, to what extent and subject to what conditions. As noted in Appendix B below, a mediator could easily fail to satisfy a condition imposed by the Allied World policy. If that happened, Allied World could legally refuse to cover the claim.<sup>137</sup>

The first condition would help parties understand that the psychologist-mediator will not mix professional roles,<sup>138</sup> and perhaps, more importantly, that he or she will not provide legal advice to, or advocacy for, any party.<sup>139</sup> The second condition apparently seeks a level of actual neutrality \*101 that most experts agree never exists.<sup>140</sup> Alternatively, it may seek to reinforce the prohibition against any advocacy role on behalf of either party.<sup>141</sup> The third condition reminds parties to get the expert legal advice the mediator cannot provide under the prior two conditions, or cannot provide under applicable ethics codes.<sup>142</sup>

The Allied World policy provides in pertinent part:

[Exclusion A.(20)] shall not apply to the provision of Divorce Mediation Services, if:

1. prior to providing such services, a written statement to all parties is provided explaining that the Insured is a neutral and unbiased intermediary whom shall not act as an advocate for any one party;
2. The Insured, in fact, act[s] exclusively as a neutral and unbiased intermediary between the parties; and
3. the Insured, in connection with such Divorce Mediation Services, advises all parties, in writing **at the time any settlement agreement or other such agreement is presented to the parties**, to have such agreement reviewed independently by counsel of their choice prior to their execution of the agreement.<sup>143</sup>

A cautious mediator would include these statements in his or her agreement to mediate and the final settlement agreement as later proof that the mediator has met the conditions of coverage under the policy.<sup>144</sup>

### G. “Other Insurance” Clauses

This article also explores the “other insurance” clauses found in the policies. They may give rise to an inter-policy coverage dispute when a mediator has a profession-of-origin policy, as well as a policy specifically designed for mediators, like the Underwriters policy.<sup>145</sup> Insurers use “other insurance” clauses to limit the risk that two or more insurers will pay the policyholder for the same claim under separate policies.<sup>146</sup> Generally, three \*102 forms of “other insurance” clauses exist: excess, escape, and pro rata clauses.<sup>147</sup>

The policies analyzed at Appendices A to C all contain an “excess” other-insurance clause despite the variation in the language used.<sup>148</sup> An “excess” other-insurance clause provides coverage only if the loss exceeds the limits of liability of any other applicable insurance policy.<sup>149</sup> The Philadelphia Insurance policy also has language creating an “escape” other-insurance clause that seeks to avoid coverage of claims covered by any other policy.<sup>150</sup>

### H. The Insurer's Duty to Defend Claims

#### i. In General

In addition to the insurer's promise to indemnify any covered claims brought against the policyholder, the insurer also promises to defend the policyholder against claims brought against him or her, as specified in the policy. The policies analyzed in this

article generally cover the following defense costs: (1) reasonable costs and expenses incurred in the investigation, adjustment, or defense of the claim;<sup>151</sup> (2) interest on judgments;<sup>152</sup> (3) reasonable attorneys' fees;<sup>153</sup> and (4) appeals.<sup>154</sup>

As a general matter, the insurer has a duty to defend the policyholder for any covered claim.<sup>155</sup> Depending on the policy, it may also require the insurer to defend claims even when the allegations against the policyholder (1) state a claim that might be a covered claim,<sup>156</sup> or (2) raise both covered claims and claims not covered by the policy.<sup>157</sup> Two of the policies--Allied World and CNA--promise to defend the policyholder even if the allegations in a claim, suit, or other covered proceeding are groundless or fraudulent.<sup>158</sup> Because of the definitions of the terms "claim," "suit," or "proceeding," the allegations must relate to negligent acts, errors or omissions.<sup>159</sup> Moreover, with the exception of "Divorce Mediation Services" \*103 under the Allied World policy, the allegations must likely involve professional services performed in the policyholder's profession-of-origin.<sup>160</sup>

## ii. Defense Costs as "Inside" or "Outside" the Policy Limits

In addition, policy provisions governing the duty to defend typically will indicate if defense costs "erode" the money available to pay a judgment or settlement.<sup>161</sup> All three policies analyzed provide that defense costs are "outside" the policy limits and so provide monies in addition to the money available to pay claims.<sup>162</sup>

## iii. Settlement Obligations

Malpractice policies typically give the insurer great control over the timing and amount of any settlement of the claim. Some policies--like the CNA policy-- do not require the policyholder to agree to the settlement with any third-party claimant.<sup>163</sup> The Philadelphia Insurance policy seeks the insured's consent, but the insurer must wait a reasonable period of time to get that consent. If the insured does not consent to the offered settlement, the insurer's obligation ends with the payment of the limits of liability and incurred defense costs.<sup>164</sup> In addition, under two policies--Philadelphia Insurance and CAN--the insurer can settle and "tender the defense" to the policyholder and thereby make the policyholder responsible for further defense of the claim.<sup>165</sup> The Allied World policy seeks written consent to settle from the insured, but the insured's failure to accept a settlement triggers arbitration.<sup>166</sup>

## iv. Choice of Defense Counsel

"Some mediators, facing career-threatening claims, may wish to play an important role in choosing their defense counsel. Dr. Fremed certainly had that expectation."<sup>167</sup> However, Philadelphia Insurance, Allied World, and CNA keep the right to choose defense counsel for themselves, without input from the policyholders.<sup>168</sup>

## \*104 v. Defense Costs Associated with Depositions or Subpoenas

Mediators may also be concerned about the cost of keeping confidential mediation communications beyond the reach of a discovery or trial subpoena, by defending against a request or subpoena for documents, a motion to compel, or a deposition.<sup>169</sup> All three policies analyzed have an additional benefit to cover the defense of a discovery deposition.<sup>170</sup> Two policies cover the defense of a document subpoena.<sup>171</sup> One policy covers defense costs of a deposition or document request in "any proceeding."<sup>172</sup> Two policies require that the insured not be a party to the litigation.<sup>173</sup>

## vi. Defense of Ethics Grievances and UPL Disciplinary Proceedings

The profession-of-origin policies may also provide a defense of certain licensing or disciplinary proceedings held before various types of regulatory bodies, including: a “state licensing board,”<sup>174</sup> “regulatory body,”<sup>175</sup> “licensing board” or “agency;”<sup>176</sup> “state or federal administrative agency;”<sup>177</sup> or “licensing or regulatory authority.”<sup>178</sup> As a general matter, the claim must arise from professional services relating to the policyholder's profession-of-origin.<sup>179</sup> However, a court might read the policies as requiring a defense in hearings that raise issues of professional misconduct as a mediator, depending on whether mediation is a profession insured by the policy.<sup>180</sup> These sections of the policy again require a careful parsing of the language creating the duty to defend, any limitations on that \*105 duty, and any definitions of terms used in outlining the scope of the duty to defend.

Taken together, the terms of the duty to defend found in most policies would likely preclude any defense of an ethics grievance or a UPL disciplinary proceeding brought against a mediator. Mediators would also most likely bear the cost, time, and stress of defending the confidentiality of mediation communications because the policies do not cover professional acts as a mediator. The only exception is the Allied World's coverage for “Divorce Mediation Services.” However, even under that policy, ethics grievances and UPL claims would need to raise issues of negligence to trigger the policy.

### I. Endorsements to Fill Gaps in the Coverage Provided

My research of the profession-of-origin policies also indicates insurers are not offering gap-filling endorsements to any extent, and certainly none that expand the scope of coverage to general mediation practices.<sup>181</sup> Allied World does offer, for the payment of an additional premium, an increase in the limits on the defense cost benefit, up to \$150,000, for licensing board hearings.<sup>182</sup>

## VI. Conclusions and Recommendations

The analyses found in Appendices A to C of this article clearly shows that profession-of-origin policies typically:

- Are fraught with coverage ambiguities that invite coverage disputes;
- Limit coverage to acts committed while the policyholder is engaged in his or her profession-of-origin, but not as a mediator, unless engaged in “Divorce Mediation Services” under the Allied World policy;
- Do not define profession-of-origin to expressly exclude, or include, the services of a mediator;
- Cover only negligent acts, errors, or omissions;
- May cover acts leading to bodily injury or property damage claims if they occurred on the premises of the policyholder;
- Cover assault to the insured, but limit where the covered assault must occur;

- Offer a limited deposition defense benefit;

**\*106** • Expressly exclude liability coverage for claims arising from:

- o Acts committed outside the listed profession-of-origin;

- o Intentional acts;

- o Criminal, dishonest, fraudulent, or malicious acts or omissions;

- o Fines, penalties, or sanctions;

- o Agreements or contracts;

- o Fee disputes;

- o Discrimination; and

- o Professional services when the policyholder is not properly licensed or certified to perform those services as required by state laws;

- Limit the amount of, or exclude, legal expenses incurred in defending against ethics grievances and UPL disciplinary proceedings; and

- Would not cover the defense costs incurred in keeping mediation communications confidential, under most policies.

Mediators entering the field from the mental healthcare profession must recognize that, apart from policies like the Allied World policy, their profession-of-origin policies provide little, if any, coverage of claims arising from the services they provide as mediators. As Dr. Fremed learned, even the specialized insurance provided by Underwriters will not provide peace of mind for

mediators with active practices, especially if they deal with high conflict personalities<sup>183</sup> who may be likely to bring a claim against the mediator.

In short, mediators coming into the field from the mental health profession are likely to think that their profession-of-origin policies will protect them if a claim arises. They would be wrong under most policies issued to them. Accordingly, members of the mediation community must communicate with insurers to get the kind of insurance that will provide meaningful coverage for mediators, with clearer language, fewer coverage ambiguities, more coverage options; and with a duty to defend ethics grievances, UPL disciplinary proceedings, and subpoenas seeking confidential mediation communications. Otherwise, risk tolerant mediators must rationally decide to self-insure against possible claims.

## \*107 Appendix A

### Connecticut Marriage & Family Therapist's Professional Malpractice Insurance Policy Provided by Philadelphia Insurance Companies

Philadelphia Insurance provided Dr. Fremed<sup>184</sup> with its “Allied Healthcare Providers Professional and Supplemental Liability Insurance Policy.”<sup>185</sup> When carefully analyzed, the policy offers little coverage, if any, for therapists working as mediators.

#### I. Coverage Provisions of the Philadelphia Insurance Policy

##### A. Professional Liability

The coverage section of this policy provides:

##### a. Coverage A - Professional Liability

We will pay on your behalf those sums that you become legally obligated to pay as *damages* because of a *professional incident* that takes place in the coverage territory and occurs during the policy period. *The professional incident must result from the practice of the profession shown in the Declarations.* This [coverage] includes services performed by you as a member of a credentialing group or utilization review panel, as a case management reviewer or clinical evaluator, or as a member of a board or committee of a hospital or professional society where similar services are performed by you.<sup>186</sup>

Like the Allied World<sup>187</sup> and CNA<sup>188</sup> policies discussed in Appendices B and C, this policy section delineates the types of professional activities or roles that give rise to coverage but excludes any specific reference to mediation. By doing so, the insurer could argue that the policy does not cover “professional incidents” arising in mediation, especially when the profession shown in the Declarations does not mention mediation.<sup>189</sup> Also note that the list of covered professional services does not include mediation.

\*108 The Declarations page (also known as a “Certificate of Insurance”) appears as the first page on an issued policy. It specifies the name and contact information for the policyholder, the policy period, and the dollar limits of coverage for the various coverage benefits offered. It also identifies the location of the insured business or property. Thus, the information appearing on the “Dec page” varies from one insured to the next. In the Philadelphia Insurance and CNA policies,<sup>190</sup> the insurer uses this page to designate the insured professions or specialties covered.



In the case of the Connecticut therapist-mediator, Dr. Fremed, the Declarations page listed the insured profession as: “Marriage & Family,” perhaps a sufficiently ambiguous term that could also cover marriage- and family-related mediation.<sup>191</sup> It notes, however, an affiliation with “AAMFT,”<sup>192</sup> which the insurer would no doubt cite to limit the listed profession to family and marriage therapists. In this circumstance, failure to specify or exclude mediation as a covered profession or field of activity invites a coverage dispute. A court might construe that ambiguity against the drafter-insurer to allow coverage of claims not otherwise expressly excluded under the policy language.

Next, the insured must consider any defined terms used in this coverage provision. The policy defines “claim” as “a demand ... for damages.”<sup>193</sup> In turn, it defines “damages” as “a monetary: 1. Judgment; 2. Award, or 3. Settlement, but does not include fines, sanctions, penalties, punitive or exemplary damages or multiple portion of any damages.”<sup>194</sup> \*109 Thus, like the Allied World<sup>195</sup> and CNA<sup>196</sup> policies, this policy limits coverage to claims seeking monetary damages. As discussed in more detail later in this article, this policy excludes claims imposing fines, seeking the restitution of fees, or seeking non-monetary relief or corrective action. If the policy does not cover a claim, the claim does not trigger any duty to defend.<sup>197</sup>

The Philadelphia Insurance policy defines “professional incident” as:

[A]ny actual or alleged *negligent*:

1. Act;
2. Error; or
3. Omission;

in the actual rendering of *professional services* to others in your capacity as an insured including professional services performed as a member of a credentialing group or utilization review panel, as a case management reviewer or clinical evaluator, or as a member of a board or committee of a hospital or professional society where similar services are performed by you.<sup>198</sup>

Thus, like the Allied World<sup>199</sup> and CNA<sup>200</sup> policies, this policy limits coverage to claims based on negligence. As noted in my earlier article, a number of claims a party could bring against a mediator would not involve professional \*110 negligence.<sup>201</sup> For example, the policy would not cover claims arising from intentional breach of impartiality or neutrality, intentional infliction of emotional distress, conspiracy, or when a mediator is accused of assisting in a crime or fraud.<sup>202</sup>

One more complicating term exists. The policy does not define “professional services.”<sup>203</sup> Accordingly, a policyholder might argue that they include mediation services. However, the reference to the “practice of the profession shown in the Declarations” in the coverage provision itself could limit a more expansive reading of the policy.<sup>204</sup>

In summary, the professional liability coverage provision limits coverage to claims of negligence that seek monetary damages in the nature of a court judgment, arbitral award, or settlement. The claims must likely arise from professional services tied to the profession listed on the Declarations page.

## **B. Bodily Injury and Personal Injury**

Like the Allied World policy,<sup>205</sup> the coverage section of the Philadelphia Insurance policy provides coverage for bodily injury. Like the CNA policy,<sup>206</sup> the Philadelphia Insurance policy covers personal injury. Those sections of the Philadelphia Insurance policy state:

#### **b. Coverage B - Supplemental Liability**

(1) Bodily Injury and Property Damage Coverage[:] We will pay on your behalf those sums that you become legally obligated to pay as *damages*, other than those for which coverage is provided under Coverage A, for *bodily injury* or property damage that takes place in the coverage territory and occurs during the policy period. *It must result from a professional incident that arises out of the profession shown in the Declarations.*

(2) Personal Injury Coverage[:] We will pay on your behalf those sums that you become legally obligated to pay as *damages*, other than those for which coverage is provided under Coverage A, for personal injury that takes place in the coverage territory and occurs during the policy period. *It must result from a professional incident that arises out of the profession shown on the Declarations.*<sup>207</sup>

\*111 The Philadelphia Insurance policy defines “bodily injury” broadly as “bodily injury, sickness or disease ... including death ....”<sup>208</sup> It limits the personal injury coverage to a short list of injuries arising out of false arrest, detention, imprisonment, malicious prosecution, wrongful evictions, invasions of premises, slander and libel, or violations of a person's right of privacy.<sup>209</sup> Both sections limit coverage to a “professional incident” tied to the profession indicated on the Declarations page.

Thus, the policy provides coverage not available to lawyers for bodily injury, as I described in my earlier article.<sup>210</sup> But, to trigger that coverage, the policyholder would likely need to list mediation as an additional profession on the Declarations page.

#### **C. Assault**

The Philadelphia Insurance policy also covers assault. Under the section describing “Additional Policy Benefits,” the insurer agrees: “We will pay for expenses you incur, up to \$15,000 for bodily injury to you or property damage to your personal property ... resulting from an assault on you while traveling to and from your place of employment.”<sup>211</sup> Unlike the CNA policy,<sup>212</sup> which covers assaults occurring at the workplace, this coverage is limited to assaults on the policyholder while traveling to and from the workplace.

In summary, the limit of coverage to professional incidents, then defined as negligent acts, errors, or omissions occurring in the practice of the profession designated in the Declarations, presents the biggest hurdle to coverage under this policy for the therapist-mediator. The definitions of \*112 “claim” or “damages” limits covered claims to those that give rise to monetary awards from judgments, arbitration awards, and settlements. Some malpractice claims might satisfy these definitions.<sup>213</sup> However, ethics grievances and UPL disciplinary proceedings resulting in a monetary sanction would not likely qualify for coverage especially when the definition of “damages” expressly excludes fines, sanctions, penalties, or punitive and exemplary damages.<sup>214</sup> The policy does not likely cover ethics grievances and UPL disciplinary proceedings that result in a non-monetary sanction because they do not result in a monetary judgment, award, or settlement.

## II. Exclusions of the Philadelphia Insurance Policy

Subsection 2 of the Coverage section sets out several exclusions that could quickly take away any coverage that may possibly exist for many malpractice claims, ethics grievances, or UPL disciplinary proceedings involving mediators.<sup>215</sup>

### \*113 A. *Acts Committed Outside the Profession Listed on Declarations Page*

First, the policy excludes coverage of claims arising out of services provided in a capacity other than the profession specified in the Declarations.<sup>216</sup> Accordingly, the policy could expressly exclude coverage of malpractice claims incident to a mediation practice if the insured does not allow the policyholder to list this additional practice area on the Declarations page.<sup>217</sup>

### B. *Criminal or Intentional Acts*

Like the exclusions found in all the other policies analyzed in this article,<sup>218</sup> the Philadelphia Insurance policy excludes coverage for any malpractice claim based on an intentional,<sup>219</sup> criminal, dishonest, fraudulent, or malicious act.<sup>220</sup> Insurance policies, as a matter of public policy, exclude these types of claims.<sup>221</sup> Policyholders cannot engage in deliberate acts or decisions that produce a known consequence or predictable damage to someone else. Public policy precludes an insured from acting wrongfully and expecting an insurance company to pick up the cost of the resulting loss.<sup>222</sup> Thus, liability policies insure unanticipated losses that typically arising from an accident or act of negligence.<sup>223</sup> As one treatise explains: “Every modern insurance policy - it is impossible to think of an exception - has some kind of language that purports to put intentional conduct outside coverage ....”<sup>224</sup> Thus, the policy would likely exclude coverage for many of the claims a party might bring against a mediator that arise from intentional acts.<sup>225</sup> It would exclude, for example, claims alleging intentional breach of impartiality or neutrality, intentional infliction of emotional distress, conspiracy, and claims that a mediator has assisted a crime or fraud.<sup>226</sup>

### \*114 C. *Fines, Penalties, or Sanctions*

As noted in my earlier article, disciplinary agencies can impose sanctions that might involve fines, restitution, or a non-monetary sanction.<sup>227</sup> This policy excludes coverage of fines through the definition of covered “damages” associated with a claim. That definition excludes “fines, sanctions, penalties, punitive or exemplary damages or multiple portion of any damages.”<sup>228</sup> Thus, any fine or sanction would not trigger coverage under this policy when imposed by a disciplinary or regulatory agency that regulates mediator ethics or hears UPL allegations.

### D. *Claims Based on Contract*

Like the exclusions found in the other policies analyzed in this article,<sup>229</sup> one exclusion found the Philadelphia Insurance policy would likely preclude coverage of malpractice claims alleging any breach of the agreement to mediate.<sup>230</sup> The policy excludes “any liability you assume under any contract or agreement.”<sup>231</sup> Thus, for example, the policy would exclude claims alleging negligent disclosure of confidential communications in violation of the promises the mediator made in the agreement to mediate.<sup>232</sup>

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

The Philadelphia Insurance policy, like the other policies analyzed,<sup>233</sup> would likely exclude coverage of any ethics grievance in which a regulatory body requires the mediator to repay any fees charged to the complaining party.<sup>234</sup> It would also exclude coverage for a malpractice claim \*115 based on allegations that the mediator wrongly billed or charged fees to the complaining party.<sup>235</sup>

### ***F. Discrimination by the Insured***

The Philadelphia Insurance policy could exclude claims when an unhappy party alleges that the mediator showed bias or favoritism towards one party, or lost his or her neutrality because of the race, gender, nationality, or the sexual orientation of one of the parties.<sup>236</sup> The policy does not cover claims based on “discrimination,” even though it does not define the term.<sup>237</sup> All the policies analyzed in this article have similar exclusions of discrimination claims.<sup>238</sup>

### ***G. Claims Based on Improper or Suspended Licensing***

The policy is not clear about coverage of ethics grievances and UPL disciplinary proceedings. As noted above,<sup>239</sup> the policy may exclude them because grievance and disciplinary proceedings do not typically end with monetary compensation or “sums that you become legally obligated to pay as damages ....”<sup>240</sup> The exception might be an ethics grievance resulting in a sanction requiring the reimbursement of the costs of the disciplinary process.<sup>241</sup>

An exclusion to the Philadelphia Insurance policy offers additional information.<sup>242</sup> The exclusion is similar to the one on which Underwriters' counsel relied in denying coverage under its policy to Dr. Fremed for her UPL claim.<sup>243</sup> The Philadelphia Insurance policy excludes coverage of “any claim arising from professional services that you provide when ... [y]ou are not properly licensed ... or [if] [s]uch services are not authorized or permitted by the laws of the state(s) in which your professional services are provided.”<sup>244</sup> An insurer would likely argue that a court should broadly construe the word “laws” to include statutes, rules, regulations, or other sources of legal authority that would govern UPL in any state.<sup>245</sup> As a result, the policy would cover few, if any, of the UPL claims a therapist- \*116 mediator would likely face. Neither the Allied World nor CNA policies, discussed below,<sup>246</sup> have this type of provision.

On the other hand, the Philadelphia Insurance policy does not exclude claims resulting from professional services provided when the policyholder's license is suspended, revoked, or no longer valid, nonetheless, a court would likely read the exclusion broadly to prevent coverage.<sup>247</sup> The Allied World<sup>248</sup> and CNA<sup>249</sup> policies expressly exclude claims when the policyholder's license is suspended, revoked, or no longer valid.

## **III. “Other Insurance” Clause of the Philadelphia Insurance Policy**

Insurers use “other insurance” clauses to limit the risk that two or more insurers will pay the policyholder for the same claim under separate policies.<sup>250</sup> Generally, three forms of “other insurance” clauses exist: excess, escape, and pro rata clauses.<sup>251</sup>

Using more complicated language than appears in any other policy analyzed in this article, the Philadelphia Insurance policy limits its coverage, under Coverage A, to “excess” of any coverage provided by any other policies issued to the insured.<sup>252</sup> An “excess other insurance” clause provides coverage only if the loss exceeds the limits of liability of any other \*117 applicable insurance policy.<sup>253</sup> In this way, the coverage limitation mirrors those found in the Allied World<sup>254</sup> and CNA<sup>255</sup> policies discussed below. It pays only after all the other applicable policies pay out their limits of liability.

On the other hand, Philadelphia Insurance uses a combination “escape/excess” clause for Coverage B claims.<sup>256</sup> Accordingly, to trigger coverage under this clause, the insured would need to show that no other insurer is liable for the claim or that the total liability for the claim exceeds the coverage provided by any other policy held by the insured. Only then would the Philadelphia Insurance policy pay the claim, and then only to the extent the claim exceeded the amount available under any other insurance policy.<sup>257</sup> In addition, this policy clarifies the relationship between its coverage and the deductibles and self-insurance the insured has under other policies. The policy operates as excess to those obligations.<sup>258</sup> Thus, the policy becomes a policy of last resort, which likely does not reflect the reasonable expectations of the insured.<sup>259</sup>

#### IV. Duty to Defend, Settlement Obligations, and Choice of Defense Counsel Under the Philadelphia Insurance Policy

As noted above, the typical insurance policy promises three things: 1. payment of covered claims seeking damages, 2. the insurer's defense of those claims, and 3. a good faith attempt to settle the claims.<sup>260</sup> In meeting its duty to defend, the insurer will provide an attorney to handle the investigation, trial-related discovery, trial, and possibly an appeal. The policy will typically explain what defense costs are covered. It also describes whether they “erode” the limits of liability or are outside those limits.<sup>261</sup>

##### A. *Duty to Defend*

The Philadelphia Insurance policy provides a defense benefit in three contexts relevant to this discussion. First, the insurer provides a general defense of claims by promising to “pay, with respect to any claim or suit we defend: 1. All expenses we incur including defense costs .... 3. All \*118 reasonable expenses incurred by you at our request to assist us in the investigation or defense of the *claim* or *suit* .... 4. All costs taxed against you in the *suit*,” and pre- and post-judgment interest as specified in the policy.<sup>262</sup>

The policy expressly covers “[a]ll expenses we incur, including defense costs.”<sup>263</sup> The policy does not further define defense costs. “Claim,” as noted above, requires a demand for damages.<sup>264</sup> The policy defines a “suit” as “a civil proceeding in which damages are sought and to which this insurance applies.”<sup>265</sup> Accordingly, an ethics grievance or UPL disciplinary proceeding would not likely trigger the duty to defend because those proceedings typically do not involve a claim based on negligence seeking damages. More importantly, the exclusion in section I.A.2.a. of the policy states that coverage does not apply for any proceeding not related to the profession shown in the Declarations.<sup>266</sup>

Unlike the Allied World<sup>267</sup> policy and the CNA<sup>268</sup> policy, the Philadelphia Insurance policy provides no explicit defense of groundless or fraudulent claims.<sup>269</sup>

Before I leave this topic, I note that the definition of “suit” includes “an arbitration proceeding in which such damages are sought ... or [a]ny other alternative dispute resolution proceeding in which such damages are sought ....”<sup>270</sup> The policy does not define the terms “arbitration proceeding” or an “alternative dispute resolution proceeding.”<sup>271</sup> Many ethics grievances or

UPL disciplinary proceedings could be characterized as *arbitral* \*119 in nature within the definition of “suit.”<sup>272</sup> The rules of some ethics grievance proceedings also contemplate the use of mediation or facilitated discussions to resolve grievances.<sup>273</sup> However, two limitations would typically exclude ethics grievances and UPL disciplinary proceedings from coverage. First, the proceeding must involve a demand for “damages.” Second, the claim must arise from the practice of the profession-of-origin listed on the Declarations page.

The Philadelphia Insurance policy provides unlimited defense expense coverage.<sup>274</sup> Therefore, like the Allied World<sup>275</sup> and CNA<sup>276</sup> policies, defense costs are “outside” the policy’s limits of coverage and do not erode the money available to pay a judgment or settlement.<sup>277</sup>

The insured must cooperate in the defense of the claim.<sup>278</sup> All the policies analyzed in this article impose this requirement.

### ***B. Settlement Obligations***

Philadelphia Insurance gives notice to the policyholder that if he or she refuses to consent to a recommended settlement “within a reasonable period of time,” the insurer will limit its liability to the amount “for which the claim could have been settled, plus the costs of defense incurred by us up to the date of such refusal.”<sup>279</sup> Unlike Allied World,<sup>280</sup> Philadelphia Insurance does not expressly tender the defense to the policyholder when he or she refuses a settlement offer.<sup>281</sup> The policy, instead, states that the insurer will not pay any more defense costs if the insured does not accept a recommended settlement offer.<sup>282</sup> The policyholder would then need to fund the defense costs.

### **\*120 *C. Choice of Defense Counsel***

Like the Allied World<sup>283</sup> and the CNA<sup>284</sup> policies, the Philadelphia Insurance policy reserves the choice of defense counsel to the insurer.<sup>285</sup>

### ***D. Defense of Depositions and Subpoenas***

Like Allied World<sup>286</sup> and CNA,<sup>287</sup> Philadelphia Insurance provides a “Deposition Expense” benefit as an additional policy benefit. Thus, Philadelphia Insurance provides a defense in a second context. The coverage, however, is more comprehensive than in the other policies. The policy provides: “We will pay for the reasonable legal expenses incurred by you for appearance at a deposition to which you are required to submit, and that involves the professional occupation shown in the Declarations.”<sup>288</sup> Thus, it would cover depositions of therapists acting as therapists, but would not likely cover depositions of therapists acting as mediators if the insurer has not listed mediation as an additional profession on the Declarations page. This benefit would not extend to trial testimony about the mediated settlement agreement or confidential mediation communications.

The policy caps the benefit at \$10,000 per “professional incident” and at \$35,000 for any one deposition.<sup>289</sup>

In short, Philadelphia Insurance will not likely cover the cost of resisting a subpoena, motion to compel, or court order seeking the disclosure of confidential mediation communications.

**\*121 E. Defense of Disciplinary Proceedings**

Disciplinary proceedings offer a third context for the duty of defense. Like the Allied World<sup>290</sup> and CNA<sup>291</sup> policies, the Philadelphia Insurance policy, under a separate provision entitled “Additional Policy Benefits ... State Licensing Board Investigation Expenses,” covers reasonable expenses of an investigation by a “state licensing board or other regulatory body” if the events at issue could result in “claims” covered by the policy.<sup>292</sup> The use in this provision of the term, “state licensing board,” suggests that mediators subject to state certification, rostering, or registration who face an ethics grievance might find coverage for the expense of responding to the grievance. The additional use of the broader language “regulatory body” suggests the policy might cover UPL disciplinary proceedings. Interestingly, the policy fails to define either term and does not describe the benefit in the detail found in the Allied World<sup>293</sup> and CNA<sup>294</sup> policies.

Several barriers exist to coverage of mediation-related proceedings under this provision. First, the definition of “claim” as a “demand ... for damages” would likely exclude coverage for any ethics grievance or UPL disciplinary proceeding. Second, to trigger coverage, the insurer likely must agree to include mediation as one of the professions appearing on the Declarations page.<sup>295</sup>

Finally, neither an ethics grievance nor a UPL proceeding would trigger a duty to defend. The policy only covers expenses needed to defend “claims.”<sup>296</sup> Thus, like Dr. Fremed, the insured must arrange and manage the defense in these types of proceedings.<sup>297</sup>

**\*122 F. Summary of Defense Obligation of the Philadelphia Insurance Policy**

In summary, Philadelphia Insurance will provide an attorney and cover the costs of defending claims, in court or in arbitration, for monetary damages involving an act, error or omission based on professional negligence. Groundless or fraudulent claims do not clearly trigger the insurer's duty to defend, thereby creating the possibility of a coverage dispute similar to the one Dr. Fremed faced. Defense costs associated with covered claims do not erode the limits of liability. They are an additional benefit. The insured must cooperate in the defense. Furthermore, the insurer pressures the insured to consent to a reasonable offer of settlement, unless the insured wants to cover the costs of the defense himself thereafter. The insurer will choose defense counsel without consulting with the insured.

The policy offers covers the cost of defending a deposition but does not cover the cost of trial testimony, or of defending subpoenas, motions to compel, or court orders seeking confidential mediation communications. Finally, the policy will cover the costs of defending a claim for damages resulting in an investigation by a “state licensing board or other regulatory body.” Even then, the insured must arrange for the defense by retaining his or her own counsel.

**V. Endorsements to Fill Gaps in the Policy's Coverage**

The agent's website does not show any available mediation-related endorsements.<sup>298</sup> As noted briefly above, endorsements allow the insurer or policyholder to expand or modify the coverage, benefits, or terms offered by the standard policy. They act as “mini-policies” to enhance the policy and to provide coverage that is typically more comprehensive.<sup>299</sup> Each endorsement can lead to conflicts between the terms of the standard policy and the endorsement when not drafted carefully.

**VI. Conclusions About the Coverage Provided by the Philadelphia Insurance Policy**

A therapist-mediator hoping to find coverage for any claims relating to his or her mediation practice should not look to this type of policy for that coverage. The first gateway issue for coverage arises under the definition of “covered professional incidents”, which is limited to a “negligent” act, error, or omission.<sup>300</sup> Thus, the coverage provisions would not cover all \*123 types of malpractice claims a mediator might face.<sup>301</sup> Earlier, I listed the intentional acts that this language would likely not cover.<sup>302</sup>

The exclusions further limit coverage by excluding claims relating to intentional, criminal, dishonest, fraudulent, or malicious conduct; fines, penalties, and sanctions; fees; and discrimination. Overall, the language found in the Declarations, coverage provisions, and exclusions has sufficient ambiguity to invite a coverage dispute, and a court could easily read the terms as excluding coverage for mediators.

As the second gateway issue, the policy expressly limits coverage to the profession named in the Declarations. At the same time, coverage is limited to “professional services,” a phrase the policy does not define.<sup>303</sup> The ambiguity of the undefined term in this context clearly raises the risk of a coverage dispute. If an interpreting court applied a broader definition of the term, it might include mediation services provided by a therapist. However, ethics codes applying to mediators would cut the other way. They typically prevent a person from mixing professional roles.<sup>304</sup> The insurer would undoubtedly argue that the therapist-mediator is using a distinct set of skills, knowledge, and labor when functioning as a mediator. Accordingly, an insurer would argue that the policy does not cover acts, errors, or omissions arising from services outside the “practice of the profession shown in the Declarations.”<sup>305</sup>

The policy further limits the insurer's obligation to defend a mediator or to pay the costs of defense to “professional incident[s]” involving the profession named in the Declarations. However, if the insurer agrees to list mediation on the Declarations page, the insured would have a deposition cost benefit for disciplinary proceedings. Finally, the insurer does not offer endorsements that would close these gaps in coverage.

## **\*124 Appendix B**

### **Maryland Psychologists' Professional Malpractice Insurance Policy Provided by Allied World Insurance**

This appendix analyzes the policy used by Allied World Insurance (Allied World) under its program for psychologists.<sup>306</sup> It offers coverage in 50 states.<sup>307</sup> In this article, I analyze the policy available in Maryland because it expressly offers coverage for “Divorce Mediation Services,” but not other mediation services, and then only if the insured meets three conditions.<sup>308</sup> This additional coverage is buried in an exception to an exclusion. Therefore, I will discuss this mediation coverage when I discuss the policy exclusions.

#### **I. Coverage Provisions of the Allied World Policy**

##### ***A. Professional Liability***

The coverage section of the Allied World policy<sup>309</sup> approximates the coverage offered under the Philadelphia Insurance<sup>310</sup> and CNA<sup>311</sup> policies. The coverage provisions state: “[t]he Insurer will pay on behalf of the Insured ... the Damages arising from any Claim ... for a Professional Incident.”<sup>312</sup> The policy uses slightly different language from the language used in the Philadelphia Insurance policy,<sup>313</sup> but the effect of the terms remains similar in limiting coverage.



The Allied World policy defines “Damages” as settlements, judgments, pre- and post-judgment interest, and “costs and fees awarded in favor of a claimant.”<sup>314</sup> The definition sets out certain exceptions that I will discuss in the next section of the article. Thus, the term does not include:

(a) amounts for which the Insureds are not legally liable;

\***125** (b) amounts which are without legal recourse to the Insureds;

(c) taxes;

(d) the return, restitution, refund, or disgorgement of fees, profits or amounts charged, held or retained by the Insured in connection with the rendering of Professional Services.

(e) fine or penalties, except:

(i) as provided for in Section V.D.; or

(ii) HIPPA fines and penalties, but solely under Insuring Agreement C.(1); or

(f) amounts deemed uninsurable under applicable law.<sup>315</sup>

The policy defines “Claim” as a:

(1) written demand for monetary relief made against an Insured;

(2) judicial proceeding which is commenced against an Insured by service of a civil complaint ... or similar pleading;

(3) arbitration proceeding .... or

(4) administrative proceeding or formal investigation commenced by a Regulator, but solely as respects Insuring Agreement C.<sup>316</sup>

Thus, as with the Philadelphia Insurance<sup>317</sup> and CNA<sup>318</sup> policies, the coverage is limited to claims seeking money damages that result in a court judgment or settlement. As noted later, the policy would not cover claims for fines and penalties, or restitution of fees.<sup>319</sup> It, however, does not clearly exclude non-monetary sanctions that a disciplinary committee might impose on a mediator.<sup>320</sup>

Next, the policy defines “Professional Incident” as “any actual or alleged *negligent* act, error, or omission, solely in the performance of, or actual or alleged failure to perform, Professional Services as a Psychologist.”<sup>321</sup> By limiting liability coverage to negligent acts, errors, or omissions, this provision would severely limit the scope of coverage for claims a mediator might face.<sup>322</sup> Accordingly, this limitation mirrors the limitations found in the Philadelphia Insurance<sup>323</sup> and CNA<sup>324</sup> policies. Some claims \***126** against a mediator could involve intentional, dishonest, or even criminal acts, which these policies do not cover.<sup>325</sup> For examples of these types of claims, see my earlier article.<sup>326</sup>

The Allied World policy then defines “Professional Services” as:

[A]ll mental health related services rendered by the Insured ... including but not limited to the following:

(1) services as a member of a formal accreditation, credentialing or standards review or similar professional board or committee;

(2) the publication of articles books, and broadcasting or telecasting activities directly relating to Professional Services;

(3) formal clinical teaching activities/clinical trials.<sup>327</sup>

The policy closes this loop by defining “Psychologist” as:

[A]n individual with a master's degree or doctorate in psychology by an accredited college or university, and who is licensed or certified, as applicable, by the appropriate State Licensing Board or other governmental regulatory body, to engage in the practice of psychology, as defined by state laws and regulations. Where used throughout the Policy, the term Psychologist shall be deemed to include a Mental Health Counselor.<sup>328</sup>

The policy defines “Mental Health Counselor” as including the following professions: “mental health counselor, social worker, pastoral counselor, hypnotist, psychoanalyst, psychotherapist, life coach or marriage and family counselor, as defined by state laws and regulations, or any individual practicing other mental health disciplines, as approved by the Insurer.”<sup>329</sup> Clearly missing from this list is any mention of mediators.

Thus, nothing in this coverage section suggests that a psychologist operating as a mediator would find coverage under this policy. It limits coverage to conduct as a psychologist or mental health provider. The coverage provisions severely limit coverage of claims the psychologist-mediator is likely to face by constraining coverage through the definitions of “Damages,” “Claim,” “Professional Services,” “Psychologist,” and “Mental Health Counselors.” It covers claims for negligence seeking monetary damages for mistakes made in the profession of psychologist or mental health counselor. Instead, we must find some coverage for mediation \*127 later in the policy.<sup>330</sup> An exception to an exclusion creates coverage for “Divorce Mediation Services” when mediators meet three conditions of practice.<sup>331</sup>

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

Unlike the policies available to lawyer-mediators<sup>332</sup> and the CNA policy,<sup>333</sup> but like the policy of Philadelphia Insurance,<sup>334</sup> this policy provides coverage for bodily injury caused by a patient or an immediate family member of the patient. This added coverage clearly reflects the different risks psychologists face in their profession. The policy provides: “[t]he Insured will pay ... the Damages arising from a Claim ... for *Bodily Injury* suffered by a Business Invitee or Property Damage, where such Bodily Injury or Property Damage was caused by an *Occurrence* .... The *Occurrence* must take place on the *Business Premises* ....”<sup>335</sup>

“Bodily injury” is defined as “bodily harm, sickness, or disease, including any resulting death, and mental anguish or emotional distress, resulting therefrom.” “Occurrence” is then defined as “an accident”.<sup>336</sup> The policy defines “Business Premises” as the “location owned, leased, or rented by the Insured where Professional Services are rendered, and the ways and means immediately adjacent thereto, and may include the Insured's residence if Professional Services are regularly rendered at such residence.”<sup>337</sup> Accordingly, the policy will cover a claim in which a third-person is hurt from an accident that happens at your workplace.

Allied World does not have a separate provision governing personal injury, as does the Philadelphia Insurance<sup>338</sup> and CNA policies.<sup>339</sup> Instead, it covers some personal injury claims under a “Personal or Advertising Injury” clause<sup>340</sup> and an “Information Privacy Liability” clause.<sup>341</sup>

### C. Assault

This policy creates coverage for the medical expenses or personal property damage caused by an assault or battery to the insured. The policy provides:

\*128 The Insurer will reimburse the Insured for medical expenses that the Insured incurs as a result of Bodily Injury caused by an Assault or Battery, or Property Damage to the Insured's personal property if caused by an Assault or Battery. The Assault or Battery must be committed by a patient or client of the Insured [or by a family member of a patient or client].<sup>342</sup>

The assault or battery must occur “during the Insured's rendering of Professional Services.”<sup>343</sup> But, unlike the Philadelphia Insurance policy that limits coverage to assaults happening during travel to and from the workplace,<sup>344</sup> and unlike the CNA policy that limits coverage to assaults in the workplace,<sup>345</sup> this policy does not have a location limitation.

As I write this, I am thinking of the episode of *The Sopranos* in which Tony Soprano angrily flips and shatters his therapist's glass table top and charges her when she tries to pursue analyzing his relationship with his mother.<sup>346</sup> In a later episode, he admits he would like to turn the therapist's face into a “hamburger.”<sup>347</sup> Does this provision of the insurance policy cover a client's outburst in his therapist's office when it leads to property damage? Would it also cover the client's destruction of the therapist's vehicle once he is outside the therapist's office? Is the psychologist still rendering Professional Services after the client's departure? Would it cover any damages during the hiatus in their therapeutic relationship? In other words, what is the temporal limit? Now, ask these questions in the context of mediation.<sup>348</sup>

In conclusion, the insurance coverage provided under section I of the Allied World policy will disappoint a psychologist-mediator who hopes to find coverage for the possible claims a mediator will face. While it provides more coverage for bodily injury and assault than similar policies available to lawyers,<sup>349</sup> it still ties coverage to professional services provided by a psychologist or mental health provider. The insured will have to look to other provisions of the policy for protection of his or her mediation practice. Moreover, the definition of “Professional Incident” would exclude coverage for malpractice claims of an intentional nature, because the covered \*129 act, error, or omission must be negligent.<sup>350</sup> The definitions of “Claim” or “Damages” would limit covered claims to those giving rise to monetary awards from judgments, awards, and settlements. Some malpractice claims might satisfy these definitions.<sup>351</sup> However, ethics grievances and UPL disciplinary proceedings resulting in a monetary sanction would not likely qualify for coverage especially when the definition of “damages” expressly excludes fines or penalties.<sup>352</sup> In addition, like the Philadelphia Insurance and CNA policies,<sup>353</sup> this policy does not likely cover ethics grievances and UPL disciplinary proceedings that result in a non-monetary sanction.<sup>354</sup>

## II. Exclusions of the Allied World Policy

### A. Acts Committed Outside the Professions of Psychology or Mental Health Counselor: Exclusion, then Inclusion, of Certain Mediation Services

Not surprisingly, the exclusions in the Allied World policy<sup>355</sup> closely resemble those offered by Philadelphia Insurance<sup>356</sup> and CNA.<sup>357</sup> But, \*130 importantly, the policy contains an exception to exclusion IV.A. (20)<sup>358</sup> that expressly excludes coverage

of mediation services unless they are “Divorce Mediation Services” (an undefined term).<sup>359</sup> Unlike all the other policies I have analyzed<sup>360</sup> -whether for lawyers or mental health providers- this policy expressly references mediation services. The policy, however, excludes coverage for most of those services arising in other areas of mediation, for example, collection, employment, tort, or breach of contract cases. These mediation practice fields, when pursued by a psychologist, create risks that this insurer will not cover.

However, it *will* cover “Divorce Mediation Services” if the insured psychologist meets three practice conditions. I discuss these conditions in the next section of this article.<sup>361</sup>

### ***B. Dishonest, Fraudulent, Criminal, or Malicious Acts***

Unlike the Philadelphia Insurance<sup>362</sup> and CNA<sup>363</sup> policies, this policy does not expressly exclude intentional acts, but the policy makes clear that claims must arise from negligence to trigger coverage.<sup>364</sup> Like the Philadelphia Insurance policy,<sup>365</sup> the Allied World policy excludes coverage of dishonest, fraudulent, criminal, or malicious acts.<sup>366</sup> Accordingly, the policy would clearly exclude many claims against mediators arising from these types of intentional acts.<sup>367</sup>

### **\*131 C. Fines, Penalties, or Sanctions**

Like the other policies analyzed in this article,<sup>368</sup> the Allied World policy excludes claims resulting in fines or penalties that a disciplinary body might impose in an ethics grievance or a UPL disciplinary proceeding. The definition of the term “Damages” expressly excludes these types of claims.<sup>369</sup> Interestingly, and unlike the other policies,<sup>370</sup> this policy does not exclude coverage of “sanctions.”<sup>371</sup> A regulatory body might describe its action in an ethics grievance or a UPL disciplinary proceeding using any of these terms. So, coverage might depend on the language used by that body to define its disciplinary action. In any event, the claim would still need to arise from professional services performed by a psychologist, mental health counselor,<sup>372</sup> or insured providing qualified “Divorce Mediation Services.”<sup>373</sup>

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

Unlike the Philadelphia Insurance<sup>374</sup> and CNA<sup>375</sup> policies, the Allied World policy does not expressly preclude coverage of a malpractice claim based on breach of contract, including, I assume, a breach of the provisions of an agreement to mediate that guarantees the parties confidentiality in the process.<sup>376</sup> Accordingly, a divorce mediator may have coverage for contract-based claims.

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

Section III.G.(d) of the Allied World policy, like the Philadelphia Insurance<sup>377</sup> and CNA<sup>378</sup> policies, would not cover malpractice claims, ethics \*132 grievance proceedings, or UPL disciplinary proceedings that make complaints about the mediator's fees.<sup>379</sup>

### ***F. Discrimination by the Insured***

Like all the other policies analyzed in this article,<sup>380</sup> the Allied World policy excludes claims based on discrimination, an undefined term.<sup>381</sup> It could preclude coverage of claims based on mediator bias or the negligent failure to accommodate the needs of disabled persons.<sup>382</sup>

### ***G. Claims Based on Improper or Suspended Licensing***

Unlike the Philadelphia Insurance policy<sup>383</sup> and like the CNA policy,<sup>384</sup> the Allied World policy does not exclude coverage for claims arising from acts not allowed by the Insured's professional license.<sup>385</sup> For instance, Underwriters denied Dr. Fremed's claim by relying on a provision that excluded claims “[a]rising out of any act, error, or omission in the conduct of professional services for which the insured is not properly licensed where such license is required by applicable law or regulation.”<sup>386</sup> This type of clause can quickly defeat claims for UPL, which by their nature allege that the mediator is not properly licensed to render a legally-related service.

Instead, the Allied World policy, like the CNA policy,<sup>387</sup> excludes any “Claim” or “Proceeding” relating to “any Professional Service that is not allowable since the Insured's professional license or registration to practice is suspended, revoked, terminated, suspended or is not in effect.”<sup>388</sup>

Ethics grievances do not typically involve issues of a valid license to practice mediation. Similarly, UPL claims do not typically involve claims against non-lawyer mediators because of a lapse in the profession-of-origin or mediator license. Instead, they allege that the mediator has offered legal services for which he or she was *never* properly licensed as a lawyer. UPL claims do not typically involve claims of negligence, but instead involve allegations that the accused person intentionally provided legal services he or she was not licensed to provide. Intentional acts are seemingly, although \*133 not expressly, excluded under the policy,<sup>389</sup> while acts of negligence are not.<sup>390</sup> Accordingly, policy coverage may depend on the allegations in the UPL disciplinary proceeding.<sup>391</sup>

Through a careful parsing of this language, a divorce mediator<sup>392</sup> accused of UPL could try to get coverage of the claim under this policy so long as the claim arises from a “negligent act, error, or omission.”<sup>393</sup> The insurer might still have a duty to defend the claim until a court or other disciplinary body ruled on the substantive nature of the alleged acts. For instance, a UPL disciplinary body might accuse a nonlawyer-mediator of giving legal advice to a party without being a licensed attorney. As it turns out, the mediator gave inaccurate advice. In other words, he or she negligently gave advice. The policy might cover that claim and the claim should trigger the duty to defend. Even then, the mediator would still need to show that the claim seeks money damages.<sup>394</sup> On the other hand, I would expect an insurer to argue that all UPL-related claims fall outside coverage because the “Insured's professional license ... is not in effect” for these law-related claims.

In short, a divorce mediator hoping to get coverage of an ethics grievance or a UPL proceeding will not likely find it in this policy. A provision I discuss in the next section, offers a limited duty of defense for certain disciplinary proceedings.<sup>395</sup>

## **III. Conditions of the Allied World Policy**

As noted,<sup>396</sup> the exception to the exclusion found at section IV.A.(20)<sup>397</sup> of the Allied World policy contains three conditions that the policyholder must satisfy to trigger coverage of divorce-related mediation. \*134 The policy will cover a mediator providing “Divorce Mediation Services” if:

(a) prior to providing such services, a written statement to all parties is provided explaining that the Insured is a neutral and unbiased intermediary whom shall not act as an advocate for any one party;

(b) The Insured[,] in fact, act[s] exclusively as a neutral and unbiased intermediary between the parties; and

(c) the Insured, in connection with such Divorce Mediation Services, advises all parties, in writing at the time any settlement or other such agreement is presented to the parties, to have such agreement reviewed independently by counsel of their choice prior to their execution of the agreement.<sup>398</sup>

A mediator could easily fail to satisfy these conditions. If that happened, Allied World could legally refuse to cover the claim.<sup>399</sup> The first condition helps parties understand that the psychologist-mediator will not mix professional roles,<sup>400</sup> and perhaps, more importantly, that the psychologist mediator will not provide legal advice to, or advocate for, any party.<sup>401</sup>

A mediator is unlikely to meet the second condition because it requires neutrality and unbiased conduct “in fact.”<sup>402</sup> Many mediator ethics codes make a distinction between subjective impartiality and objective impartiality, with most codes only requiring the latter.<sup>403</sup> In other words, the codes do not require actual impartiality, but only the appearance of impartiality.<sup>404</sup> So long as the parties perceive the mediator to be unbiased, the mediator satisfies those provisions of the ethics code.<sup>405</sup> Many practitioners and scholars acknowledge that a mediator is not likely to remain unbiased throughout a mediation “in fact.”<sup>406</sup> Some practitioners say that neutrality is not essential to the process and can actually undermine it.<sup>407</sup> A discussion of this topic is far beyond the scope of this article.<sup>408</sup>

\*135 The third condition also raises a practice issue requiring the careful attention of the psychologist-mediator insured by this policy. A few states require a similar disclosure to the parties in the agreement to mediate or in the mediator's opening orientation to the parties to ensure party self-determination.<sup>409</sup> The Allied World policy condition requires the disclosure “in writing at the time such [mediated settlement] agreement is presented to the parties.”<sup>410</sup> Therefore, a cautious mediator will also include this disclosure in the draft mediated settlement agreement as a separate notice to the parties.

Review of the draft mediated settlement agreement by each party's respective counsel ensures that the parties have reached an agreement with informed consent that reflects an understanding of the parties' respective legal rights. By making this disclosure a condition of insurance coverage, Allied World may limit its risk in two ways. First, if the mediator has negligently drafted the agreement, but a party's lawyer has reviewed it, the party to the mediation could sue the reviewing attorney for negligence instead of the mediator.<sup>411</sup> The rationale is that the party's own counsel should have caught the drafting errors and corrected them before the party suffered any compensable damages. If a party to the mediation filed a claim for professional negligence, the attorney's insurer would then cover the claim and its defense, much to Allied World's relief. Second, if the parties do not take the agreement to their own respective counsel, they have assumed some of the risk that the mediator has made a drafting error. In some states, that may limit or preclude the mediator's liability for negligence.<sup>412</sup>

\*136 Interestingly, the “New Business Brochure”--that the insurance agent provides psychologists on its website--responds to this frequently asked question: “Am I covered for practicing Divorce Mediation?” The answer? “Yes. Divorce Mediation is covered as long as practice and treatment are confined to the mental health field.”<sup>413</sup> The brochure may not help define

the scope of coverage, as the answer raises some of the same definitional issues (in reverse) that the UPL paradigm raises.<sup>414</sup> Accordingly, a careful insured will be sure to comply with the three conditions of the policy.

Taken together, the coverage provisions of sections I.A. and I.B., the exclusions, and the exception to Exclusion IV.A.(20) create a confusing coverage picture. The insurer would cover a divorce mediator's negligent acts, errors, and omissions *if* the psychologist-mediator satisfies three conditions. The policy would still exclude many malpractice claims a mediator might face, especially anything deemed an intentional act. Surprisingly, as noted in the discussion of the insurer's duty to defend below, this policy may cover the defense costs for ethics grievances and certain UPL disciplinary proceedings.

#### IV. "Other Insurance" Clause of the Allied World Policy

Like the Philadelphia Insurance Coverage A limitation<sup>415</sup> and the CNA policy,<sup>416</sup> the Allied World policy provides coverage that is in "excess" of any other applicable insurance.<sup>417</sup> Accordingly, the policy pays \*137 out only if the loss exceeds the limits of liability of any other applicable insurance policy.<sup>418</sup>

#### V. Duty to Defend, Settlement Obligations, and Choice of Defense Counsel Under the Allied World Policy

##### A. *Duty to Defend*

The Allied World policy covering Maryland psychologists sets out the insurer's duty to defend in several places and it offers a defense in several contexts. First, section II.A. sets out the general duty of defense of covered claims. It provides:

The Insurer will pay ... the Defense Expenses incurred by the Insured arising from any Claim covered under Insuring Agreement A. [Psychologists' Professional Liability] or B. [General Business Liability].<sup>419</sup>

Because of the various limitations of coverage imposed by the defined terms of "Claim"<sup>420</sup> and "Professional Incident"<sup>421</sup> (used in Insuring Agreement A), only negligent acts, errors, or omissions leading to claims for money damages would trigger the duty to defend.

Section VII of the policy defines the scope of the defense obligation. It requires the defense of any covered claim, even if the claim is "groundless or fraudulent."<sup>422</sup> This provision, similar to provisions found in the CNA policy,<sup>423</sup> provides a defense against groundless or fraudulent claims within the defined scope of coverage.

Section III of the policy defines the term "Defense Expenses" as: "[R]easonable and necessary fees, costs, charges or expenses resulting from the investigation, defense or appeal of a Claim or a Proceeding."<sup>424</sup> Defense costs, however, do not "burn" or "erode" the limits available to \*138 pay claims.<sup>425</sup> The insured must cooperate in the defense at the insurer's request.<sup>426</sup>

##### B. *Settlement Obligations*

Allied World's policy is more protective of the insured's settlement interests than the other policies analyzed in this article.<sup>427</sup> Allied World may settle a claim with the policyholder's written consent if the insurer believes the settlement "is proper" and one that the "claimant will accept."<sup>428</sup> The insured may not settle a claim without the insurer's written consent.<sup>429</sup> The Philadelphia

Insurance policy is more ambiguous about the right to unilaterally settle the claim.<sup>430</sup> The CNA policy, in contrast, permits the insurer to settle the claim without policyholder approval.<sup>431</sup>

Unlike Philadelphia Insurance,<sup>432</sup> Allied World will refer the matter to arbitration under section XVII if the policyholder rejects a recommended settlement of the claim.<sup>433</sup> The arbitration option for a settlement impasse is new to me. I have not seen an insurer take this approach.<sup>434</sup> It could, however, offer an improvement over the traditional approach in which the insurer pays the policy limits of liability and then tenders the defense to the insured.

### *C. Choice of Defense Counsel*

The Allied World policy, like the Philadelphia Insurance<sup>435</sup> and CNA<sup>436</sup> policies, leaves the choice of defense counsel to the insurer without input from the policyholder.<sup>437</sup>

#### **\*139 D. Defense of Depositions and Subpoenas**

Like the Philadelphia Insurance<sup>438</sup> and CNA policies,<sup>439</sup> section II.D. of the Allied World policy potentially fills a gap in coverage that would be important to a mediator: the insurer will cover certain deposition expenses. It states: “Defense Expenses for Proceedings: The Insurer will pay on behalf of the Insured, subject to the applicable Limit of Liability, the Defense Expenses incurred by the Insured arising from any Proceeding ....”<sup>440</sup> The policy defines “Proceeding,” in part, as a “civil proceeding in which the Insured is not a defendant but has been ordered to offer deposition testimony regarding Professional Services.”<sup>441</sup> Thus, a divorce mediator who is not a defendant in the action, but is required to testify at a deposition, will not go into these proceedings alone. The insured can hire an attorney and the policy will cover the costs.<sup>442</sup>

A second clause defines “Proceeding” as a “civil proceeding in which the Insured ... has received a subpoena for document or record production.”<sup>443</sup> To trigger this coverage, however, the Insured also cannot be a defendant in the civil proceeding.<sup>444</sup> This second definition may cover trial testimony about the mediated settlement agreement or confidential mediation communications, although the extent of the coverage is not clear.

Section VII expressly excludes a duty to defend any “Proceeding.”<sup>445</sup> The insurer will not provide counsel but will cover the costs of the counsel retained by the insured. Interestingly, the policy says that “the Insurer shall have the right, but not the duty, to fully and effectively associate with the Insured in the control, investigation, defense and settlement of any Proceeding.”<sup>446</sup>

Under the section discussing the limits of liability, the policy caps these defense expenses associated with “Proceedings” at an amount that appears on the Declarations page of the individual policy.<sup>447</sup> I do not have a Declarations page for this policy, so I do not know the policy limits for this benefit. The policy is not clear whether these expenses “burn” or “erode” the limits of liability.<sup>448</sup>

In theory, the policy would cover the cost of resisting a post-mediation deposition or subpoena seeking additional information--usually \*140 designed to void the mediated settlement agreement--when the mediation parties are the parties to the civil proceeding and the suit does not name the mediator as a defendant. The mediation, however, must involve “Divorce Mediation Services” to trigger coverage.<sup>449</sup> If the insurer interprets this clause consistently with my interpretation, this policy would offer more coverage for depositions and subpoenas (but perhaps not motions to compel or court orders) than any other policy I



have examined.<sup>450</sup> The CNA policy has a very similar provision,<sup>451</sup> but the policy does not clearly cover “Divorce Mediation Services” like the Allied World policy does.<sup>452</sup>

### *E. Defense of Disciplinary Proceedings*

When I updated the research for this article, I was surprised to learn that Allied World at one time offered a separate policy called the “Psychologists and Other Mental Health Counselors Disciplinary Proceedings Defense Coverage Policy.” This coverage now appears in the Allied World policy because of a new definition of “Proceedings.”<sup>453</sup> I had hoped that the very active mediation community in Maryland, with its strong judicial and community leadership, had persuaded an insurer to provide this missing piece of coverage that offered a defense of ethics grievances and UPL disciplinary proceedings. Unfortunately, the coverage for mediators, if it exists, is limited and not clearly stated for ethics grievances and UPL proceedings.

At the beginning, the Allied World policy holds out some promise. The coverage provision broadly reads: “The Insurer will pay on behalf of the Insured ... Defense Expenses ... arising from any Proceeding ....”<sup>454</sup> “Proceeding” is defined as a “hearing or disciplinary action before any regulatory body, licensing board, agency or other organization responsible for monitoring, licensing or regulating the Insured's conduct as respects the rendering of Professional Services, but only if such hearing or action is a direct result of a Professional Incident.”<sup>455</sup> Next, the definition of “Professional Services” does not mention mediation,<sup>456</sup> but coverage for \*141 “Divorce Mediation Services” comes under an exception to an exclusion.<sup>457</sup> Okay. Still sounds good. Now here is the problem: the policy defines “Professional Incident” narrowly as “any actual or alleged *negligent* act, error, or omission, solely in the performance of, or actual or alleged failure to perform, Professional Services as a Psychologist or Mental Health Counselor.”<sup>458</sup> It fails to mention mediation. Does the exception to the exclusion found at section IV.A.(20) still apply to cover “Divorce Mediation Services” in a “Proceeding”? I would argue it does.

If so, then the insured mediator would need to show that the claim involves negligent acts, errors, or omissions. For example, a party might allege that the mediator, in violation of a code of conduct, had mishandled the mediation or settlement agreement in some impermissible, negligent manner. On the other hand, a Maryland UPL disciplinary body could summon a psychologist-mediator before it, alleging that the mediator practiced law without a license by giving legal advice. Arguably, if the mediator gave good, non-negligent advice, the policy would not cover the mediator's defense costs. Only if the mediator gave bad, negligent advice would the mediator's acts potentially trigger this policy. Thus, ethics grievances are more likely to trigger the defense cost coverage under this separate policy.

Interestingly, the application for the policy asks a series of questions about the claim experience of the applicant.<sup>459</sup> It asks:  
(b) Ha[ve] any [of the applicants] ever had any licensing board or professional ethics body require the surrender of a license or found any such person ... guilty of a violation of ethics codes, professional misconduct, unprofessional conduct, incompetence or negligence in any state or country?

(c) Are there any complaints, charges or investigations pending against any [of the applicants] by a licensing board or professional ethics body for violation of ethics codes, \*142 professional misconduct, unprofessional conduct, incompetence or negligence in any state or country?

\* \* \*

(f) Are there any circumstances, including any loss of private or confidential information, of which any [applicant] is aware of that may result in any professional liability claim or suit being made against any [of the applicants], their predecessors in business or against any past or present partner(s)?<sup>460</sup>

These questions suggest, that despite the more narrow definition of “Proceeding” found in the policy,<sup>461</sup> the policy should cover “violation of ethics codes, professional misconduct, unprofessional conduct, incompetence or negligence.”<sup>462</sup> The last question suggests that it may cover the inadvertent disclosure of confidential mediation communications. As noted, only “Divorce Mediation Services” would trigger the coverage.<sup>463</sup> Moreover, the main policy limits coverage to “Proceedings,” which I discussed earlier.<sup>464</sup>

Even so, the defense costs the policy will cover do not include fines or penalties.<sup>465</sup> So, at best, this policy will cover attorneys' fees and the costs associated with the defense and investigation of the claim.

Before I leave this discussion, I note that section VII requires the insured to defend the claim using counsel he or she selects. Allied World, however, wants to approve that selection in advance. Even though Allied World will not take the lead in defending the proceeding, it preserves the right to “associate with the control, investigation, defense and resolution” of the proceeding. In addition, the insured cannot incur any defense expenses without Allied World's prior written consent.<sup>466</sup> Again, why disclaim the duty to provide a defense but retain substantial control on the execution of that defense?

#### ***F. Summary of Defense Obligation Under the Allied World Policy***

To trigger the duty to defend, the mediator must be engaged in “Divorce Mediation Services” in compliance with section IV.A.(20).<sup>467</sup> \*143 Only claims of negligence will trigger this duty because of the definitions of “Claim” and “Professional Incident.” Unlike the other insurers, Allied World will defend groundless or fraudulent claims. Accidents and assaults occurring on the psychologist-mediator's premises should also trigger the duty to defend, and compensation for bodily injury and property damage.<sup>468</sup>

Even so, it leaves the insured open to the costs of defending claims alleging strict liability; intentional, criminal, dishonest, fraudulent, or malicious acts; and a breach of fiduciary duty. The insurer will not defend actions seeking fines and penalties or reimbursement of fees. It will not defend an ethical grievance or UPL proceeding if the claims do not involve negligence or fail to seek money damages.<sup>469</sup> It may also exclude claims based on contracts, but the policy does not expressly state this exclusion. The insured must cooperate with the defense, but has no role in choosing defense counsel.

The insurer may settle a claim with the insured's written consent. If a dispute arises about settling a claim, the policy requires arbitration. This remedy avoids an automatic tender of the defense to the insured that most policies impose. The policy also offers some defense cost coverage for depositions, trial testimony, and subpoenas as long as the insured is not a defendant in those civil actions.<sup>470</sup>

The policy could offer a divorce mediator some coverage for an ethical grievance or UPL proceeding if the claim involves a negligent act, error, or omission. The insured would first need to meet the three conditions for “Divorce Mediation Services.” The insurer would not provide defense counsel but would cover the cost of a defense arranged by the insured. At the same time, the insurer wants the right to approve the counsel selected by the insured. The policy would not cover any compliance “fines or penalties” imposed by the regulatory body.

#### **VI. Endorsements to Fill Gaps in the Allied World Policy's Coverage**

Available endorsements shown on the agent's website would not cover otherwise excluded claims or ensure the payment of defense costs in ethics grievances or UPL disciplinary proceedings.<sup>471</sup> No endorsement clearly adds coverage for motions to compel or court orders seeking the disclosure of confidential mediation communications.<sup>472</sup>

#### **\*144 VII. Conclusions About the Coverage Provided by the Allied World Policy**

The Allied World policy may show insurers' response to the increasing use of mediation, especially in the context of family law. It constitutes the only profession-of-origin policy that I have analyzed that covers some claims arising from the practice of a mediator. That coverage, however, is triggered only by "Divorce Mediation Services" that give rise to allegations of negligence. It may provide defense benefits for a limited number of ethics grievances and UPL disciplinary proceedings. Allied World is one of two insurers that offer a deposition and subpoena defense cost benefit, but only if the civil action does not name the insured as a defendant. Despite these improvements in coverage, the policy does not cover many of the claims a mediator might face. Finally, the insurer does not offer endorsements that would meaningfully close these gaps in coverage.

#### **\*145 Appendix C**

##### **Social Worker's Professional Malpractice Claims-Made Policy<sup>473</sup> Provided by CNA**

This Appendix analyzes the sample policy forms applicable to social workers working in Virginia under a policy issued by CNA.<sup>474</sup> CNA serves as the insurance underwriter for the insurance program offered to clinical social workers through the HPSO.<sup>475</sup>

CNA offers this policy in two forms: occurrence and claims-made.<sup>476</sup> The other policies I have analyzed in this article are claims-made policies. Accordingly, to keep the analysis consistent, I have analyzed only the claims-made policy. Finally, somewhat confusingly, the policy parts appear on the insurer's website in four different categories of documents: (1) Common Policy Conditions;<sup>477</sup> (2) Claims-Made Policy; (3) Occurrence Policy; and (4) Endorsements.<sup>478</sup> Thus, someone not familiar with the format or types of insurance policies could be confused about the offered insurance.

The Claims-Made Policy (CNA policy) sets out the coverage agreements, the coverage extensions, the exclusions of coverage, the limits of liability, the duties in the event of a claim, and the extended reporting period coverage. As applicable, I will also talk about the Common Policy Conditions, which set out the general terms and define an additional thirty terms used in the policy. CNA also offers several endorsements for workplace liability, general liability, assault coverage, and service animals, in addition to the coverage for professional liability. Like the Philadelphia \*146 Insurance policy, CNA offers no coverage for mediators if the policy does not list this separate profession. Even then, the coverage is limited.

#### **I. Coverage Provisions of the CNA Policy**

##### **A. Professional Liability**

The CNA policy takes an approach similar to that taken by Allied World in delineating coverage.<sup>479</sup> But, unlike the Allied World policy,<sup>480</sup> it does not expand coverage, through an exception to an exclusion, to cover divorce mediation. In that way, the CNA policy provides coverage similar to that offered by Philadelphia Insurance.<sup>481</sup>

Like the Philadelphia Insurance policy,<sup>482</sup> the CNA policy ties coverage to the “area of specialization” set out in the Declarations page (called a “[C]ertificate of [I]nsurance” in this policy).<sup>483</sup> On the Certificate of Insurance, the insurer lists one or two “Medical Specialt[ies]”<sup>484</sup> as well as an associated ISO Code number for the policyholder.<sup>485</sup> Thus, the first hurdle to coverage for social workers working in the field of mediation is learning whether he or she can list mediation as an additional specialty. Next, the policy expressly excludes coverage for any business or profession that is not named on the Certificate of Insurance.<sup>486</sup> So, if a social worker cannot list mediation as a specialty, the policy will not cover professional liability arising from a mediation practice. The policy also excludes coverage when the policyholder serves in twelve specified professions.<sup>487</sup> This exclusion, however, does not mention mediator or mediation. Accordingly, the policy may create a coverage dispute when it is properly construed \*147 against the drafter, the insurance company.<sup>488</sup> I discuss these exclusions in a later section of this article.<sup>489</sup>

Section I of the CNA policy provides coverage for acts, errors, or omissions. It states: “Coverage under any of the following coverage agreements apply only if both the act, error or omission [occurs within the claims-made policy period].”<sup>490</sup> It covers professional, Good Samaritan, personal injury, and malplacement liabilities.<sup>491</sup> The professional liability section provides:

We will pay all amounts, up to the Professional Liability limit of liability stated on the [C]ertificate of [I]nsurance, that you become legally obligated to pay as a result of a *professional liability claim* arising out of a *medical incident* by you or by someone for whose *professional services* you are legally responsible.<sup>492</sup>

Defined terms used in this section (I.A.) of the policy include “Certificate of Insurance,”<sup>493</sup> “professional liability claim,”<sup>494</sup> “medical incident,”<sup>495</sup> and “professional services.”<sup>496</sup> Only the last two terms create a significant hurdle for coverage of mediators.

The policy defines “medical incident” as “any act, error or omission in your providing *professional services* which results in injury or damage ....”<sup>497</sup> The policy defines “professional services” as:

[T]hose services for which you are licensed, certified, accredited, trained or qualified to perform within the scope of practice recognized by the regulatory agency responsible \*148 for maintaining the standards of the profession(s) shown on the [C]ertificate of [I]nsurance and which you perform ....<sup>498</sup>

Thus, the first and most significant hurdle to coverage for the social worker-mediator lies in a limitation of coverage to those medical specialties stated in the Certificate of Insurance. Profession-of-origin limitations appear in all the policies analyzed in this article.<sup>499</sup> However, in the Philadelphia Insurance and the CNA policies, an insured could try to add mediator to the list of covered professions on the Declarations page or the Certificate of Insurance. In fact, the CNA sample Certificate of Insurance contemplates at least two professions.<sup>500</sup> In contrast, the Allied World policy limits coverage through the definition of “Professional Incident” which refers specifically to performance as “a Psychologist.” But Allied World is the only insurer that adds coverage, through an exception to an exclusion, for “Divorce Mediation Services” provided by psychologist-mediators.<sup>501</sup> The Philadelphia Insurance and CNA policies do not provide this explicit coverage of any, or some types of, mediation services.

The CNA policy avoids the use of the terms “claims,” “negligent,” “wrongful act,” “damages,” or “suits” as used in the Philadelphia Insurance<sup>502</sup> and Allied World policies.<sup>503</sup> Instead, it uses the terms “act, error or omission,”<sup>504</sup> or “amounts ... that you become *legally obligated* to pay as a result of a professional liability claim ....”<sup>505</sup> The policy then defines a “professional liability claim” as “a claim arising out of a medical incident.”<sup>506</sup> As noted above, it defines a “medical incident” as “any act,

error or omission in your providing professional services which results in injury or damage ....”<sup>507</sup> Thus, unlike the Philadelphia Insurance<sup>508</sup> and Allied World<sup>509</sup> policies, this policy is not as clear in stating that coverage is limited to claims seeking monetary damages or compensation. In addition, covered claims must likely state an act, error or omission in the nature of \*149 professional negligence.<sup>510</sup> An exclusion, discussed below, clarifies this conclusion.<sup>511</sup>

The CNA policy may try to limit coverage to injuries occurring on the “business premises” of the mediator. While the policy defines this term as “the established primary practice location of the named insured,” it does not use that term in the policy’s coverage provisions. Accordingly, the insurer may have created a coverage dispute if a claim arises at, for example, the conference room of an attorney or another location for a mediation that is outside the mediator’s office.

Overall, the coverage and limitations language of the CNA policy provides no clear coverage for or against claims brought against a social worker-mediator. Like the Philadelphia Insurance policy,<sup>512</sup> it depends on the profession listed on the Certificate of Insurance.<sup>513</sup>

### **B. Bodily Injury and Personal Injury**

Unlike the Philadelphia Insurance and Allied World policies,<sup>514</sup> the CNA policy does not cover bodily injury. In that way, it is more like the policies available to lawyers.<sup>515</sup> Like the Philadelphia Insurance Policy<sup>516</sup> but unlike the Allied World policy,<sup>517</sup> the CNA policy offers coverage for personal injury. The governing provision states:

We will pay all amounts, up to the Personal Injury Liability limit of liability ... that you become legally obligated to pay as a result of a personal injury claim arising out of personal injury.<sup>518</sup>

The policy defines “Personal Injury” broadly:

“Personal Injury” means injury arising out of one or more of the following offenses committed in the conduct of your professional services.

1. testimony given at or arising out of inquests;
2. malicious prosecution;
3. false arrest, detention, imprisonment, wrongful entry or eviction or other invasion of the right of private occupancy;
4. libel, slander or other disparaging materials;
- \*150 5. a violation of an individual’s right to privacy;
6. assault, battery, mental anguish, mental shock or humiliation;
7. misappropriation of advertising ideas, trade secrets, or style of doing business; or
8. infringement of patent, copyright, trademark, trade name, trade dress, service mark, service name, logo, title or slogan.<sup>519</sup>

This language is similar to the language found in the Philadelphia Insurance policy.<sup>520</sup> Allied World covers some of these claims under a “Personal or Advertising Injury” clause and an “Information Privacy Liability” clause.<sup>521</sup>

### **C. Assault**

As noted above,<sup>522</sup> this policy does not have a separate coverage provision for “bodily injury” like the Philadelphia Insurance and Allied World policies do.<sup>523</sup> Instead, the insurer covers assault and will pay:

1. medical expenses you incur, for injury to you; or

2. reimbursement for damage to your personal property resulting from an assault on you at your workplace ....<sup>524</sup>

The policy defines “Assault” as “any willful attempt to inflict physical harm on you by another, which results in injury or damage.”<sup>525</sup>

Thus, this policy, like the Allied World policy,<sup>526</sup> will cover assaults at the workplace. Recall that the Philadelphia Insurance policy only covered assault occurring while traveling to and from the workplace.<sup>527</sup> Moreover, like the Philadelphia Insurance and Allied World policies,<sup>528</sup> the CNA policy covers only injuries to the policyholder.

In summary, the three policies analyzed in Appendices A, B, and C each take a different approach to handling the risks of a mental health practice when it comes to injuries to the practitioner, to clients, and to third parties. An insured would need to assess the preferred coverage and \*151 then carefully read the policy language. An insured would also need to include mediation as a specialty in order to trigger coverage under the CNA policy for personal injury or assault. Finally, no coverage exists for bodily injury under the CNA policy.

## **II. Exclusions of the CNA Policy**

In section V, the CNA Policy excludes coverage and defense of a number of claims.<sup>529</sup>

### **A. Acts Committed Outside Profession Listed on Certificate of Insurance**

As noted above,<sup>530</sup> the coverage provisions limit coverage to professional liability claims arising from professional services performed in the “medical specialty” listed on the Certificate of Insurance. An exclusion reinforces this limitation. The insurer will not cover claims arising from “liability you have for a business or profession ... other than that named on the [C]ertificate of [I]nsurance.”<sup>531</sup>

Nonetheless, I would argue in favor of coverage for mediators, even if the insured failed to list it as a second profession on the Certificate of Insurance, because the policy only excludes:

[A]ny of your acts, errors or omissions in your capacity as:

1. nurse anesthetist, nurse-midwife or midwife;

2. physician, dentist, chiropractor, or podiatrist;

3. self-employed perfusionist;

4. a healthcare student, healthcare aide, home healthcare aide, or dental hygienist, who is not subject to supervision.<sup>532</sup>

When the insurer goes to so much trouble to list excluded professions, including a perfusionist (a term I had to look up), its failure to list “mediator” suggests that acts, errors, and omissions of mediators are covered. A court should construe the policy against the drafter and in favor of the insured.<sup>533</sup> It is, however, a thin thread on which to rely.

### ***B. Criminal or Intentional Acts***

Like the Philadelphia Insurance policy,<sup>534</sup> the CNA policy expressly excludes intentional acts. It excludes “injury or damage you expected or intended, or which a reasonable person would have expected.”<sup>535</sup> Unlike \*152 the policies of Philadelphia Insurance<sup>536</sup> or Allied World,<sup>537</sup> the CNA policy does not expressly preclude coverage of claims arising from dishonest or fraudulent acts.<sup>538</sup> It does exclude “a willful violation of a statute, ordinance or regulation imposing criminal penalties.”<sup>539</sup> These provisions seek to limit coverage to acts of negligence<sup>540</sup> and would exclude coverage for some of the malpractice claims a party might bring against a mediator arising out of intentional or criminal conduct.<sup>541</sup>

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

Like the policies offered by Philadelphia Insurance<sup>542</sup> and Allied World,<sup>543</sup> the CNA policy excludes coverage for fines and penalties.<sup>544</sup> Unlike the Allied World policy<sup>545</sup> and like the Philadelphia Insurance policy,<sup>546</sup> the CNA policy also excludes “sanctions.” As noted above, a regulatory body might describe its action in an ethics grievance or UPL disciplinary proceeding using any of these terms. This exclusion, however, would apply to most of the actions taken by a regulatory body against a mediator.

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

Like the Philadelphia Insurance policy<sup>547</sup> and unlike the Allied World policy,<sup>548</sup> the CNA policy expressly excludes coverage of a malpractice claim based on breach of contract.<sup>549</sup> For instance, it would not cover the breach of the provisions of an agreement to mediate that guarantees the parties confidentiality in the process.<sup>550</sup>

### **\*153 E. Restitution or Reimbursement of Fees**

Section V.I. of the CNA policy--like the Philadelphia Insurance<sup>551</sup> and Allied World policies<sup>552</sup>--would not cover claims involving complaints about the mediator's fees.<sup>553</sup>

### ***F. Discrimination by the Insured***

Section V.O., like the other policies analyzed in this article,<sup>554</sup> excludes claims based on discrimination. This undefined term could preclude coverage of claims based on mediator bias or even those claims alleging a failure to accommodate the special needs of parties.<sup>555</sup>

### ***G. Claims Based on Improper or Suspended Licensing***

Like the Allied World policy,<sup>556</sup> a provision of the CNA policy excludes coverage for “liability resulting from professional services you provide while your license or certification to practice is suspended, revoked, or no longer valid.”<sup>557</sup> Accordingly, my earlier discussion of the similar Allied World provision applies,<sup>558</sup> except that the CNA policy would not likely cover claims of any mediator unless the policyholder listed that specialty on the Certificate of Insurance.<sup>559</sup>

Like the Allied World policy,<sup>560</sup> the CNA policy provides a defense for disciplinary hearings. I discuss that provision in a later section.<sup>561</sup>

## **III. “Other Insurance” Clause of the CNA Policy**

Like the Philadelphia Insurance Coverage A limitation<sup>562</sup> and the Allied World policy,<sup>563</sup> the CNA policy contains an “excess” other insurance clause.<sup>564</sup> As noted above, an “excess” other insurance clause provides \*154 coverage only if the loss exceeds the limits of liability of any other applicable insurance policy.<sup>565</sup> Accordingly, this policy would pay out last.

## **IV. Duty to Defend, Settlement Obligations, and Choice of Defense Counsel Under the CNA Policy**

### ***A. Duty to Defend***

Two sections of the policy address the issue of defense costs in different contexts. Section III of the CNA policy generally governs defense and settlement of claims arising under the policy. It provides:

We have the right and duty to defend any claim that is a professional liability claim [or] ... personal injury claim .... We will:

A. do this even if any of the charges of such claim are groundless, false or fraudulent; and

B. investigate and settle any claim, as we feel appropriate.

Our payment of the applicable limit of liability ends our duty to defend or settle. We have no duty to defend any claims not covered by this Coverage Part.<sup>566</sup>

Thus, like the Allied Insurance policy,<sup>567</sup> but unlike the Philadelphia Insurance Policy,<sup>568</sup> the CNA policy would cover a claim that a judicial or administrative body might eventually find groundless. Recall that Dr. Fremed sought coverage from Underwriters for a claim she alleged was groundless. Underwriters, however, read the policy exclusion narrowly to deny her a defense of the claim.<sup>569</sup> Unlike the Philadelphia Insurance<sup>570</sup> and Allied World<sup>571</sup> policies, the CNA policy does not describe or define covered defense expenses.



CNA tenders the defense to the policyholder and limits its obligation to indemnify the loss and pay defense costs once it pays its full limit of liability.<sup>572</sup> The policy explicitly states this end to the duty, unlike the Philadelphia Insurance policy.<sup>573</sup>

\*155 Section IV of the CNA policy provides that “claims expenses,”<sup>574</sup> including defense costs, are outside the limits of liability.<sup>575</sup> Accordingly, like the Philadelphia Insurance<sup>576</sup> and Allied World<sup>577</sup> policies, the CNA defense costs do not “erode” or “burn” the limits of liability. Like the other policies,<sup>578</sup> the insured must cooperate in the defense.<sup>579</sup>

### ***B. Settlement Obligations***

Section III of the CNA policy governs settlements.<sup>580</sup> Unlike Philadelphia Insurance<sup>581</sup> and Allied World,<sup>582</sup> CNA may settle a claim without the insured's consent.<sup>583</sup> Remarkably, the policy language puts settlement solely within the discretion of the insurer.<sup>584</sup>

### ***C. Choice of Defense Counsel***

Like the Philadelphia Insurance<sup>585</sup> and the Allied World<sup>586</sup> policies, CNA retains the right unilaterally to appoint defense counsel without input from the insured. The policy provides that the insurer will pay as “claims expenses” the fees of an attorney designated by the insurer.<sup>587</sup> The policy does not otherwise discuss this issue. The policy also allows the \*156 insured to select defense counsel for complaints relating to license protection.<sup>588</sup>

### ***D. Defense of Depositions and Subpoenas***

Like the Philadelphia Insurance<sup>589</sup> and the Allied World policies,<sup>590</sup> a coverage extension (called “Deposition Representation”) covers the defense costs of certain depositions and subpoenas.<sup>591</sup> The policy will cover the attorneys' fees needed to prepare the insured for a document or testimonial deposition,<sup>592</sup> up to the \$10,000 limit of liability.<sup>593</sup> The insured must receive a subpoena for the deposition in a lawsuit in which the insured is not a party. Thus, if a party deposed a mediator about the mediated settlement agreement or any communications in the mediation, that deposition should trigger this coverage.<sup>594</sup> This benefit, however, does not extend to trial testimony about the mediated settlement agreement, confidential mediation communications, motions to compel, or court orders requiring the disclosure of confidential communications. Moreover, it would only apply if the insured was otherwise covered for his or her mediation practice as a listed specialty on the Certificate of Insurance. The policy caps this benefit at \$10,000 per deposition and in the aggregate for all depositions during the policy period. The payment does not erode the limits of liability.<sup>595</sup>

### ***\*157 E. Defense of Disciplinary Proceedings***

Like the Philadelphia Insurance policy<sup>596</sup> and the Allied World policy,<sup>597</sup> the CNA policy--under a “Coverage Extension”--expressly covers a “license protection incident.”<sup>598</sup> It pays attorneys' fees and the cost of an investigation and defense involving “complaints.”<sup>599</sup> The policy defines “Complaint” as “the official documentation required by an entity responsible for regulating

your professional conduct to trigger an investigation of you for a license protection incident.”<sup>600</sup> The policy defines a “License Protection Incident” as “a medical incident, or an event or circumstance arising out of an actual or alleged violation of the standards that govern your profession, leading to a complaint filed against you, charging you with professional misconduct, incompetence ... and which could result in a disciplinary hearing or proceeding.”<sup>601</sup> The policy defines “Disciplinary Hearing or Proceeding” as “a hearing or professional review conducted by any state or federal administrative agency, licensing or regulatory authority responsible for regulating *your professional conduct*.”<sup>602</sup>

\*158 Unlike the Philadelphia Insurance policy,<sup>603</sup> the CNA policy does not trigger coverage of disciplinary hearings by reference to a “claim” for damages.<sup>604</sup> Instead, the “complaint” must allege an incident or injury arising from professional misconduct or incompetence.<sup>605</sup> Unlike the Allied World policy,<sup>606</sup> however, the complaint does not need to allege negligence according to the policy language. Earlier CNA policy provisions exclude intentional acts and extend to “acts, errors, or omissions” without stating anything about negligence. This ambiguity could easily create a coverage dispute.

This language could cover ethics grievances if the insured has listed mediation as one of the specialties on the Certificate of Insurance. Ethics grievance hearings would likely fall within the definition of a “disciplinary hearing or proceeding” and those proceedings typically cover professional misconduct or incompetence.

On the other hand, I can already anticipate the coverage dispute the insurer’s lawyer can create in connection with UPL disciplinary proceedings. First, they are typically handled by agents of the judicial system rather than an “administrative agency, licensing or regulatory authority” responsible for regulating professional conduct of—in this case—mediators. Instead, they regulate the conduct of lawyers and non-lawyers engaged in legal services. The insurer would have a stronger argument if the definition said instead that the regulatory authority was responsible for regulating “your profession” rather than “your professional conduct.” In that case, the benefit would more clearly apply only to hearings involving the insured’s services as a social worker and not as a mediator, even in the UPL context.

If the policy covers ethics grievances and UPL disciplinary proceedings, the policy will pay an amount not to exceed \$25,000 per Proceeding and in the aggregate for all Proceedings in the policy period.<sup>607</sup> Moreover, payments are outside the policy limits, and thus do not erode the limit of liability.<sup>608</sup>

#### \*159 F. *Summary of Defense Obligation Under the CNA Policy*

The policy provides a duty of defense for professional liability and personal injury claims, even if groundless, false, or fraudulent. The policy fails to define covered defense expenses but does cover attorney fees. It tenders the defense to the insured when the claim exhausts the limits of liability. The defense costs do not erode the limits of liability.

The policy is unclear as to what happens if the insured rejects a settlement offer. It is clear that the insurer can unilaterally settle a claim without the insured’s permission. This language invites a coverage dispute.

The insurer retains the right to select defense counsel for professional liability and personal injury claims. The policy allows (and requires) the insured to select defense counsel for complaints relating to license protection.

The policy provides a deposition and subpoena benefit if the insured is not a party to the lawsuit. The benefit does not extend to trial testimony.

The policy also covers the costs of disciplinary proceedings when a complaint alleges a violation of the standards governing the insured's professional conduct. The policy could cover ethics grievances if the insurer listed mediation on the Certificate of Insurance. It probably does not cover UPL proceedings.

#### V. Endorsements to Fill Gaps in the Coverage of the CNA Policy

CNA does not offer any endorsements that would broaden coverage for mediators under its standard policy or fill any coverage gaps created by that policy.<sup>609</sup> In addition, no endorsement adds coverage for testimonial or document subpoenas requiring an appearance at trial.<sup>610</sup> It also does not cover motions to compel or court orders seeking the disclosure of confidential mediation communications.<sup>611</sup>

#### VI. Conclusions About the Coverage Provided by the CNA Policy

As with Philadelphia Insurance's family therapist policy, a social worker-mediator under the CNA policy would find little coverage for claims arising in his or her practice of mediation. Again, as a gateway issue, the policy expressly limits coverage for most liability claims to those arising \*160 from professional services provided in the ISO "Medical Specialty" listed on the Certificate of Insurance. An insured might try to list mediation, but the insurer could reject offering coverage for that specialty under this policy. An exclusion also precludes coverage for "a business or profession ... other than that named on the Certificate of Insurance."<sup>612</sup> At the same time, mediation is not listed among the twelve professions excluded from coverage in section V.C. To be safe, a mediator would want to get this separate practice listed on the Certificate of Insurance.

Next, the coverage provisions would not cover all types of liability claims a mediator might face, especially if they involve an intentional act or do not raise issues of negligence. Coverage exists for property damage and personal injury claims, but not bodily injury claims. The policy expressly excludes injuries that the policyholder expected or intended, willful violation of laws imposing criminal penalties, contract-based claims, discrimination claims, sanctions, fee-related claims, and acts committed while the policyholder's license is suspended, revoked, or no longer valid.

The policy has a coverage extension for "License Protection" that an ethics grievance might trigger if the policy covers mediation-related claims. The language of the policy would not likely extend that coverage to a UPL disciplinary proceeding. The policy covers only professional misconduct or incompetence claims filed with a "state or federal administrative agency, licensing or regulatory authority responsible for regulating your professional conduct," presumably limited to the profession listed on the Certificate of Insurance. In addition, the complaint of misconduct must be the official documentation required by the authority "regulating your professional conduct." Authorities regulating the practice of law are not the authorities regulating the professional conduct of social workers or mediators. Thus, the policy is not likely to cover UPL-related claims. The policy is in excess of any other insurance the mediator may have, and CNA would pay only after the exhaustion of the limits of liability of any other applicable policy.

The policy covers the cost of investigation, adjustment, defense, and appeal of claims involving "a demand for money or services alleging an injury or damage." The License Protection clause, however, pays \$10,000 of covered costs. The insurer has the unilateral right to choose the attorney handling the professional liability claim and can settle a claim without consulting the insured.

The policy will provide \$10,000 to help an insured prepare for a deposition, but it does not cover the cost of resisting a subpoena at trial, a motion to compel, or a court order seeking disclosure of confidential \*161 mediation communications. Finally, the insurer does not offer endorsements that would close these gaps in coverage.

## Footnotes

- d1 Clinical Professor at Qatar University College of Law. Prof. Young teaches legal writing, research, and advocacy, negotiation, mediation, arbitration, and dispute resolution system design. She taught ADR courses at the Appalachian School of Law from 2002 to 2015. She is the winner of the first Distinguished Mediator Award presented by the Virginia Mediation Network (VMN). Young joined VMN's Board of Directors in 2010 and became its President in 2012. Young has 30 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, when she represented Transit Casualty Company, the largest P&C insurance insolvency in history, at that time. 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 Dispute Resolution Section Standing Committee on Mediator Ethical Guidance and as Co-Chair of the ABA Dispute Resolution Section Ethics Advisory Opinions Database Subcommittee. These appointments made her a member of the top mediator ethics boards nationally and in Virginia. Most recently, her writing applies dispute resolution theory to the blockade of Qatar by four neighboring Arab countries.
- Professor Young thanks Dean Mohammed Abdalaziz Al-Khulaifi, Associate Dean Muna Al-Marzouqui, and Dr. Mohamed Mattar for supporting her scholarship. She also thanks the staff of the journal for working with her across time zones.
- 1 **PaulaMarieYoung**, *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, 1055-1057, 1113 (2008) [hereinafter Young, *Kangaroo Court?*].
- 2 Paula M. 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. Disp. Resol. 721 (2006) (hereinafter Young, *Take It, or Leave It*); Young, *Kangaroo Court?*, *supra* note 1 *passim*; Paula M. Young, *Teaching Professional Ethics to Lawyers and Mediators Using Active Learning Techniques*, 40:1 Sw. L. Rev. 127 (2010); Paula M. 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 (2011) [hereinafter Young, *Teaching Mediator Impartiality*]; **PaulaMarieYoung**, *The Crisis in Insurance Coverage for Mediators - Part 1: Even Lawyer-Mediators are "Going Bare,"* 15 *Appalachian J. L.* 1 (2016) [hereinafter Young, *Part 1, Insurance Coverage for Lawyer-Mediators*]; Paula M. Young, *The Crisis in Insurance Coverage for Mediators Part 3: Specialized Coverage for Mediators - Still "no There, There* (Working Paper, 2017) (on file with author) [hereinafter Young, *Part 3: Specialized Coverage for Mediators*].
- 3 Young, *Kangaroo Court?*, *supra* note 1, at 1055.
- 4 *Id.* The article 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. It next describes the "authorized practice of mediation" paradigm. 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. 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.
- 5 *Id.* at 1099, 1101-02.
- 6 *Id.* at 1101-05.
- 7 *Id.* at 1110-13.

8 *Id.* at 1068-92. The SGC consists of 21 members, seven of whom do not have law degrees. The judges of the Connecticut Supreme Court appoint its members. *Id.* at note 509. See Statewide Grievance Committee, [www.jud.ct.gov/SGC/](http://www.jud.ct.gov/SGC/) (last visited Feb. 24, 2019).

9 Professor Deborah L. Rhode, a leading scholar on UPL is quoted as saying that UPL enforcement can be handled by local prosecutors or the state's attorney general, who have more public accountability than state bar committees. Many bar committees routinely proceed against lay competitors without evidence of consumer injury. This should cease, and it is more likely to when disinterested decision-makers control enforcement priorities. States should also rethink the composition of governance bodies to prevent active market participants from controlling decisions. No matter how well-intentioned, such participants are likely to lack impartiality in appearance if not in fact.

See David L. Hudson Jr., *DOES THIS HURT? The Supreme Court's Ruling in an Antitrust Case Involving the Regulation of Dentists Has Raised Questions about the Regulatory Structure for Lawyers*, 102-APR 102 APR-A.B.A. J. 22 (April 2016).

10 574 U.S., 135 S.Ct. 1101 (2015).

11 Young, *Kangaroo Court?*, *supra* note 1, at 1115-1134.

12 *Id.* at 1092-98, 1154-55, nn. 98 & 214.

13 *Id.* at 1154-55, 1201-03.

14 See Allied World Assurance Company, Claims-Made Psychologists' Professional and Business Liability Policy, Form APA-PSY 00002 00 (06/14) [hereinafter Allied World policy]; CNA Healthcare Providers Professional Liability Claims-Made policy, Form G-121502-C (7/2001), available at *Sample Policy Forms - Professional Liability Insurance*, HPSO, <http://www.hpso.com/support/sample-policy-forms> (last visited Feb. 24, 2019) [hereinafter CNA policy]; CNA Healthcare Providers Professional Liability Insurance, Common Policy Condition, Form G-121500-D (4/2008), available at *Sample Policy Forms - Prof'l Liability Ins.*, HPSO, <http://www.hpso.com/support/sample-policy-forms> (last visited Feb. 24, 2019) [hereinafter CNA Common Policy Conditions]. Philadelphia Insurance Companies, Allied Healthcare Providers Professional and Supplemental Liability Insurance Policy, Form PI-PHCP-02 (07/10), available at <https://www.cphins.com/Services/PolicySpecimen/tabid/100/Default.aspx> (last visited <blocked in Qatar>) [hereinafter Philadelphia Ins. policy]. In this article, I also refer to the specialized coverage offered to mediators under a policy issued by Underwriters at Lloyd's, London. See *Arbitrators and Mediators Professional Liability Insurance* (revised April 25, 2006) (on file with author) [hereinafter Underwriters policy].

15 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2 *passim*.

16 Young, *Part 3: Specialized Coverage for Mediators*, *supra* note 2 *passim*.

17 See Letter from Robert A. Badgley, Attorney, Lord, Bissel & Brook, LLP to Resa Fremed, Mediator, New England Counseling & Mediation (Nov. 22, 2005) (on file with author). See also Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 9-10; Underwriters policy, *supra* note 14, at § VII(i).

18 The term typically applies to the deliberate decision of a person to forgo paying for any insurance coverage for reasons of cost or the low likelihood of loss. That decision requires the person thereafter to assume personal responsibility for the payment of any claims or defense costs, otherwise known as "self-insuring" the claim. See, e.g., *Going Bare?*, Physicians Prac., <http://www.physicianspractice.com/articles/going-bare> (last visited Feb. 24, 2019); *Homeowners insurance: Don't go bare*, Bankrate, <http://www.bankrate.com/finance/money-guides/homeowners-insurance-don-t-go-bare-1.aspx> (last visited Feb. 24, 2019).

19 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 12-31.

20 See *infra* discussion at notes 184-305. Dr. Fremed held two policies, one profession-of-origin policy through Philadelphia Insurance and a specialized mediator policy issued by Underwriters. See Handwritten Note from Resa Fremed, Therapist, New England Counseling, to author (undated) (on file with author); Letter from Robert A. Badgley, *supra* note 17, at 1; Letter from C. Philip Hodson, President, CPH & Associates, to Resa Fremed, New England Counseling (March 14, 2007) (on file with author).

21 Philadelphia Ins. policy, *supra* note 14 *passim*. In all quotes from the policy, I have omitted the original bold emphasis on defined terms, and I will not indicate this change in later citations.

22 Welcome to CPH & Associates, <https://www.cphins.com/> (last visited <blocked in Qatar>).

- 23 *See infra* discussion at notes 306-472; Allied World policy, *supra* note 14. In all quotes from the policy, I have omitted the original bold emphasis on defined terms, and I will not indicate this change in later citations. *See also Application for Psychologists' Professional and Business Liability Insurance Coverage*, Allied World, [http://www.americanprofessional.com/wp-content/uploads/PSY\\_NEW\\_XX.pdf](http://www.americanprofessional.com/wp-content/uploads/PSY_NEW_XX.pdf) (last visited Feb. 24, 2019).
- 24 Psychologist, Am. Prof'l Agency, Inc., <http://www.americanprofessional.com/covered-professions/psychologists/> (last visited Feb. 24, 2019) [hereinafter Psychologist].
- 25 *See infra* discussion at notes 473-612; CNA policy, *supra* note 14 *passim*. In all quotes from the policy, I have omitted the original bold emphasis on defined terms, and I will not indicate this change in later citations.
- 26 HPSO, <http://www.hpsso.com/> (last visited Feb. 24, 2019).
- 27 I first described her story in Young, *Kangaroo Court?*, *supra* note 1, at 1055-1134.
- 28 *Id.* at 1057-60.
- 29 *Id.* at 1060-62.
- 30 *Id.* at 1061-62.
- 31 *Id.* at 1062-67, 1246-48.
- 32 *Id.* at 1066-67.
- 33 *Id.* at 1099.
- 34 *Id.* at 1099 at note 230.
- 35 *Id.*
- 36 *Id.* at 1101.
- 37 *Id.* at 1101-05.
- 38 *Id.* at 1105-10.
- 39 *Id.* at 1109.
- 40 *Id.* at 1109-12.
- 41 *Id.* at 1112-13.
- 42 *Id.* at 1113-14 at note 317.
- 43 *Id.* at 1114.
- 44 *Id.* at 1114-15.
- 45 *Id.* at 1133-34 at notes 415, 416 (footnotes omitted).
- 46 Young, *Part 3: Specialized Coverage for Mediators*, *supra* note 2, at 7-12.
- 47 *Id.* at 7-8. She also had a profession-of-origin policy written by Philadelphia Insurance. *See supra* discussion at note 20.
- 48 Arbitrators, Hearing Officers and Mediators, Complete Equity Markets, <http://cemins.com/additional/mediators.php> (last visited Feb. 24, 2019).
- 49 Underwriters policy, *supra* note 14 *passim*; Complete Equity Markets, Inc., <http://www.cemins.com/> (last visited Feb. 24, 2019). New Appelman on Ins. L. Practice Guide § 4.10 (2012) ("There are insurers (most notably Lloyd's of London) who specialize in

making available insurance coverage specially designed to fulfill the unusual needs of individual applicants.”) [hereinafter Ins. L. Practice Guide].

50 Complete Equity Markets, Inc., *supra* note 49, at 1. I have talked several times with their representative at these events.

51 Robert A. Badgley, *Mediator Liability: A Survey* (Feb. 2010), available at <http://www.cemins.com/pdf/medarticle.pdf> [hereinafter 2010 Badgley Survey]; Robert A. Badgley, *Mediator Liability Claims: A Survey of Recent Developments* (May 2013), available at [http://www.lockelord.com/~media/Files/NewsandEvents/Publications/2013/05/Mediator%20Liability%CC20Claims%CC20A%CC20Survey%CC20of%CC20Recent%20Dev\\_\\_\\_/Files/201305mediatorliabilityclaims\\_badgley/FileAttachment/201305-mediatorliabilityclaims\\_badgley.pdf](http://www.lockelord.com/~media/Files/NewsandEvents/Publications/2013/05/Mediator%20Liability%CC20Claims%CC20A%CC20Survey%CC20of%CC20Recent%20Dev___/Files/201305mediatorliabilityclaims_badgley/FileAttachment/201305-mediatorliabilityclaims_badgley.pdf) [hereinafter 2013 Badgley Survey Update].

52 2010 Badgley Survey, *supra* note 51, at 5; 2013 Badgley Survey Update, *supra* note 51, at 5.

53 2010 Badgley Survey, *supra* note 51, at 6.

54 2013 Badgley Survey Update, *supra* note 51, at 5.

55 *See infra* discussion at notes 57-62.

56 Young, *Part 3: Specialized Coverage for Mediators*, *supra* note 2, at 33.

57 Robert A. Badgley Letter, *supra* note 17, at 1-2.

58 The author apologizes in advance for using the term nonlawyer-mediator in this article, which some mediators have labeled “pejorative.” Lemoine D. Pierce, Letter to the Editor, *It's Time to Get Rid of the Term “Non-Lawyer,”* Disp. Resol. Mag., Fall 1998, at 2. *See also* Ericka B. Gray, *What's in a Name? A Lot When “Non-” Is Involved*, 15 Negotiation J. 103, 103 (1999); David A. Hoffman, *Is There a Niche for Lawyers in the Field of Mediation?*, 15 Negotiation J. 107, 107-08 (1999) (“When the term ‘nonattorney’ is used scornfully or dismissively to describe these [mediation] colleagues, it is painful, and I stand shoulder-to-shoulder with Ericka [Gray] and other mediators who seek to end this invidious distinction.”).

59 Young, *Part 3: Specialized Coverage for Mediators*, *supra* note 2, at 33 (the policy fails to define “damages”).

60 *Id.* at 9-10.

61 *Id.* at 10.

62 *Id.*

63 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 3-4.

64 *Id.* at 6.

65 *Id.* at 12-14.

66 *Id.* at 17-18, 20-21.

67 *Id.* at 21-22.

68 *Id.* at 35-57.

69 I practiced as an insurance lawyer for over a decade, serving at one time as the General Counsel for the then-largest insurance insolvency in U. S. history. Over the last decade, I have drafted chapters on insurance insolvency for the Missouri Bar's Deskbook series. *See, e.g.,* Paula M. Young, *Supervision, Rehabilitation and Liquidation of Troubled Insurance Companies*, in Missouri Insurance Practice (5th ed. 2004 & Supp. 2010). I participated in many insurance coverage disputes as a private practitioner. I have taught a practicum on Insurance Practice at the Appalachian School of Law. Despite this experience, I found the analysis of the policies discussed in this article challenging.

70 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 3.

- 71 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 (April 9, 2012, 06:36:00:00 DST) (on file with author).
- 72 Gertrude Stein, *Everybody's Autobiography* 289 (1937).
- 73 *See supra* discussion at note 18 (definitions for “going bare”).
- 74 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 15.
- 75 This article is not a substitute for that professional advice.
- 76 *See infra* discussion at notes 186-238, 309-82, 479-555.
- 77 *See infra* discussion at notes 239-49, 292-97, 385-95, 453-66, 557-59, 598-10.
- 78 *See infra* discussion at notes 186-192, 312-31, 482-501.
- 79 *See infra* discussion at notes 331, 355-61, 396-414.
- 80 *Id.*
- 81 *Id.*
- 82 *See infra* discussion at notes 193-204, 309-22, 490-98, 502-11.
- 83 *See infra* discussion at notes 239-47, 292-97, 385-95, 453-66, 557-59, 598-608.
- 84 *See infra* discussion at notes 227-28, 368-73, 542-46. Two profession-of-origin policies exclude coverage of “sanctions,” which might matter in the context of proceedings involving ethics grievances or UPL disciplinary matters. *See* Philadelphia Ins. policy, *supra* note 14, at § V.H.; CNA policy, *supra* note 14, at § V.I.
- 85 *See infra* discussion at notes 286-89, 438-52, 589-95.
- 86 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 34 (footnotes omitted).
- 87 *Id.* at 12-22.
- 88 *Id.* at 15, 18-19, 21. If you want even more detail about the nature of ethical grievances filed against mediators, *see* Young, *Take It, or Leave It*, *supra* note 2, 748-76. If you want more detail about UPL complaints, *see* Young, *Kangaroo Court?*, *supra* note 1, at 1068-1099, 1134-1172.
- 89 *See* MEAC Op. 1996-006 (1996) (psychologist-mediator); Tenn. Op. 2014-002 (March 15, 2016) (psychiatrist); Va. Op. 513 (April 28, 1983) (therapist); Vt. Op. 1980-012 (March 15, 2016) (psychologist), available at [https://www.americanbar.org/groups/dispute\\_resolution/resources/mediator\\_ethics\\_opinions.html](https://www.americanbar.org/groups/dispute_resolution/resources/mediator_ethics_opinions.html) (last visited Feb. 8, 2019). Not all of these claims involve complaints against the mediator.
- 90 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 24, notes 132, 133 (footnotes omitted).
- 91 *Id.* at 1. *See also* 2010 Badgley Survey, *supra* note 51 *passim*; 2013 Badgley Survey Update, *supra* note 51 *passim*; Young, *Part 3: Specialized Coverage for Mediators*, *supra* note 2, at 10-11.
- 92 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 24-26.
- 93 *Id.* at 26-31.
- 94 Philadelphia Ins. policy, *supra* note 14 *passim*. Dr. Fremed bought an earlier version of this policy. *See* Philadelphia Insurance Companies, Allied Health Providers Professional and Supplemental Liability Insurance Policy, Form PI-HCH-02 (11/00) (on file with author) [hereinafter Earlier Philadelphia Ins. policy].



- 95 Allied World policy, *supra* note 14 *passim*.
- 96 CNA policy, *supra* note 14 *passim*.
- 97 Ins. L. Prac. Guide., *supra* note 49, at § 4.09[4] (2012) (effect of endorsements on the basic policy forms). *See generally* New Appelman on Ins. Library Ed. §§ 21.01-21.03 (2011) [hereinafter Appelman on Ins.]
- 98 Appelman on Ins., *supra* note 97, at §§ 21.01-21.03.
- 99 *See infra* discussion at notes 186-192, 312-31, 479-501.
- 100 *Id.* *See also* Robert H. Jerry, II & Douglas R. Richland, *Understanding Ins. L.* 154-56 (4th ed. 2007) [hereinafter *Understanding Ins. L.*].
- 101 *See infra* discussion at notes 331, 355-61, 396-414.
- 102 *See infra* discussion at notes 186-192, 479-501.
- 103 *See infra* discussion at notes 328-329.
- 104 *See infra* discussion at notes 186, 193-97, 312-20.
- 105 *See infra* discussion at notes 193-94.
- 106 *See infra* discussion at notes 193-94, 314.
- 107 *See infra* discussion at notes 186, 198, 312, 321.
- 108 *See infra* discussion at notes 492-98, 502-11.
- 109 *See infra* discussion at notes 186, 198, 312, 321, 492-98, 502-11.
- 110 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 33.
- 111 *See infra* discussion at notes 207-10, 335-37.
- 112 *See infra* discussion at notes 207, 211, 335, 524.
- 113 *See infra* discussion at notes 207, 338-41, 518-21.
- 114 *See infra* discussion at notes 211-14, 342-54, 522-28. *See also* Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 40 (describing murders committed by parties to mediations).
- 115 *See infra* discussion at notes 211-12, 342-48, 522-28.
- 116 *See infra* discussion at notes 125-35.
- 117 *See infra* discussion at notes 120-21, 123, 136, 203, 211, 237, 271, 292-94, 303, 359, 381, 463, 504, 555.
- 118 *See infra* discussion at notes 193-94, 198.
- 119 *See infra* discussion at notes 208-09.
- 120 *See infra* discussion at notes 203, 211.
- 121 *See infra* discussion at notes 186, 190.
- 122 *See infra* discussion at notes 314-29, 336, 342.
- 123 *See infra* discussion at notes 312-16, 321-27.
- 124 *See infra* discussion at notes 494-98, 506-07, 519, 525, 598, 600, 604.

- 125 *See infra* discussion at notes 220, 366, 539-41.
- 126 *See infra* discussion at notes 219, 364, 535.
- 127 *See infra* discussion at notes 220, 366, 538.
- 128 *See infra* discussion at notes 227-28, 368-373, 545-46.
- 129 *See infra* discussion at notes 229-32, 549-50. *But see infra* discussion at notes 374-76 (no express exclusion of contract claims).
- 130 *See infra* discussion at notes 233-35, 377-79, 551-53.
- 131 *See infra* discussion at notes 236-38, 380-82, 554-55.
- 132 *See infra* discussion at notes 239-249, 383-395, 556-561.
- 133 *See infra* discussion at notes 243-45.
- 134 *See infra* discussion at notes 358-59.
- 135 *See infra* discussion at notes 361, 396-414.
- 136 As noted, the policy fails to define this term. *See infra* discussion at notes 358-61.
- 137 Understanding Ins. L., *supra* note 100, at 418. As a matter of general insurance law, if a policyholder fails to meet specified policy conditions, the insurer can legally deny coverage of the claim. As a practical matter, however, the policyholder's breach of one of the conditions would need to be material to coverage. *Id.* at 418, 764-68. An insurer would easily deem breach of one of these Allied World policy conditions as material to coverage.
- 138 *See infra* discussion at notes 400-01.
- 139 *See* Young, *Kangaroo Court?*, *supra* note 1, at 1134-39, 1211-19.
- 140 *See* Young, *Teaching Mediator Impartiality*, *supra* note 2, at 321-23.
- 141 *Id.*
- 142 *See infra* discussion at notes 409-12.
- 143 *See infra* discussion at notes 396-412.
- 144 Young, *Kangaroo Court?*, *supra* note 1, at 1232-33.
- 145 Underwriters policy, *supra* note 14 *passim*. *See also* Young, *Part 3: Specialized Coverage for Mediators*, *supra* note 2 *passim*.
- 146 *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*, PLI Litig. & 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).
- 147 *Id.*
- 148 *See infra* discussion at notes 250-59, 415-18, 562-65.
- 149 *See* Robinson, *supra* note 146, at 526-27.
- 150 *See infra* discussion at note 256.
- 151 *See infra* discussion at notes 262, 419-21, 566-71.
- 152 *See infra* discussion at note 262.

- 153 *See infra* discussion at notes 262, 424, 574.
- 154 *Id.*
- 155 *See infra* discussion at notes 262-273, 419-423, 566-573.
- 156 *See infra* discussion at notes 269, 422, 566-69.
- 157 *See infra* discussion at notes 422, 566-69.
- 158 *Id.*
- 159 *See infra* discussion at notes 262, 264-265, 420-21, 494, 502-510, 566. Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 12-13 (negligent acts a mediator might commit).
- 160 *See, e.g.*, discussion at note 266.
- 161 *See infra* discussion at notes 274-77, 425, 576-77.
- 162 *Id.*
- 163 *See infra* discussion at notes 580-84.
- 164 *See infra* discussion at notes 279-82.
- 165 *See infra* discussion at notes 279-82, 572-73.
- 166 *See infra* discussion at notes 427-34.
- 167 Young, *Part 3: Specialized Coverage for Mediators*, *supra* note 2, at 37.
- 168 *See infra* discussion at notes 285, 437, 587. CNA allows the choice of counsel by the insured in license protections proceedings. *See infra* discussion at note 588.
- 169 *See* 2010 Badgley Survey, *supra* note 51, at 3 (describing a 2004 case in which a mediator, attempting to protect confidential mediation communications, incurred nearly \$10,000 in defense costs). *See generally* Joshua S. Rogers, *Riner v. Newbraugh: The Role of Mediator Testimony in the Enforcement of Mediated Agreements*, 107 W.Va. L. Rev. 329 (2004); Irene Stanley Said, *The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality under the Texas ADR Statute*, 36 S. Tex. L. Rev. 579 (1995); Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 22.
- 170 *See infra* discussion at notes 286-89, 438-52, 589-95.
- 171 *See infra* discussion at notes 443-44, 591-94. This benefit does not seem to cover a subpoena for trial testimony or document production. *See also* Philadelphia Ins. Policy, *supra* note 14, at § I.C.1.; CNA policy, *supra* note 14, at § II.C. *Cf.* Allied World policy, *supra* note 14, at §§ II.D., III.V. (policy may cover the defense costs incurred by a mediator in a post-mediation subpoena or deposition).
- 172 *See infra* discussion at notes 440-44. The Allied World policy defines “Proceeding” as a civil proceeding in which the insured must give deposition testimony or produce a document or record under a subpoena. Allied World policy, *supra* note 14, at § III.V.
- 173 *See infra* discussion at notes 444, 591.
- 174 *See infra* discussion at note 292.
- 175 *See infra* discussion at notes 292, 454-55.
- 176 *Id.*
- 177 *See infra* discussion at note 602.

- 178 *Id.*
- 179 *See infra* discussion at notes 295, 455-58, 604-05.
- 180 *See supra* discussion at notes 99-103.
- 181 *See infra* discussion at notes 298-99, 471-72, 609-11.
- 182 Psychologists Prof'l Liability Ins. - Group 2, Am. Prof'l Agency, [http://www.americanprofessional.com/wp-content/uploads/Psychology\\_Group\\_2.pdf](http://www.americanprofessional.com/wp-content/uploads/Psychology_Group_2.pdf) (last visited Feb. 24, 2019).
- 183 Resources for Dealing with High Conflict People, High Conflict Inst., <http://www.highconflictinstitute.com/> (last visited Feb. 24, 2019).
- 184 Dr. Fremed held an earlier version of the policy analyzed in this article. Telephone Interview with Dr. Resa Fremed, Private Mediator, New England Counseling & Mediation, in Ridgefield, Conn. (Feb. 20, 2007). *See also* Earlier Philadelphia Ins. policy, *supra* note 94 *passim*.
- 185 Philadelphia Ins. policy, *supra* note 14 *passim*.
- 186 *Id.* at § I.A.1.a. (emphasis added).
- 187 *See infra* discussion at notes 321-31.
- 188 *See infra* discussion at notes 483-89.
- 189 *See also infra* discussion at notes 216-17 (excluding professions not listed on the Declarations Page). A communication from the insurer's agent shows that it does not contemplate coverage of mediation services. It said:  
CPH and Associates has asked me to provide you with my contact information regarding your inquiry about coverage for mediators. If have you have questions you would like answered, I will be happy to attempt to do so. There was some confusion about your previous inquiry, in that CPH specializes in insurance for allied healthcare providers, and your inquiry was captioned for mediators. *See* E-mail from Howard Goldstein, Asst. Vice Pres., Philadelphia Insurance Companies, to author (March 9, 2012 14:26:00 EST) (on file with the author). Mr. Goldstein never replied to my repeated attempts to get my questions answered about coverage for mediators, if any, offered by this company.
- 190 *See supra* discussion at note 102. *See also* Philadelphia Ins. policy, *supra* note 14, at §§ I.A.1.a.-b.; CNA policy, *supra* note 14, at Certificate of Insurance; CNA Common Policy Conditions, *supra* note 14, at § XVII. (definitions of “area of specialization” and “professional services”).
- 191 Earlier Philadelphia Ins. policy, *supra* note 94, at Renewal Declarations. Note that the policy does not define “profession shown in the Declarations.” Philadelphia Ins. policy, *supra* note 14, at § V.
- 192 “AAMFT,” apparently refers to the American Association for Marriage and Family Therapy. Am. Ass'n for Marriage and Fam. Therapy, <http://www.aamft.org/iMIS15/AAMFT/> (last visited Feb. 24, 2019).
- 193 Philadelphia Ins. policy, *supra* note 14, at § V.E.
- 194 *Id.* at § V.H. Thus, like the Allied World and CNA policies, the Philadelphia Insurance policy excludes coverage of fines and penalties. *See infra* discussion at notes 227-28, 368-73, 544-46. Courts tend to find the exclusions for fines, penalties, sanctions, and punitive or exemplary damages unambiguous. A few courts find the terms ambiguous and require the insurer to provide a defense of the claims. Appelman on Ins., *supra* note 97, at § 25.06 [6].
- 195 *See infra* discussion at notes 312-20.
- 196 *See infra* discussion at notes 502-11.
- 197 Understanding Ins. L., *supra* note 100, at 827.

- 198 Philadelphia Ins. policy, *supra* note 14, at § V.P. (emphasis added). The structure of this paragraph would undoubtedly eliminate the argument that the term “negligent” only modifies the term “acts,” and not the terms “errors” or “omissions.” Appelman on Ins., *supra* note 97, at § 25.03[7]. If “negligent” only modifies the first term in these policies, the policies could cover many more claims a mediator might face. *Id.* The Appelman treatise points out:  
[A]ny analysis of coverage should evaluate if and where the word “negligent” is placed in describing “act, error, or omission.” More particularly, careful attention should be paid to whether coverage for a claim alleging a “wrongful act” is defined to include “any negligent act, error, or omission ....” or “any act, error, or omission” and how their individual jurisdiction interprets the clause. This is because some jurisdictions have stated that “negligent” when placed before “act, error, or omission” modifies all the terms whereas other courts have not been willing to read the term “negligent” before all the terms.  
*Id.* Compare the language appearing in the Allied World and CNA policies, *infra* discussion at notes 321-22, 497-98, 502-07.
- 199 *See infra* discussion at notes 321-22.
- 200 *See infra* discussion at notes 497-98, 502-11.
- 201 Young, *Part 1, Insurance Coverage for Lawyer-Mediators supra* note 2, at 13-22.
- 202 *Id.* at 39
- 203 *See* Philadelphia Ins. policy, *supra* note 14, at § V.
- 204 Earlier Philadelphia Ins. policy, *supra* note 94, at Renewal Declarations.
- 205 *See infra* discussion at notes 332-37.
- 206 *See infra* discussion at notes 516-21.
- 207 Philadelphia Ins. policy, *supra* note 14, at §§ I.A.1.b.(1) & (2) (emphasis added).
- 208 *Id.* at § V.D. E&O policies issued outside the medical fields typically exclude coverage for bodily injury and property damage because other types of insurance should provide this coverage. Appelman on Ins., *supra* note 97, at § 25.06[10].
- 209 The policy provides:  
Personal injury means injury, other than bodily injury, arising out of one or more of the following offenses:  
1. False arrest, detention or imprisonment;  
2. Malicious prosecution;  
3. The wrongful eviction from, wrongful entry to, or invasion of the right of occupancy of a room, dwelling, or premises ....  
4. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or  
5. Oral or written publication of material that violates a person's right to privacy.  
Philadelphia Ins. policy, *supra* note 14, at §§ V.M.1.-5.
- 210 Young, *Part 1, Insurance Coverage for Lawyer-Mediators supra* note 2, at 32-33.
- 211 Philadelphia Ins. policy, *supra* note 14, at § I.C.5. The policy does not define “assault.” *Id.* at § V.
- 212 *See infra* discussion at notes 522-28. The Allied World policy has no location limitation. *See infra* discussion at notes 342-45.
- 213 *Id.* *See* Young, *Part 1, Insurance Coverage for Lawyer-Mediators supra* note 2, at 12-13.
- 214 Philadelphia Ins. policy, *supra* note 14, at § V.H. *See infra* discussion at notes 227-28.
- 215 The policy provides:  
This insurance does not apply to claims or suits for damages:  
a. Arising out of an occupation, business, profession, or personal activity other than the profession specified in the Declarations;  
b. Arising out of any liability you assume under any contract or agreement. This exclusion does not apply to:  
\* \* \*  
2. A warranty of ... quality of any therapeutic agents ... you have furnished .... in connection with treatment you have provided;

\* \* \*

f. Arising out of your intentional wrongful acts;

\* \* \*

i. Arising out of any claim made by a person because of any ... actual or alleged discrimination;

\* \* \*

n. Arising out of the inability or failure of you or others to collect or pay money, including fee disputes and third party reimbursement disagreements;

\* \* \*

q. Arising out of any criminal, dishonest, fraudulent or malicious act or omission;

\* \* \*

v. Any claim arising from professional services that you provide when:

(1) You are not properly licensed or certified by the laws of the state(s) in which you provide such services; or

(2) Such services are not authorized or permitted by the laws of the state(s) in which your professional services are provided.

Philadelphia Ins. policy, *supra* note 14, at § I.A.2.

216 The policy excludes claims for damages: “Arising out of any occupation, business, profession, or personal activity other than the profession specified in the Declarations.” *Id.* at § I.A.2.a.

217 *Id.* (emphasis added).

218 *See infra* discussion at notes 364-67, 535-41.

219 Philadelphia Ins. policy, *supra* note 14, at § I.A.2.f.

220 *Id.* at §§ I.A.2.f. & I.A.2.q. *See generally* Appelman on Ins., *supra* note 97, at § 25.06[2].

221 Understanding Ins. L., *supra* note 100, at 431-74.

222 *Id.* at 431-32, 459.

223 *Id.* at 507-08.

224 *Id.* at 432.

225 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 12-15.

226 *Id.* at 39.

227 *Id.* at 17-18, 20-21. *See also* Young, *Take it, or Leave it*, *supra* note 2, at 811, 827, 842-43, 859-60, 873-74.; Young, *Kangaroo Court?*, *supra* note 1, at 1156.

228 *Id.* at § V.H. Thus, like the Allied World and CNA policies, the Philadelphia Insurance policy excludes coverage of fines and penalties. *See infra* discussion at notes 368-73, 542-46.

229 *See infra* discussion at notes 374-76, 547-50.

230 Philadelphia Ins. policy, *supra* note 14, at § I.A.2.b.

231 *Id.* *See generally* Ins. L. Practice Guide, *supra* note 49, at § 25.06[11] (E&O policies typically exclude coverage for breach of contract or liability assumed under a contract).

232 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at notes 57-58, 64-65.

233 *See infra* discussion at notes 377-79, 551-53. The CNA policy also excludes “sanctions.” CNA policy, *supra* note 14, at § V.I.

234 Philadelphia Ins. policy, *supra* note 14, at § I.A.2.n. (“Arising out of the inability or failure of you or others to collect or pay money, including fee disputes ....”). *See generally* Appelman on Ins., *supra* note 97, at § 25.06[8] (most policies expressly exclude coverage for claims involving fee disputes).

- 235 Philadelphia Ins. policy, *supra* note 14, at § I.A.2.n.
- 236 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 42.
- 237 Philadelphia Ins. policy, *supra* note 14, at § I.A.2.i. (4) (excluding “claims or suits for damages ... [a]rising out of actual or alleged discrimination.”)
- 238 *See infra* discussion at notes 380-82, 554-558.
- 239 *See supra* discussion at notes 186, 193-97.
- 240 Philadelphia Ins. policy, *supra* note 14, at § I.A.1.a.
- 241 Young, *Take It, or Leave It*, *supra* note 2, at 811, 827-28, 842-43, 859-60, 873-74, 893.
- 242 Philadelphia Ins. policy, *supra* note 14, at § I.A.2.v.
- 243 *See supra* discussion at notes 57-59.
- 244 Philadelphia Ins. policy, *supra* note 14, at §§ I.A.2.v.(1) & (2).
- 245 *See* Young, *Kangaroo Court?*, *supra* note 1, at nn. 417-20.
- 246 *See infra* discussion at notes 383-95, 556-59. Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 30; Robinson, *supra* note 146, at 526-27.
- 247 Philadelphia Ins. policy, *supra* note 14, at §§ I.A.2.v.(1) & (2).
- 248 *See infra* discussion at notes 383-95.
- 249 *See infra* discussion at notes 556-59.
- 250 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 30.
- 251 *Id.*
- 252 Section IV.D. of the Philadelphia Insurance policy provides:  
If all or part of any covered claim or suit is covered by other insurance, whether on a primary, excess, umbrella, contingent, or any other basis, then this policy:  
1. Will be excess with respect to Coverage A; and  
2. Will not apply and no coverage will be afforded under this policy with respect to Coverage B. However, when the limits of this policy are greater than the limits of all other insurance, then this policy will provide excess insurance up to an amount sufficient to give the Insured, as respects the amount afforded under Coverage B, a total limit of insurance equal to the limit of insurance provided by this policy.  
This [limitation] will apply even as to fully or partially self-insured programs, and policies in which you have a deductible or has retained a self-insured portion of the risk. In no event will this policy be construed to contribute more than on an excess basis. This provision does not apply to coverage under an excess policy that is specifically written to be excess of this policy and that specifically refers to this policy as an underlying policy.  
Philadelphia Ins. policy, *supra* note 14, at § IV.D.
- 253 *See generally* Robinson, *supra* note 146, at 526-27.
- 254 *See infra* discussion at notes 415-18.
- 255 *See infra* discussion at notes 562-65.
- 256 Philadelphia Ins. Policy, *supra* note 14, at § IV.D.2.
- 257 *Id.*

- 258 *Id.*
- 259 Some states recognize the “doctrine of reasonable expectations” as an additional tool used in interpreting insurance policies. *See* Understanding Ins. L., *supra* note 100, at 161-70.
- 260 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 26.
- 261 *Id.* at 28.
- 262 Philadelphia Ins. policy, *supra* note 14, at § I.B. (emphasis added). The policy defines “Claims expenses” as “fees charged by any lawyer designated by us and all other fees, costs, and expenses resulting from the investigation, adjustment, defense, and appeal of a claim.” *Id.* at § V.F. The policy also covers appeal bonds and interest accruing on judgments. *Id.* For a discussion of the appeal coverage of the other policies analyzed in this article, *see infra* discussion at notes 424, 574.
- 263 Philadelphia Ins. policy, *supra* note 14, at § I.B.1.
- 264 Philadelphia Ins. policy, *supra* note 14, at § V.E.
- 265 Philadelphia Ins. policy, *supra* note 14, at § V.R. The policy defines “Suit” as:  
a civil proceeding in which *damages* are sought and to which this insurance applies. Suit also includes:  
1. An arbitration proceeding in which such *damages* are sought and to which you must submit or do submit with our consent, or  
2. Any other alternative dispute resolution proceeding in which such *damages* are sought and to which you submit with our consent.  
Philadelphia Ins. policy, *supra* note 14, at § V.R. (emphasis added). *See supra* discussion at notes 186, 193-94 (the definition of “damages”).
- 266 *See infra* discussion at notes 216-17.
- 267 *See infra* discussion at notes 422, 437.
- 268 *See infra* discussion at notes 566-70.
- 269 Philadelphia Ins. policy, *supra* note 14, at §§ I.B., I.C., & V.F.
- 270 *Id.* at § V.R.
- 271 *Id.* at § V.
- 272 *See* Young, *Take it or Leave it*, *supra* note 2, at 804-814, 821-830, 838-848, 855-862, 870-876.
- 273 *Id.*
- 274 *See, e.g.*, Certificate of Insurance (Proof of Coverage) issued by Philadelphia Ins. Co., to Dr. Resa Fremed (March 14, 2007) (on file with author).
- 275 *See infra* discussion at note 425.
- 276 *See infra* discussion at note 578.
- 277 Philadelphia Ins. policy, *supra* note 14, at § I.B. (“These [defense] payments will not reduce the limits of liability otherwise available under this policy.”). *See also* Understanding Ins. L., *supra* note 100, at 865-66.
- 278 Philadelphia Ins. policy, *supra* note 14, at § IV.B.3.c.
- 279 *Id.* at § IV.G. Any liability under this section of the policy is further limited by the per claim and aggregate limits of coverage of the policy. *Id.*
- 280 *See infra* discussion at notes 432-34.
- 281 Philadelphia Ins. policy, *supra* note 14, at § IV.G.



- 282 The policy provides:  
If you refuse to consent, within a reasonable period of time, to any settlement offer we recommend and elect to contest the claim or continue any legal proceedings in connection with such claim then, subject to provisions of Section III - Limits of Liability, our liability for the claim will not exceed the amount for which the claim could have been settled, plus the cost of defense incurred by us up to the date of such refusal.  
Philadelphia Ins. policy, *supra* note 14, at § IV.G.
- 283 *See infra* discussion at note 437.
- 284 *See infra* discussion at notes 585-88.
- 285 Philadelphia Ins. policy, *supra* note 14, at § V.F. (defining “claims expenses” as “fees charged by any lawyer designated by us ...”).  
*See also* Appelman on Ins., *supra* note 97, at § 25.06[2] at n.215.  
In certain cases, the determination of the excluded conduct may pose a conflict of interest between the insurer and the policyholder, when the insurer needs to comply with its duty to defend under the policy. In some jurisdictions, this conflict may give the policyholder the right to select independent counsel of its own choosing, and the insurer may be obligated to pay that counsel's fees.  
*Id.*
- 286 *See infra* discussion at notes 440-52.
- 287 *See infra* discussion at notes 596-608.
- 288 Philadelphia Ins. policy, *supra* note 14, at § I.C.1.
- 289 *Id.*
- 290 *See infra* discussion at notes 453-66.
- 291 *See infra* discussion at notes 598-608.
- 292 The section provides:  
We will pay reasonable expenses that you incur resulting from an investigation or proceeding by a *state licensing board or other regulatory body* provided that the investigation or proceeding arises out of events which could result in *claims* covered by this policy. *We will not be responsible for conducting such investigation or providing such defense.* The maximum aggregate amount we will pay for this benefit is \$35,000. Reasonable expenses will include those you or we incur for legal defense, including the production of expert witnesses, as well as your travel expenses to such proceedings.  
Philadelphia Ins. policy, *supra* note 14, at § I.C.2. (emphasis added).
- 293 *See infra* discussion at notes 453-66.
- 294 *See infra* discussion at notes 598-608.
- 295 *See supra* discussion at notes 193-97 (definition of “claim”).
- 296 Philadelphia Ins. policy, *supra* note 14, at § I.C.2.
- 297 *Id.*
- 298 Welcome to CPH & Associates, Program Highlights, <https://www.cphins.com/Default.aspx?tabid=55> (last visited <blocked in Qatar>).
- 299 *See generally* *What is an Insurance Endorsement? How a Rider Works*, About.com, Ins. <http://personalinsure.about.com/od/insurancetermsglossary/g/Insurance-Endorsement.htm> (last visited Feb. 24, 2019).
- 300 *See supra* discussion at notes 198-202.
- 301 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 13-15, 16-22.

- 302 *Id.* at 14-15.
- 303 *See supra* discussion at notes 198, 203-04.
- 304 *See, e.g.*, Model Standards of Conduct for Mediators Standard § VI.A.5, available at [https://www.americanbar.org/groups/dispute\\_resolution/policy\\_standards.html](https://www.americanbar.org/groups/dispute_resolution/policy_standards.html) (last visited Feb. 24, 2019). It provides:  
The role of mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles.  
*See generally* Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 Appalachian J. of L. 195 (2006).
- 305 Philadelphia Ins. policy, *supra* note 203, at § I.A.1.a.
- 306 Allied World policy, *supra* note 14 *passim*. *See generally* Programs Psychologists & Mental Health Prof'ls, Prof'l & Gen. Liability, Allied World Ins., <http://www.alliedworldinsurance.com/marketing/QR/AWprograms-APA-Psychologists.pdf> (last visited Feb. 24, 2019); Programs/Delegated Authority US, Allied World Ins., <http://www.alliedworldinsurance.com/usa-programs> (last visited Feb. 24, 2019).
- 307 Psychologist, Am. Prof'l Agency, Inc., <http://www.americanprofessional.com/profession-page/psychologists/> (last visited Feb. 24, 2019) [hereinafter Psychologist].
- 308 *See infra* discussion at notes 358-61, 396-414.
- 309 *See* Allied World policy, *supra* note 14, at § I. Allied World sells this policy through its agent, American Professional Agency, Inc. *See* Psychologist, *supra* note 307, at 1.
- 310 *See supra* discussion at notes 186-214.
- 311 *See infra* discussion at notes 475-528.
- 312 Allied World policy, *supra* note 14, at § I.A.
- 313 *See supra* discussion at notes 186, 193-94.
- 314 Allied World policy, *supra* note 14, at § III.G. The definition excludes fines and penalties. *Id.*
- 315 *Id.*
- 316 *Id.* at § III.F.(1)-(4).
- 317 *See supra* discussion at notes 186, 194-97.
- 318 *See infra* discussion at notes 492, 503-11.
- 319 *See infra* discussion at notes 368-73, 379.
- 320 *See infra* discussion at note 371.
- 321 Allied World policy, *supra* note 14, at § III.W. (emphasis added).
- 322 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 13-22.
- 323 *See supra* discussion at notes 186, 198-202.
- 324 *See infra* discussion at notes 490-98, 503-11.
- 325 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 13-15.
- 326 *Id.* at 14-15.

- 327 Allied World policy, *supra* note 14, at §§ III.X.(1)-(3).
- 328 *Id.* at § III.2.
- 329 *Id.* at § III.N.
- 330 *See infra* discussion at notes 358-61, 396-414.
- 331 *Id.*
- 332 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 39-41, 52-53.
- 333 *See infra* discussion at notes 514-15.
- 334 *See supra* discussion at notes 207-08.
- 335 Allied World policy, *supra* note 14, at § I.B.(1).
- 336 *Id.* at § III.P.(1).
- 337 *Id.* at § III.E.
- 338 *See supra* discussion at notes 207, 209.
- 339 *See infra* discussion at notes 518-21.
- 340 Allied World policy, *supra* note 14, at § I.B.(2).
- 341 *Id.* at § I.C.
- 342 *Id.* at § II.G. The policy defines “assault” as “the willful infliction of physical harm on the Insured, by a patient or their immediate family member, or any attempt thereof.” *Id.* at § III.B.
- 343 *Id.* at § II.G.
- 344 *See supra* discussion at note 211.
- 345 *See infra* discussion at note 527.
- 346 *The Sopranos: I Dream of Jeannie Cusamano* (HBO television broadcast April 4, 1999).
- 347 *The Sopranos: The Happy Wanderer* (HBO television broadcast Feb. 20, 2000).
- 348 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 40-41 (discussing possible bodily injury claims against mediators).
- 349 *Id.* at 32.
- 350 *Id.* at 12-15.
- 351 *Id.*
- 352 Philadelphia Ins. policy, *supra* note 14, at § V.H.
- 353 *See supra* discussion at notes 186, 193-97; *see infra* discussion at notes 492, 502-11.
- 354 Young, *Take It, or Leave It*, *supra* note 2, at 811, 827-28, 842-43, 859-60, 873-74, 893.
- 355 The exclusions provide, in pertinent part:  
A. This Policy shall not cover any Defense Expenses or Damages in connection with any Claim or Proceeding:

(1) alleging, arising out of, based upon or attributable to an Insured's dishonest, fraudulent, criminal, or malicious act, error, or omission or that of any person for whose acts the Insured is legally responsible ....

(2) alleging, arising out of, based upon or attributable to any actual or alleged discrimination ....

\* \* \*

(13) alleging, arising out of, based upon or attributable to any Professional Service that is not allowable since the Insured's professional license or registration to practice is suspended, revoked, terminated, surrendered or is not in effect.

\* \* \*

(19) alleging, arising out of, based upon or attributable to medical treatment ....

(20) alleging, arising out of, based upon or attributable to Professional Services as a mediator, including but not limited to the provision of Divorce Mediation Services, whether or not for a fee; provided, however, this Exclusion shall not apply to the provision of Divorce Mediation Services, if:

(a) prior to providing such services, a written statement to all parties is provided explaining that the Insured is a neutral and unbiased intermediary whom shall not act as an advocate for any one party;

(b) The Insured[,] in fact, act[s] exclusively as a neutral and unbiased intermediary between the parties; and

(c) the Insured, in connection with such Divorce Mediation Services, advises all parties, in writing at the time any settlement or other such agreement is presented to the parties, to have such agreement reviewed independently by counsel of their choice prior to their execution of the agreement.

Allied World policy, *supra* note 14, at §§ IV.A.(1), (2), (13), (19), and (20).

356 *See supra* discussion at notes 215-47.

357 *See infra* discussion at notes 529-59.

358 Allied World policy, *supra* note 14, at § IV.A.(20).

359 *Id.*

360 *See supra* discussion at notes 186-90, 203-04; *see infra* discussion at notes 479-89, 492-501. *See also* Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 31-57.

361 *See infra* discussion at notes 396-414.

362 *See supra* discussion at notes 218-26.

363 *See infra* discussion at notes 534-41.

364 Allied World policy, *supra* note 14, at §§ I., III.W.

365 *See supra* discussion at note 220. *Cf. infra* discussion at note 538 (CNA policy excludes coverage for acts that are “expected or intended” and for acts that are willful violations of law).

366 Allied World policy, *supra* note 14, at § IV.A.(1).

367 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 14-15.

368 *See supra* discussion at notes 227-28; *see infra* discussion at notes 547-49.

369 The policy provides:

“Damages” do not include:

\* \* \*

(e) Fines or penalties, except:

(i) as provided for in Section V.D. [governing punitive damages]; or

(ii) HIPPA fines and penalties, but solely under Insuring Agreement C.(1)[.]

Allied World policy, *supra* note 14, at § III.G.(e).

370 *See supra* discussion at note 228; *see infra* discussion at note 546.

- 371 Allied World policy, *supra* note 14, at § III.G.(e).
- 372 *Id.* at §§ I.A., III.N., III.W, III.Z.
- 373 *Id.* at § IV.A.(20).
- 374 *See supra* discussion at notes 230-32.
- 375 *See infra* discussion at notes 549-50.
- 376 Allied World policy, *supra* note 14, at § IV. Appelman on Ins., *supra* note 97, at § 25.06[11] (E&O policies typically exclude coverage for breach of contract or liability assumed under a contract).
- 377 *See supra* discussion at notes 234-35.
- 378 *See infra* discussion at note 553.
- 379 Allied World policy, *supra* note 14, at § III.G.(d) (by limitation of the definition of “Damages”). *See supra* discussion at notes 312, 315-20.
- 380 *See supra* discussion at notes 236-37; *see infra* discussion at notes 554-55.
- 381 Allied World policy, *supra* note 14, at § IV.A.(2).
- 382 Young, *Part I: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 40 (describing a perilous trip to a second story mediation office, up a flight of stairs, on crutches).
- 383 *See supra* discussion at notes 239-47.
- 384 *See infra* discussion at notes 557-59.
- 385 Allied World policy, *supra* note 14, at § IV. *See infra* discussion at notes 557-59.
- 386 *See infra* discussion at notes 557-59.
- 387 *See infra* discussion at notes 557-59.
- 388 Allied World policy, *supra* note 14, at § IV.A.(13).
- 389 *See supra* discussion at note 364.
- 390 *See supra* discussion at note 321.
- 391 *See Young, Part I: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 43, 54-55.
- 392 Recall that this policy only covers “Divorce Mediation Services.” *See supra* discussion at notes 361.
- 393 Allied World policy, *supra* note 14, at §§ I.A., III.W.
- 394 *See supra* discussion at notes 312, 315, 316-20.
- 395 *See infra* discussion at notes 453-66.
- 396 *See supra* discussion at notes 358-61.
- 397 This section excludes:  
[A]ny Defense Expenses or Damages in connection with any Claim or Proceeding:  
\* \* \*

(20) alleging, arising out of, based upon or attributable to Professional Services as a mediator, including but not limited to the provision of Divorce Mediation Services, whether or not for a fee; provided however, this Exclusion shall not apply to the provision of Divorce Mediation Services, if [the Insured meets three conditions].

Allied World policy, *supra* note 14, at § IV.A.(20) (emphasis added).

398 *Id.* at §§ IV.A.(1), (2), (13), (19), and (20).

399 Understanding Ins. L., *supra* note 100, at 418.

400 *See* Young, *Mediator Impartiality*, *supra* note 2, at n. 246.

401 *See* Young, *Kangaroo Court?*, *supra* note 1, at 1134-39, 1211-19.

402 *See* Young, *Mediator Impartiality*, *supra* note 2, at 318-19. Alternatively, this condition may seek to reinforce the exclusion of any role as an advocate for any party to the mediation.

403 *Id.*

404 *Id.*

405 *Id.*

406 *Id.* at 321-23.

407 *Id.* at 324-26.

408 *See generally* Young, *Mediator Impartiality*, *supra* note 2 (comprehensively discussing topic).

409 For example, in Virginia, certified mediators must give what is known as the “four legals.” Virginia's Standards of Ethics provide:

a) Prior to commencement of a court-referred mediation, the *mediator shall* inform the parties *in writing* of the following:

1. The mediator does not provide legal advice.
2. Any mediated agreement may affect the legal rights of the parties.
3. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.
4. Each party to the mediation should have any draft agreement reviewed by independent legal counsel prior to signing the agreement.

>b) In all other cases, the *mediator shall* inform the parties, *orally or in writing*, of the substance of the [disclosures required in (a) above].

cfs]Standards of Ethics and Prof'l Responsibility for Certified Mediators § D(2)(a)-(b) (Jud. Council Va. 2011) (emphasis added).

410 Allied World policy, *supra* note 14, at § IV.A.(20)(c).

411 James R. Coben & Peter N. Thompson, *Disputing Irony, A Systematic Look at Litigation about Mediation*, 11 Harv. Neg. L. Rev. 43, 89-94, 142-43 (2006) (discussing malpractice claims against lawyers in the mediation process and suggesting best practices).

412 *See, e.g.*, Ronald J. & Margaret Ivey Bacigal, *Contributory Negligence*, in Va. Prac. Jury Instruction § 11:4 (Thomson Reuters 2011) (defining Virginia's contributory negligence rule as “the failure to exercise the care that a reasonably prudent person would exercise for one's own safety under the circumstances); Ronald J. & Margaret Ivey Bacigal, *Contributory Negligence a Bar to Recovery*, in Va. Prac. Jury Instruction § 12:6 (providing the jury instruction on contributory negligence as follows: “If the jury believes from the evidence that the defendant was negligent and that such negligence was a proximate cause of the [injury causing event], and if you further believe from the evidence that the plaintiff was also negligent and that such negligence proximately contributed to cause the [injury causing event], then your verdict shall be in favor of the defendant. The law does not undertake to apportion or balance the negligence of the parties where both are at fault ....”); Ronald J. & Margaret Ivey Bacigal, *Proximate Cause*, in Va. Prac. Jury Instruction 11:10 (defining the proximate cause of an event as “that act or omission that, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred .... It is an act or omission that immediately causes or fails to prevent the event ....”). *See generally* 57B Am. Jur. 2D *Negligence* §§ 797-856 (2004).

413 Psychologist, New Bus. Brochure, Am. Prof'l Agency, Inc., [http://www.americanprofessional.com/wp-content/uploads/PSY\\_Brochure\\_AW.pdf](http://www.americanprofessional.com/wp-content/uploads/PSY_Brochure_AW.pdf) (last visited Feb. 24, 2019).

- 414 Young, *Kangaroo Court?*, *supra* note 1, at 1119-34, 1173-1200.
- 415 *See supra* discussion at notes 252-59.
- 416 *See infra* discussion at notes 564-65.
- 417 It provides:  
The insurance ... shall apply only as excess over any other valid and collectible insurance, self-insurance plan or self-funded vehicle whether such other insurance, plan or vehicle is stated as primary, contributory, excess, contingent or otherwise unless such other insurance ... is written specifically as excess insurance over the applicable Limits of Liability provided by this Policy.  
Allied World policy, *supra* note 14, at § IX. In some situations, a policy issued by Allied World to an affiliate or organization may also cover the psychologist. In that case, this policy would pay on a pro rata basis with the other policy. *Id.*
- 418 Two other forms of “other insurance” clauses exist: escape clauses and pro rata clauses. *See generally* Robinson, *supra* note 146, at 526-27 (discussing the three types of “other insurance” clauses).
- 419 Allied World policy, *supra* note 14, at § II.A. (emphasis added). Other provisions of the Allied World policy cover appeal bonds. Allied World policy, *supra* note 14, at § II.C.
- 420 Allied World policy, *supra* note 14, at § III.F. *See supra* discussion at note 316.
- 421 *Id.* at § III.W. *See supra* discussion at notes 321-25.
- 422 *Id.* at § VII.
- 423 *See infra* discussion at notes 566-69.
- 424 *Id.* at § III.H.
- 425 *Id.* at § V.A.(2). *Cf.* Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 28, 45, 56 (eroding limits of liability).
- 426 Allied World policy, *supra* note 14, at § VII.
- 427 *Cf. supra* discussion at notes 279-82; *see infra* discussion at notes 580-84 (the other policies permit settlement at the insurer's discretion with or without agreement of the insured).
- 428 Allied World policy, *supra* note 14, at § VII.
- 429 *Id.*
- 430 *See supra* discussion at notes 279-82.
- 431 *See infra* discussion at notes 580-84.
- 432 *See supra* discussion at notes 279-82. *See also* CNA policy, *supra* note 14, at §§ III, IV.
- 433 Allied World policy, *supra* note 14, at §§ VII., XVII.
- 434 Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 44-45, 56.
- 435 *See supra* discussion at note 285.
- 436 *See infra* discussion at notes 587-88.
- 437 Allied World policy, *supra* note 14, at § VII (providing that “the Insurer has the right and duty to defend, at the Insurer's expense and using counsel selected by the Insurer, any [covered] Claim against the Insured ... even if the Claim is groundless or fraudulent.”); *see supra* discussion at note 285.
- 438 *See supra* discussion at notes 286-89.

- 439 *See infra* discussion at notes 591-95.
- 440 Allied World policy, *supra* note 14, at § II.D.
- 441 *Id.* at § III.V.(2).
- 442 *See supra* discussion at notes 424-25.
- 443 Allied World policy, *supra* note 14, at § III.V.(3).
- 444 *Id.*
- 445 *Id.* at § VII.
- 446 *Id.* at §§ II.D., VII.
- 447 *Id.* at § V.E.(2).
- 448 *Id.* at §§ II.D., III.H., V.E.(2).
- 449 *See supra* discussion at notes 396-412.
- 450 *See supra* discussion at notes 288-89; *see infra* discussion at notes 591-95; Young, *Part I: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 44-45, 55-57.
- 451 *See infra* discussion at notes 591-95.
- 452 *See infra* discussion at notes 591-95.
- 453 Allied World Psychologists and Other Mental Health Counselors Disciplinary Proceedings Defense Coverage Policy, Form APA-DISC 00007 00 (11/15), available at [http://www.americanprofessional.com/wp-content/uploads/DPIC\\_POLICY\\_MD.pdf](http://www.americanprofessional.com/wp-content/uploads/DPIC_POLICY_MD.pdf) (last visited Feb. 24, 2019). *Cf.* Allied World policy, *supra* note 14, at §§ II.D., III.V.(1), VII. *See supra* discussion at notes 316, 424, 445-46; *see infra* discussion at notes 455-56.
- 454 Allied World policy, *supra* note 14, at § II.D.
- 455 *Id.* at § III.V.(1).
- 456 The Allied World policy defines “Professional Services” as:  
[A]ll mental health related services rendered by the Insured ... including but not limited to the following:  
(1) services as a member of a formal accreditation, credentialing or standards review or similar professional board or committee;  
(2) the publication of articles, books, and broadcasting or telecasting activities directly relating to Professional Services; and  
(3) formal clinical teaching activities/clinical trials.  
*Id.* at § III.X.
- 457 *Id.* at § IV.A.(20).
- 458 *Id.* at § III.W. (emphasis added).
- 459 *Application for Psychologists' Professional and Business Liability Insurance Coverage*, Allied World Ins. Co., [http://www.americanprofessional.com/wp-content/uploads/PSY\\_NEW\\_XX.pdf](http://www.americanprofessional.com/wp-content/uploads/PSY_NEW_XX.pdf) (last visited Feb. 24, 2019).
- 460 *Id.*
- 461 Allied World policy, *supra* note 14, at § III.V.(1).
- 462 *Application for Psychologists' Professional and Business Liability Insurance Coverage*, *supra* note 459, *passim*.
- 463 Allied World policy, *supra* note 14, at § IV.A.(20).



- 464 Allied World policy, *supra* notes 14, at §§ III.V.(1), VII. *See supra* discussion at notes 316, 424, 445-46, 455-56.
- 465 Allied World policy, *supra* note 14, at §§ III.G.(e). *See* discussion *supra* note 314-16, 369 (definition of “Damages”).
- 466 Allied World policy, *supra* note 14, at § VII.
- 467 *See* discussion *supra* notes 396-99.
- 468 Allied World policy, *supra* note 14, at § I.A.
- 469 *See generally* Young, *Part 1: Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 12-22.
- 470 Allied World policy, *supra* note 14, at §§ I.A., II.A., III.V.(2), III.V.(3).
- 471 Psychologist, *supra* note 24, at 1.
- 472 *Id.*
- 473 The first draft of this article analyzed a policy offered by CNA Assurance Company for social workers practicing in Virginia. Its agent at the time was American Professional Agency, Inc. When I returned to the article in 2017, I learned that the agent was now working with Allied World to offer coverage for social workers. Soc. Worker Program, Am. Prof'l Agency, Inc., <http://www.americanprofessional.com/profession-page/social-workersno-association-membership-or-dues/> (last visited Feb. 24, 2019). The Allied World policy for social workers is nearly identical to the one offered to psychologists that I analyzed in Appendix B. Accordingly, I am analyzing a policy issued by another underwriter to show the various forms of coverage and the issues different policies can create by virtue of the language the insurer uses.
- 474 Sample Policy Forms - Prof'l Liability Ins., HPSO, <http://www.hpsoc.com/support/sample-policy-forms> (select “Virginia” from drop-down menu) (last visited Feb. 24, 2019) [hereinafter Sample Policy Forms].
- 475 Prof'l Liability Ins. for Clinical Soc. Workers, HPSO, <http://www.hpsoc.com/individuals/professional-liability/social-work-malpractice-insurance> (last visited Feb. 24, 2019).
- 476 Sample Policy Forms, *supra* note 474, at 1 (select “Virginia” from drop-down menu; policy forms are identified as G-121501-C (Occurrence form) & G-121502-C (Claims-Made form)).
- 477 CNA Common Policy Conditions, *supra* note 14 *passim*.
- 478 Sample Policy Forms, *supra* note 474, at 1 (search “Virginia”).
- 479 *See supra* discussion at notes 306-472.
- 480 Allied World policy, *supra* note 14, at § IV.Y. *See supra* discussion at notes 358-61, 397-414.
- 481 *See supra* discussion at notes 184-305.
- 482 *See supra* discussion at notes 186-92.
- 483 CNA policy, *supra* note 14, at Certificate of Insurance; CNA Common Policy Conditions, *supra* note 14, at § XVII. (definitions of “area of specialization” and “professional services”). *See also infra* discussion at notes 530-33 (excluding professions not listed on the Certificate of Insurance).
- 484 For a list of medical specialties, *see Category: Medical specialties*, [https://en.wikipedia.org/wiki/Category:Medical\\_specialties](https://en.wikipedia.org/wiki/Category:Medical_specialties) (last visited Feb. 24, 2019). This resource does not list mediation as a medical specialty.
- 485 CNA policy, *supra* note 14, at Certificate of Insurance. *See, e.g.*, The Classification Codes and Related, Mo. Dept. of Ins., [https://insurance.mo.gov/Contribute%20Documents/iso\\_specialty\\_codes.pdf](https://insurance.mo.gov/Contribute%20Documents/iso_specialty_codes.pdf) (last visited Feb. 24, 2019) (ISO codes used in Missouri for medical specialties).
- 486 CNA policy, *supra* note 14, at § V.E. *See infra* discussion at notes 530-33.

- 487 CNA policy, *supra* note 14, at § V.C.
- 488 *Id.* See Understanding Ins. L., *supra* note 100, at 154-56, 406.
- 489 See *infra* discussion at notes 530-33.
- 490 CNA policy, *supra* note 14, at § I. Interestingly, the word “negligent” does not appear in this section of the policy. *Cf. supra* discussion at notes 198, 300, 321, 393, 458 (limiting coverage to “negligent” acts, errors or omissions).
- 491 CNA policy, *supra* note 14, at § I.
- 492 CNA policy, *supra* note 14, at § I.A (emphasis added). The policy also provides Good Samaritan coverage and malplacement liability coverage. *Id.* at §§ I. B., I.D.
- 493 The policy defines a “Certificate of Insurance” as “the page of the policy[ ] containing specific information about the named insured, including, but not limited to its policy period, limits of liability, premium, and policy number.” CNA Common Policy Conditions, *supra* note 14, at § XVII. A sample Certificate of Insurance is available at Certificate of Insurance, CNA, <http://www.hpso.com/Lists/CommonFormStateList/Attachments/6/G-141230-B.pdf> (last visited Feb. 24, 2019).
- 494 CNA policy, *supra* note 14, at § IV.
- 495 *Id.*
- 496 CNA Common Policy Conditions, *supra* note 14, at § XVII.
- 497 CNA policy, *supra* note 14, at § IV (emphasis added).
- 498 CNA Common Policy Conditions, *supra* note 14, at § XVII (emphasis added). This part of the policy also defines “area of specialization,” but the term is not used in the CNA policy or in the Certificate of Insurance. Nonetheless, the policy defines it as “body of knowledge or expertise attained through experience and training in the profession specified on the certificate of insurance.” *Id.*
- 499 See *supra* discussion at notes 186-192, 216-17, 321-331, 355-61, 396-414.
- 500 CNA Claims-Made Certificate of Insurance, Form G-141230-B (3/2010), <http://www.hpso.com/Lists/CommonFormStateList/Attachments/6/G-141230-B.pdf> (last visited Feb. 24, 2019).
- 501 Allied World policy, *supra* note 14, at § IV.Y.
- 502 See *supra* discussion at notes 186, 193-94, 198, 207, 215, 240, 270, 300.
- 503 See *supra* discussion at notes 312, 314, 321, 335, 393, 458.
- 504 CNA policy, *supra* note 14, at § I (which are not defined in the policy).
- 505 *Id.* at § I.A.
- 506 *Id.* at § IV.
- 507 *Id.*
- 508 See *supra* discussion at notes 186, 193-94.
- 509 See *supra* discussion at notes 312-20.
- 510 CNA policy, *supra* note 14, at §§ I., IV.
- 511 *Id.* at §§ V.F., V.K. See *infra* discussion at notes 535-41.
- 512 See *supra* discussion at notes 186-92.

- 513 *See supra* discussion at notes 482-88.
- 514 *See supra* discussion at notes 205-08, 332-37.
- 515 CNA policy, *supra* note 14, at §§ I., II. *See Young, Part 1, Insurance Coverage for Lawyer-Mediators, supra* note 2, at 32-33.
- 516 *See supra* discussion at notes 205-09.
- 517 *See supra* discussion at notes 338-41.
- 518 CNA policy, *supra* note 14, at § I.C.
- 519 CNA Common Policy Conditions, *supra* note 14, at § XVII.
- 520 *Cf.* Philadelphia Ins. policy, *supra* note 14, at § V.M.1.-5. (false arrest, detention, or imprisonment; malicious prosecution; wrongful evictions or invasions of premises; slander and libel; or violations of a person's right of privacy).
- 521 *See supra* discussion at notes 340-41.
- 522 *See supra* discussion at notes 514-15.
- 523 *See supra* discussion at notes 205-10, 332-37.
- 524 CNA policy, *supra* note 14, at § II.D.
- 525 *Id.* at § IV.
- 526 *See supra* discussion at notes 342-45 (no location limit).
- 527 *See supra* discussion at note 211.
- 528 *See supra* discussion at notes 211, 342.
- 529 CNA policy, *supra* note 14, at § V. (emphasis added).
- 530 *See supra* discussion at notes 482-89.
- 531 CNA policy, *supra* note 14, at § V.E.
- 532 *Id.* at § V.C.
- 533 *See* Understanding Ins. L., *supra* note 99, at 154-56, 406.
- 534 *See supra* discussion at note 220.
- 535 CNA policy, *supra* note 14, at § V.K.
- 536 *See supra* discussion at note 220.
- 537 *See supra* discussion at note 366.
- 538 CNA policy, *supra* note 14, at § V.
- 539 *Id.* at § V.F. The policy does provide a defense in a civil suit “seeking amounts” in claims not excluded by this exclusion. *Id.*
- 540 *See supra* discussion at notes 497, 502-11.
- 541 Young, *Part 1, Insurance Coverage for Lawyer-Mediators, supra* note 2, at 14.
- 542 *See supra* discussion at notes 227-28 (by defining “damages” as excluding fines, penalties, and sanction).

- 543 *See supra* discussion at notes 368-73 (by expressly excluding fines and penalties, but not sanctions).
- 544 CNA policy, *supra* note 14, at § V.I.
- 545 *See supra* discussion at note 371.
- 546 *See supra* discussion at note 228.
- 547 *See supra* discussion at notes 229-32.
- 548 *See supra* discussion at notes 374-76.
- 549 CNA policy, *supra* note 14, at § V.D.
- 550 *Id.* at § V.D. (with two exceptions that do not apply in the mediation context).
- 551 *See supra* discussion at notes 233-35.
- 552 *See supra* discussion at notes 377-79.
- 553 CNA policy, *supra* note 14, at § V.I. The policy excludes “the return or withdrawal of fees ....” *Id.*
- 554 *Id.* at § V.O.3.
- 555 *See supra* discussion at notes 236-38, 380-82.
- 556 *See supra* discussion at note 386.
- 557 CNA policy, *supra* note 14, at § V.J.
- 558 *See supra* discussion at notes 383-95.
- 559 *See supra* discussion at notes 482-89.
- 560 *See supra* discussion at notes 453-66.
- 561 *See infra* discussion at notes 596-608.
- 562 *See supra* discussion at notes 250-59.
- 563 *See supra* discussion at notes 415-18.
- 564 CNA Common Policy Conditions, *supra* note 14, at § VIII. In this policy, the insurer calls it “Availability of Other Coverage.” *Id.*
- 565 Two other forms of “other insurance” clauses exist: escape clauses and pro rata clauses. *See supra* discussion at notes 145-50.
- 566 CNA policy, *supra* note 14, § III.
- 567 *See supra* discussion at note 422.
- 568 *See supra* discussion at note 269.
- 569 Young, *Part 1, Insurance Coverage for Lawyer-Mediators*, *supra* note 2, at 16-21.
- 570 *See supra* discussion at notes 262-63.
- 571 *See supra* discussion at notes 419, 424.
- 572 CNA policy, *supra* note 14, § III.
- 573 *See supra* discussion at notes 281-82.

- 574 The policy defines “Claims Expenses” as “1. fees charged by an attorney we designate, and 2. all other fees, costs, and expenses ... which result from the investigation, adjustment, defense and appeal of a claim.” CNA Common Policy Conditions, *supra* note 14, at § XVII.
- 575 CNA policy, *supra* note 14, at § VI.C.
- 576 *See supra* discussion at note 277.
- 577 *See supra* discussion at note 425.
- 578 *See supra* discussion at notes 278, 426.
- 579 CNA Common Policy Conditions, *supra* note 14, § III.A.
- 580 It states:  
We have the right and duty to defend any claim that is a professional liability claim ... [or] personal injury claim .... We will:  
A. do this if any of the charges of such claim are groundless, false or fraudulent; and  
B. investigate and settle any claim, as we feel appropriate.  
Our payment of the applicable limit of liability ends our duty to defend or settle. We have no duty to defend any claims not covered by this Coverage Part.  
CNA policy, *supra* note 14, at § III.
- 581 *See supra* discussion at notes 279-82.
- 582 *See supra* discussion at notes 427-34.
- 583 CNA policy, *supra* note 14, at § III.B (“settle any claim, as we feel appropriate”).
- 584 *Id.*
- 585 *See supra* discussion at note 285.
- 586 *See supra* discussion at note 437.
- 587 CNA Common Policy Conditions, *supra* note 14, at § XVII (definition of “Claims Expenses”).
- 588 CNA policy, *supra* note 14, § II.A. *See infra* discussion at notes 598 (policy language), 601.
- 589 *See supra* discussion at notes 286-89.
- 590 *See supra* discussion at notes 438-52.
- 591 CNA policy, *supra* note 14, § II.C. This provision states:  
[W]e will pay up to the Deposition Representation limit of liability stated on the [C]ertificate of [I]nsurance, for attorneys fees, charged by an attorney we designate, to prepare you for deposition provided:  
1. you receive a subpoena ... for documents or testimony arising out of professional services; and  
\* \* \*  
3. the subpoena arises out of a lawsuit to which you are not a party ....  
*Id.*
- 592 *Id.*
- 593 *Id.* at Certificate of Insurance.
- 594 This conclusion assumes the insurer has listed mediation as an additional specialty on the Certificate of Insurance.
- 595 CNA policy, *supra* note 14, § I. (“In addition to the limits of liability, we will also pay claims expenses.”). *Id.* § VI.C. (“Claim expenses are in addition to our limits of liability.”).

- 596 *See supra* discussion at notes 290-97.
- 597 *See supra* discussion at notes 453-66.
- 598 The Coverage Extension provides:  
Although payment does not arise from claims, we will pay amounts provided by these Coverage Extensions as follows:  
A. License Protection  
We will pay you up to the License Protection limit of liability state on the [C]ertificate of [I]nsurance, for attorney fees incurred by you, for your investigation and defense of complaints.  
Such complaints must:  
1. arise from a license protection incident which occurred [within the coverage period of the claims-made policy];  
2. be filed against you with a state or federal administrative agency, licensing or regulatory authority responsible for regulating your professional conduct.  
The amount payable for attorney fees will not exceed \$150 per hour. Included within, and not in addition to, this limit of liability are covered expenses incurred by you as a result of your required attendance at a disciplinary hearing or proceeding. The amount payable for covered expenses will not exceed \$500 per proceeding.  
In no event shall the amount payable hereunder exceed the per proceeding limit of liability and per policy period License Protection limit of liability shown on the [C]ertificate of [I]nsurance regardless of the number of ... such proceedings.  
You have the right to select your legal defense counsel, but only for the purposes of your defense of complaint(s) and disciplinary hearings or proceedings under this Coverage Extension.  
CNA policy, *supra* note 14, at § II.A.
- 599 *Id.*
- 600 *Id.* at § IV.
- 601 *Id.*
- 602 *Id.* (emphasis added).
- 603 *See supra* discussion at note 292.
- 604 CNA policy, *supra* note 14, at § II.A.
- 605 *Id.* The policy defines “Complaint” as “the official documentation required by an entity responsible for regulating your professional conduct to trigger an investigation of you for a license protection incident.” *Id.* at § IV. The Allied World policy, however, is triggered by “any actual or alleged negligent act, error, or omission” in connection with professional services. Allied World policy, *supra* note 14, at § I.A., III.W.
- 606 *See supra* discussion at note 458.
- 607 CNA policy, *supra* note 14, at Certificate of Insurance; *Id.* at § II.A. (“In no event shall the amount payable hereunder exceed the per proceeding limit of liability and per policy period License Protection limit of liability shown on the [C]ertificate of [I]nsurance regardless of the number ... of such proceedings.”)
- 608 CNA policy, *supra* note 14, at Certificate of Insurance.
- 609 *See generally* Sample Policy Forms, *supra* note 474, at 1 (select “Virginia” from drop-down menu).
- 610 As noted, the policy provides a “Deposition Representation” to cover the expense of preparing to testify or produce documents in a deposition. CNA policy, *supra* note 14, at § II.C.
- 611 *Id.*
- 612 *Id.* at Certificate of Insurance; CNA Common Policy Conditions, *supra* note 14, at § XVII (definitions of “area of specialization” and “professional services”).

19 APPALJL 79

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