

PROPOSAL: A NEW UNIFIED CANON OF MEDIATOR ETHICS

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I. INTRODUCTION

Mediation—as a profession—presumably requires that mediators not make it up as they go along. Many who have written about the profession of mediation agree that to move towards further professionalization of the field, mediators must have agreed upon standards of practice and create some system of accountability for following those standards.¹ While a large number of mediators and mediation organizations agree that mediation ethics are important, there is great disagreement as to what is required under already-existing ethical standards, and what should be required under any future iterations of ethical mediation standards in the United States.²

¹ Art Hinshaw, *Regulating Mediators*, 21 HARV. NEGOT. L. REV. 163, 204–05 (2016) (“[T]he question of whether mediation is a sufficiently distinct occupation to be a separate profession is far from settled. The fundamental attributes of a profession [include] . . . a settled ethical framework . . . [M]ediation practitioners routinely ignore [the Model Standards], or are completely unaware of them, leaving the field with little in the way of common ethical guidance.” (footnotes omitted)); see also Kimberlee K. Kovach, *Musings on Idea(l)s in the Ethical Regulation of Mediators: Honesty, Enforcement, and Education*, 21 OHIO ST. J. ON DISP. RESOL. 123, 130 (2005); Michael L. Moffitt, *The Four Ways to Assure Mediator Quality (and Why None of Them Work)*, 24 OHIO ST. J. ON DISP. RESOL. 191, 193 (2009); Geetha Ravindra, *Is Mediation a Profession?*, DISP. RESOL. MAG., Summer 2009, at 6, 7–8; Paula M. Young, *A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the “Authorized Practice of Mediation” Paradigm to “Unauthorized Practice of Law” Disciplinary Bodies*, 49 S. TEX. L. REV. 1047, 1197–98 (2008) [hereinafter Young, *A Connecticut Mediator*]; 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. ON DISP. RESOL. 721, 725–26 (2006) [hereinafter Young, *Take It or Leave It*]; Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, DISP. RESOL. MAG., Spring 2005, at 13, 13; Pierrick Le Goff, *4th Key—Professionalism: Act to Ensure Mediation is Respected as a True Professional Practice*, MEDIATE.COM (July 20, 2020), <https://www.mediate.com/articles/legoff-key4-respected.cfm> [<https://perma.cc/26UG-ZDEY>]; IMI *Seeks Comments on Mediator Competency Standards*, 63 DISP. RESOL. J. 9, 9 (2008). But see Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 DICK. L. REV. 1017, 1020 (2004) (arguing against ethical standards that “inhibit mediator discretion and flexibility”).

² See *infra* Appendix C (listing articles from the past few decades regarding the mediation community’s thinking on mediation ethics).

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Concerned about possible harm being inflicted on mediation parties,³ after hearing mediation war stories⁴—and musing about a possible “do no harm” standard in mediation—Dr. Alan Rothfeld⁵ and I started discussing professional ethics and the “do no harm”⁶ standard in medicine. He remarked that what separates professionals from non-professionals is that society gives professionals the right to make wrong decisions, provided they follow “general community standards and perform with reasonable diligence.” Mediators and mediation organizations do not always agree on what their general community standards should be, or how to perform under them.⁷ Nor do mediators want their behavior judged by other mediators with whom they disagree.⁸ Due to the lack of a set of agreed upon ethical standards and an understanding of how

³ The terms “party” and “participant” as used in this article are defined in the California Rules of Court: “‘Participant’ means any individual, entity, or group, other than the mediator taking part in a mediation, including but not limited to attorneys for the party. . . . ‘Party’ means any individual, entity, or group taking part in a mediation that is a plaintiff, a defendant, a cross-complainant, a cross-defendant, a petitioner, a respondent, or an intervenor in the case.” CAL. R. CT. 3.852(3)–(4). The term “party” as used here also includes individuals, entities, and groups in those roles *when no lawsuit has been filed*.

⁴ See, e.g., Mary B. Culbert, *It’s High Time for State Bar to Regulate Attorney Mediators*, L.A. DAILY J. (Oct. 20, 2005), at 8, dailyjournal.com/articles/282013 (discussing fear and intimidation tactics used by a mediator in a medical malpractice case).

⁵ Conversations with Dr. Alan Rothfeld, Medical Doctor, Former Vice President for Quality Control at Hollywood Presbyterian Medical Center in Los Angeles and Trained Mediator (Sept. 2010–Feb. 2011) (conversing about the “Do No Harm” standard in medicine versus our newly proposed “Do No Harm” standard in mediation).

⁶ We propose a “Do No Harm or Do the Least Harm When Harm Cannot Be Avoided” requirement as part of the New Canon of Mediator Ethics. See *infra* Appendix A, Fourth Fundamental Principle.

⁷ Even those who generally agree on what mediation ethical standards should include do not necessarily agree on how to comply with them. I believe both are necessary for further professionalization of the field. See *supra* notes 1–2. Compare Michael L. Moffitt, *The Wrong Model, Again*, DISP. RESOL. MAG., Spring 2006, at 31–33 (stating that the Model Standards are “fundamentally flawed” in their structure in that they “ignore ethical tensions,” “create no hierarchy of ethical concerns” and “purport to establish a standard of practice”), with Joseph B. Stulberg, *The Model Standards of Conduct*, DISP. RESOL. MAG., Spring 2006, at 34–35 (stating that the Model Standards are not “structurally deficient,” do “identify a hierarchy for some standards” and do not “establish[] a standard of care” for mediators but suggest “how other people or agencies, not mediators, might view the Model Standards.”).

⁸ Many California mediators had concerns about whether that program would be voluntary, and who would be the overseer of that program and the potential repercussions if it were the “wrong person.” See Hinshaw, *supra* note 1, at 188–89 (discussing California’s failed legislative attempt at voluntary certification despite “widespread support of the California mediation community”).